



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

DAVID W. LANNETTI
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

September 21, 2018

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Re: Adams v. Children's Hospital of the King's Daughters
Docket No.: CL18-2656

Dear Counsel:

Today the Court rules on a demurrer (the "Demurrer") filed by Defendant Children's Hospital of the King's Daughters ("CHKD") to the claims of defamation and violation of the Virginia Consumer Protection Act (the "VCPA") as alleged in the Complaint filed by Plaintiff Dawn Adams. The specific issues before the Court are as follows: (1) whether CHKD can be held liable for the actions of a debt collector; (2) whether Adams adequately pleaded the intent required for common law defamation; (3) whether Adams's defamation claim (the "Defamation Claim") is preempted by the Federal Credit Reporting Act (the "FCRA"); (4) whether Adams adequately pleaded her VCPA claim (the "VCPA Claim"); and (5) whether the VCPA Claim is preempted by federal consumer protection law.

For the reasons discussed herein, the Court finds that, for purposes of the Demurrer, (1) CHKD potentially is liable for the actions of a debt collector, (2) Adams adequately pleaded the intent required for common law defamation, (3) the Defamation Claim is not preempted by the FCRA, (4) Adams failed to adequately plead the VCPA Claim, and (5) the VCPA Claim is not preempted by federal consumer protection law. The Court therefore **OVERRULES** the Demurrer as to the Defamation Claim and **SUSTAINS** the Demurrer as to the VCPA Claim.

Background

In August 2015, CHKD sent an invoice (the "Invoice") to Adams for medical services it provided to a child named Nathaniel Kaufman. (Compl. ¶ 4.) Kaufman is neither Adams's child nor related to Adams, nor has Adams ever met Kaufman. (*Id.* ¶ 5.) Adams alleges that CHKD acquired her billing information from previous medical treatment she obtained for her son from CHKD. (*Id.* ¶¶ 37–38.) She subsequently called CHKD to dispute the Invoice. (*Id.* ¶ 7.) CHKD informed Adams that the Invoice resulted from a billing error and that it would correct the error.

CHKD nevertheless referred the Invoice to Security Collection Agency ("Security Collection"), a debt collector, falsely asserting that Adams was responsible for the Invoice. (*Id.* ¶¶ 8–9.) In December 2015, Adams learned that Security Collection had reported to Equifax Information Services, LLC ("Equifax") that it had a collection account for Adams related to the Invoice. (*Id.* ¶¶ 11–12.) Adams subsequently discovered that Equifax had furnished related incorrect consumer reports regarding Adams to "at least twelve separate companies, all of whom were actual or prospective creditors to Adams." (*Id.* ¶ 20.)

Adams tried to correct the error by calling Security Collection and CHKD on several occasions to dispute the charge and by submitting multiple credit reporting disputes to Equifax. (*Id.* ¶ 13.) On March 22, 2017, CHKD sent a letter to Adams acknowledging that "a debt for \$101.23 was reported to [Adams's] file in error" and that "[t]he process has begun to remove this debt from [Adams's] credit file." (*Id.* ¶ 23, Ex. A.)

On September 5, 2017, Adams filed a two-count complaint in the Circuit Court for the City of Richmond seeking \$200,000 in compensatory damages—with a request they be trebled—and \$350,000 in punitive damages, plus attorney's fees and costs. (*Id.* at 7.)

Count One, the Defamation Claim, alleges that CHKD defamed Adams by disseminating information through its agent Security Collection with knowledge that the information was false and inaccurate. (*Id.* ¶¶ 24–33.) As a result of CHKD's reporting through Security Collection, Adams alleges that she has suffered "loss of credit opportunities, injuries to her reputation and standing in the community, and embarrassment, humiliation, and other mental and emotional distress." (*Id.* ¶ 32.)

