

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED

JUN 3 0 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY _____
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

AMERICAN BANKERS ASSOCIATION,
THE FINANCIAL SERVICES
ROUNDTABLE, and CONSUMERS
BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official
capacity as Attorney General
of California, HOWARD GOULD,
in his official capacity as
Commissioner of the Department
of Financial Institutions of
the State of California,
WILLIAM P. WOOD, in his
official capacity as
Commissioner of the Department
of Corporations of the State
of California, and JOHN
GARAMENDI, in his official
capacity as Commissioner of
the Department of Insurance of
the State of California,

Defendants.

-----oo0oo-----

Plaintiffs American Bankers Association, The Financial
Services Roundtable, and Consumers Bankers Association

NO. CIV. S 04-0778 MCE KJM

MEMORANDUM AND ORDER

1 ("Plaintiffs") have sued various California state officials
2 (Attorney General Bill Lockyer, Department of Insurance
3 Commissioner John Garamendi, Commissioner of the Department of
4 Corporations William P. Wood, and Commissioner of the Department
5 of Financial Institutions Howard Gould) in an attempt to prevent
6