Count Two, the VCPA Claim, alleges that CHKD's dissemination of false and inaccurate information, through its agent Security Collection, violated the VCPA, which provides, *inter alia*, that "any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer" is unlawful when "committed by a supplier in connection with a consumer transaction." (*Id.* ¶¶ 34–46 (referencing *Va. Code* § 59.1-200(14).) Adams argues that CHKD's false reporting was in connection with a "consumer transaction" because Adams obtained medical treatment for her son from CHKD within the two years prior to the complaint being filed. (*Id.* ¶¶ 37–38.) She also contends that CHKD obtained her identifying information as a result of her son's treatment. (*Id.* ¶ 39.) According to Adams, "CHKD engaged in 'deception . . . [and] misrepresentation in connection with a consumer transaction,' i.e. medical treatment and/or services provided to Adams for her son, through its actions alleged above in this

Complaint.” (*Id.* ¶ 40.) She alleges the same injuries as pleaded in the Defamation Claim. (*Id.* ¶ 42.)

On February 26, 2018, CHKD filed the Demurrer and a plea in bar, as well as a motion to transfer venue. On March 26, 2018, venue was transferred to this Court. (Def. Mem. Supp. Dem. 4.) A hearing on the Demurrer was held on July 11, 2018.¹ At the conclusion of the Hearing, the Court took the matter under advisement and granted the parties leave to submit post-hearing briefs.

Adams also has a pending action against Security Collection and Equifax in the United States District Court for the Eastern District Court of Virginia pursuant to the FCRA, case number 2:17cv527. (*Id.* at 5).

Positions of the Parties

CHKD's Position

CHKD argues that the Demurrer should be granted for several reasons. First, it asserts that it did not perform any of the allegedly inaccurate credit reporting that Adams claims led to her injuries. (Def. Mem. Supp. Dem. 5.) CHKD also contends it cannot be held liable for the actions of Security Collection because Adams has made “no effort to allege with sufficiency any facts to support her conclusory claims of agency.” (*Id.* at 5.)

CHKD asserts that both claims are preempted by the FCRA. CHKD contends that the Defamation Claim is preempted because section 1681h(e) of the FCRA “preempts common law allegations based on defamation, invasion of privacy, or negligence without a showing of actual malice.” (*Id.* at 5–6.) It contends that the VCPA Claim is preempted because section 1681t(b)(1)(F) of the FCRA “prevents consumers from bringing causes of action under state statutes based on the conduct regulated by FCRA” and that Adams’s allegations are entirely related to credit reporting, which is regulated by the FCRA. (*Id.* at 6.)

CHKD further argues that the Defamation Claim fails to allege the requisite intent—which it contends also precludes a claim for punitive damages—and is barred by the applicable statute of limitations.² (Dem. and Plea in Bar 1.)

CHKD asserts that the VCPA Claim fails for two additional reasons. First, CHKD argues that the claim is barred because the VCPA states that “[n]othing in the chapter shall apply to . . . aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act (FCCPA),” which includes the FRCA. (Def. Mem. Supp. Dem. 11 (citing *Va. Code* § 59.1-199(C)).) Second, even if the claim were not pre-empted by the VCPA, CHKD

¹ Although CHKD filed a plea in bar with the Demurrer, it elected to move forward only on the Demurrer at this time.

² Because CHKD failed to articulate the basis for its statute-of-limitations argument in its supporting memorandum and at the Hearing, the Court overrules the Demurrer on this basis.

alleges that Adams still fails to state a claim under the VCPA. (*Id.* at 12.) According to CHKD, “[t]o state a claim under the VCPA, [a plaintiff] must allege ‘(1) fraud, (2) by a supplier, (3) in a consumer transaction.’” (*Id.* (citing *Nahigian v. Juno Loudoun, LLC*, 684 F. Supp. 2d 731, 741 (E.D. Va. 2010)).) CHKD asserts that Adams fails to “explain how the alleged billing error could constitute the purposeful deception and intent” required to fulfill the fraud element. (*Id.* at 13.) Additionally, CHKD contends that for the VCPA claim to proceed, Adams must show that she relied on the alleged misrepresentation, and Adams fails to allege that she relied on the billing error. (*Id.*)

Adams's Position

Adams argues that she has sufficiently pleaded that CHKD made defamatory statements to Security Collection and that Security Collection's repeating and republishing of those statements were “authorized by CHKD and [were] the natural and probable consequence” of CHKD's disclosure. (Pl.'s Mem. Opp'n Dem. 6–7.)

Adams contends that 15 U.S.C. sections 1681h(e) and 1681t(b)(1)(F) of the FCRA do not preempt—or provide CHKD qualified immunity from—the Defamation Claim because CHKD is not a liable party under the statute.

She argues that section 1681h(e) only applies to “(a) consumer reporting agencies ('CRAs'); (b) users of information; and (c) ‘any person who furnishes information to a consumer reporting agency.’” (*Id.* at 8 (quoting 15 U.S.C. § 1681h(e).) She contends that CHKD admitted to not being a CRA, and Adams has not alleged that CHKD used her credit report in any way. (*Id.* at 14.) Adams argues that even if section 1681h(e) applied to this case, CHKD acted with malice and/or willful intent, so CHKD is not immune from the Defamation Claim. (*Id.* at 15.) She claims that CHKD acted with malice and/or willful intent because CHKD “knew that its republished statements about her were false and allowed continued republication of false statements despite receiving repeated disputes from Mrs. Adams.” (*Id.* at 15.)

Similarly, she argues that section 1681t(b)(1)(F) only applies to “persons who furnish information to consumer reporting agencies.” (*Id.* at 8–9.) She argues that CHKD cannot be considered a “furnisher” because courts have “limited the term ‘furnisher’ to those entities that actually transmit consumer information to CRA's,” whereas CHKD transmitted the consumer information to Security Collection, which is not a CRA. (*Id.* at 8–9.)

As for her claim that CHKD violated the VCPA, Adams argues that the claim is not subject to regulation by the FCCPA—and thus not barred by section 59.1-199(C) of the *Code of Virginia*—because CHKD did not furnish information to a CRA. (*Id.* at 16.) She further contends that she has pleaded the necessary elements of a claim under the VCPA because she established that “CHKD misrepresented to Security Collection that Mrs. Adams . . . was subject to collection activity” and that she suffered a loss from such misrepresentation. (*Id.* at 17.) She argues that “[t]he Court should reject CHKD's narrow interpretation of VCPA” because the General Assembly enacted the VCPA to expand remedies available to consumers. (*Id.* at 17.) She also

asserts that only a misrepresentation—and not fraud—must be pleaded and that reliance upon that misrepresentation is not required.³ (Pl.'s Supp. Mem. Opp'n Dem. 1–3.)

Finally, if the Court sustains the Demurrer, Adams requests leave to amend her complaint. (*Id.* at 18.)

Analysis

Legal Standard

A demurrer tests the legal sufficiency of the claims stated in the pleading challenged. *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 189, 518 S.E.2d 312, 312 (1999). On demurrer, the court must admit “the truth of all material facts properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the alleged facts.” *Cox Cable Hampton Rds., Inc. v. City of Norfolk*, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). A demurrer does not admit the correctness of any conclusions of law, however. *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997).

Even if imperfect, a complaint drafted such that a defendant cannot mistake the true nature of the claim should withstand demurrer. *CaterCorp, Inc., v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). The court will not consider any factual assertions not included in the pleading being attacked, or its accompanying exhibits, for purposes of a demurrer. *See id.* at 24, 431 S.E.2d at 279. If a court sustains a demurrer, it is within the court's discretion to allow leave to amend the complaint, and such leave “shall be liberally granted in furtherance of the ends of justice.” Va. Sup. Ct. R. 1:8.

In Virginia, common-law defamation requires “(1) publication of (2) an actionable statement with (3) the requisite intent.” *Jordan v. Kollman*, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005).

Title 15, section 1681h(e), of the *United States Code* states as follows:

Except as provided in [other] sections . . . of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

³ According to Adams, she “should not be required to plead reliance where misrepresentations about [her] creditworthiness made by CHKD harmed [her] despite the fact that she did not rely on those misrepresentations.” (Pl.'s Supp. Mem. Opp'n Dem. 3.)

15 U.S.C. § 1681h(e).

The General Assembly intended that the VCPA “be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public.” *Va. Code* § 59.1-197 (2014 Repl. Vol.). Stated differently, “the legislative purpose underlying the VCPA was, in large part, to expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law.” *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 497, 764 S.E.2d 256, 260 (2014).

The VCPA provides, in pertinent part, that “[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction . . . committed by a supplier in connection with a consumer transaction [is] hereby declared unlawful.” *Va. Code* § 59.1-200(14).

15 U.S.C. section 1681t(b)(1)(F) states that “[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title relating to the responsibilities of persons who furnish information to consumer reporting agencies.” 15 U.S.C. § 1681t(b)(1)(F).

“Nothing in [the VCPA] shall apply to . . . [t]hose aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protections Act, 15 U.S.C. § 1601 *et seq.*” *Va. Code* § 59.1-199.

Discussion

The Court has considered the pleadings, argument presented at the hearing, and applicable authorities. The Court now rules as follows.

As an initial matter, CHKD claims that it did not perform the conduct Adams alleges led to her damages, *i.e.*, the inaccurate credit reporting. Under Virginia law, however, “the author or originator of defamation is liable for a republication or repetition thereof by third persons, provided that it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication.” *Weaver v. Beneficial Fin. Co.*, 199 Va. 196, 199, 98 S.E.2d 687, 690 (1957). The Court finds that Adams adequately alleges that a natural and probable consequence of CHKD disclosing false information about Adams to Security Collection was that Security Collection would then report Adams’s “unpaid” invoice to CRAs, including Equifax. The Court also finds that Adams adequately alleges that CHKD presumptively authorized Security Collection to report the false indebtedness to Equifax to induce payment.

A. *The Defamation Claim.*

1. The Intent Element of the Defamation Claim Is Adequately Pleaded.

CHKD argues that Adams has not sufficiently alleged the intent necessary for a common law defamation claim under Virginia law. The Court disagrees.

Common law defamation involves publication of an actionable statement with the requisite intent to injure the plaintiff. *Jordan v. Kollman*, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005). The Virginia Supreme Court has defined the necessary intent to be malice, which requires that the published statement be made “with such gross indifference or recklessness as to amount to a wanton or willful disregard of the rights of a plaintiff.” *Preston v. Land*, 220 Va. 118, 120–21, 255 S.E.2d 509, 511 (1976) (quoting *Chesapeake Ferry Co. v. Hudgins*, 155 Va. 874, 902, 156 S.E. 429, 439 (1931)). The court subsequently adopted the “*New York Times* actual malice standard,” which requires “clear and convincing proof of knowledge of falsity or reckless disregard for the truth.” *Gazette v. Harris*, 229 Va. 1, 13, 325 S.E.2d 713, 724 (1985).

The Court finds that Adams adequately alleges that CHKD acted with actual malice. Adams claims she notified CHKD that she was not responsible for the Invoice, and CHKD—despite agreeing that the Invoice was erroneous—nevertheless opted to disclose the false indebtedness to Security Collection. As such, CHKD knew, or should have known, that the information it reported to Security Collection was false and that Security Collection would relay this information to CRAs, including Equifax. Assuming the allegations in Adams’s complaint to be true, CHKD therefore acted with the requisite intent to support a defamation action, including a claim for punitive damages.

2. The Defamation Claim Is Not Preempted by 15 U.S.C. Section 1681h(e).

CHKD contends that the Defamation Claim is precluded by section 1681h(e) of the FCRA. The Court disagrees.

Title 15, section 1681h(e), of the *United States Code* provides, in pertinent part, that

no consumer may bring any action or proceeding in the nature of defamation . . . with respect to the reporting of information *against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency*, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on *information disclosed by a user of a consumer report* to or for a consumer against whom the user has taken adverse action, based . . . on the report except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e) (emphasis added). Congress included this qualified immunity “as a sort of quid pro quo limiting the tort liability of CRAs, furnishers, and consumer report users in exchange for allowing consumers to acquire the information through FCRA-required

disclosures.” *Ori v. Fifth Third Bank*, 674 F. Supp. 2d 1095, 1099 (E.D. Wis. 2009).⁴ CHKD does not qualify for immunity under section 1681h(e) because it does not fit within any of these categories. Of note, this section only bars state common law claims. *Id.*

The FCRA defines a CRA as “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in . . . the practice of assembling or evaluating consumer credit information . . . for the purpose of furnishing consumer reports to third parties.” 15 U.S.C. § 1681a(f). CHKD is not a CRA because it does not assemble or evaluate consumer information for monetary fees.⁵ *See Tierney v. Advocate Health and Hosps. Corp.*, 797 F.3d 449, 452 (7th Cir. 2015) (finding that a hospital was not a CRA because it did not assemble consumer information for monetary fees but rather was paid for health care services).⁶

Additionally, CHKD is not a user of consumer information. Although “user of information” is not defined within the FCRA, courts have defined the term as those “who deny credit or increase rates for the same due to information contained in a consumer report.” *Lema v. Citibank (South Dakota)*, 935 F. Supp. 695, 698 (D. Md. 1996).⁷ Adams does not claim that CHKD denied her credit or increased rates based on a consumer report. Rather, she merely alleges that CHKD reported information to Security Collection based on a prior transaction. CHKD therefore is not a user of consumer information for purposes of the FCRA. *Id.*

CHKD also is not an entity that “furnishes information to a consumer reporting agency” because Security Collection—the entity to which CHKD provided information—is a debt collector and not a CRA. *See Akalwadi v. Risk Mgmt. Alternative*, 336 F. Supp. 2d 492, 507–08 (D. Md. 2004) (finding that debt collectors are not CRAs, although they are still subject to the FCRA as entities that furnish information to CRAs).⁸ Security Collection is not a CRA because the term’s definition “implies a function which involves more than a receipt and retransmission of information identifying a particular debt.” *DiGianni v. Stern’s*, 26 F.3d 346, 349 (2d Cir. 1994).⁹ Security Collection also does not assemble consumer information “for the purpose of furnishing consumer reports to third parties.” 15 U.S.C. § 1681a(f). Security Collection is simply a debt collector who received and retransmitted information regarding Adams’s debt. CHKD therefore is not a furnisher of information to a CRA.

⁴ The Court does not consider opinions from other jurisdictions to hold precedential value. The Court instead considers the rationale offered by those courts to the extent the Court finds it persuasive.

⁵ CHKD in fact admits that it is not a consumer reporting agency. (Def. Mem. Supp. Dem. 7.)

⁶ *See supra* note 4.

⁷ *See supra* note 4.

⁸ *See supra* note 4.

⁹ *See supra* note 4.

Because CHKD is not a CRA, a user of information, or a furnisher of information to a CRA, it does not qualify for immunity under 15 U.S.C. section 1681h(e).¹⁰

Even if CHKD were a furnisher, *arguendo*, section 1681h(e) still would not apply because the disclosure of Adams's information was not made pursuant to the referenced other sections of the *Code*, nor was it "based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based . . . on the report." 15 U.S.C. § 1681h(e). CHKD's disclosure of Adams's information was not made pursuant to sections 1681g and 1681h because these sections only apply to CRAs. *See Ross v. F.D.I.C.*, 625 F.3d 808, 814 (4th Cir. 2010).¹¹ CHKD's disclosure also was not made pursuant to section 1681m because that section only applies to users of consumer reports. *See id.* Additionally, the exception listed in section 1681h(e) does not apply because CHKD "neither used [Adams's] consumer report nor took adverse action based on information in [Adams's] report or information disclosed by a user." *Id.*

B. The VCPA Claim.

1. The VCPA Claim Is Not Adequately Pleaded.

CHKD argues that Adams has not adequately pleaded a VCPA claim because she does not allege that CHKD made a misrepresentation upon which Adams relied or that CHKD made a misrepresentation in connection with a consumer transaction. The Court agrees.

Adams alleges that CHKD violated section 59.1-200(14) of the *Code of Virginia*, which is a "catch-all" provision of the VCPA stating that "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction . . . committed by a supplier in connection with a consumer transaction [is] hereby declared unlawful." *Va. Code* § 59.1-200(14) (2014 Repl. Vol.). Hence, to properly state a cause of action under this provision, Adams must allege (1) a misrepresentation (2) by a supplier (3) in connection with a consumer transaction. Although there apparently is no dispute that CHKD is a supplier of consumer services, Adams has not adequately pleaded that there was a misrepresentation upon which she relied or that the alleged misrepresentation was in connection with a consumer transaction. Additionally, the only misrepresentation alleged by Adams was made to Security Collection and not to Adams. *See Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387 (1994) (holding that the elements of fraud, actual or constructive, include a false representation of a material fact, reliance *by the party misled*, and resulting damage *to the party misled*).

"[T]o sustain a claim under the VCPA, a plaintiff must prove that the defendant acted with an intent to deceive or otherwise mislead, i.e., with fraudulent intent, as to a material fact on

¹⁰ CHKD ultimately conceded as much during the Hearing. *See* Tr. 12–14.

¹¹ *See supra* note 4.

which the plaintiff relied to his detriment *and* which resulted in measurable damage.” *Padin v. Oyster Point Dodge*, 397 F. Supp. 2d 712, 722 (E.D. Va. 2005).¹² However, the Supreme Court of Virginia has held that a plaintiff is not required to lay out all the common law elements of fraud because “the legislative purpose underlying the VCPA was, in large part, to expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law.” *Owens v. DRS Auto. Fantomworks*, 288 Va. 489, 497, 764 S.E.2d 256, 260 (2014). “The VCPA clearly does not require the consumer to prove in every case that misrepresentations were made knowingly or with the intent to deceive, . . . , but only in cases where the court finds that the violation was ‘willful.’” *Id.* (quoting *Va. Code* § 59.1-204(A)). The court went on to hold that the plaintiff nevertheless must still prove the elements of reliance and damages in misrepresentation cases because section 59.1-204(A) provides that “[a]ny person who suffers loss as the result of a violation of this chapter” is entitled to initiate a VCPA action. *Id.* at 498, 764 S.E.2d at 261 (quoting *Va. Code* § 59.1-204(A) (emphasis added by the court)). In light of the express holding of *Owens*, the Court disagrees with Adams’s position that reliance upon the misrepresentation is not required.

For purposes of surviving the Demurrer, Adams adequately alleges that CHKD acted with an intent to deceive because she claims that CHKD knew Adams did not owe it money but nevertheless relayed inaccurate information to Security Collection in an effort to collect payment. However, there is no allegation in Adams’s Complaint asserting that the alleged misrepresentation was directed at Adams or that Adams relied upon the misrepresentation.

The VCPA provision Adams claims was violated also requires that the misrepresentation be “in connection with a consumer transaction.” *Va. Code* § 59.1-200(14). The statute defines a consumer transaction as, *inter alia*, “[t]he advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes.” *Id.* § 59.1-198. The only allegation in Adams’s complaint related to a misrepresentation contends that “CHKD engaged in ‘deception . . . [and] misrepresentation in connection with a consumer transaction,’ i.e. medical treatment and/or services provided to Adams for her son, through its actions alleged above in this Complaint.” Although CHKD’s provision of medical services to Adams’s son appears to come within the broad ambit of a VCPA “consumer transaction”—because it involves the sale of a service used primarily for a family purpose—the Court finds that Adams has not sufficiently pleaded the nature of the alleged misrepresentation connected to this consumer transaction.

Because Adams has not adequately pleaded that there was a misrepresentation made to her upon which she relied or that the alleged misrepresentation was in connection with a consumer transaction, the Court finds that the VCPA Claim is not adequately pleaded.

2. The VCPA Claim Is Not Preempted by Federal Consumer Protection Law.

CHKD asserts that federal consumer protection law precludes Adams from bringing a VCPA claim. The Court disagrees.

¹² See *supra* note 4.

Section 1681t(b)(1)(F) of the FCRA states that “[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title relating to the responsibilities of persons *who furnish information to consumer reporting agencies.*” 15 U.S.C. § 1681t(b)(1)(F) (emphasis added). Courts have held that this section “applies to preempt only state claims against furnishers brought under state statutes.” *Marcum v. G.L.A. Collections*, 646 F. Supp. 2d 870, 874 (E.D. Ky. 2008).¹³

Similar to the discussion of section 1681h(e) qualified immunity regarding the Defamation Claim, *supra*, section 1681t(b)(1)(F) does not preempt the VCPA Claim because CHKD is not a “a person who furnish[es] information to consumer reporting agencies”; CHKD furnished Adams’s consumer information to a debt collector, not to a CRA. As such, section 1681t(b)(1)(F) does not preempt the VCPA Claim, as CHKD’s conduct is not regulated under the FCRA.

CHKD also argues that the VCPA Claim is preempted by federal consumer protection laws based on the language of the VCPA itself. Section 59.1-199 of the *Code of Virginia* provides that “[n]othing in [the VCPA] shall apply to . . . [t]hose aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act 15 U.S.C. § 1601 *et seq.*” *Va. Code* § 59.1-199 (2014 Repl. Vol.). For example, the United States District Court for the Eastern District of Virginia has held that because under “15 U.S.C. § 1603 consumer real estate transactions are covered by the Federal Consumer Protection Act, the [VCPA] is inapplicable.” *Smith v. U.S. Credit Corp.*, 626 F. Supp. 102, 103 (E.D. Va. 1985), *aff’d*, 801 F.2d 661 (4th Cir. 1986).¹⁴

Neither the FCCPA nor the FCRA, which is part of the FCCPA, preempts the VCPA Claim because CHKD is not subject to regulation under the FCCPA. As discussed *supra*, CHKD is not a CRA, a user of consumer information, or a furnisher of information to a CRA. The VCPA Claim therefore is not preempted by federal consumer protection law.

Conclusion

For the foregoing reasons, the Court finds that, for purposes of the Demurrer, (1) CHKD is potentially liable for the actions of Security Collection, (2) Adams adequately pleaded the intent required for the Defamation Claim, (3) the Defamation Claim is not preempted by 15 U.S.C. section 1681h(e), (4) Adams failed to adequately plead the VCPA Claim, and (5) the VCPA claim is not preempted by federal consumer protection law.

The Court therefore OVERRULES the Demurrer as to the Defamation Claim and SUSTAINS the Demurrer as to the VCPA Claim.

¹³ See *supra* note 4.

¹⁴ See *supra* note 4.

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Adams is granted leave to amend her complaint within fourteen days. Counsel for Defendants is directed to circulate an Order consistent with the rulings herein and file it with the Court within fourteen days.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Lannetti", with a large, stylized flourish at the end.

David W. Lannetti
Circuit Court Judge

DWL/amm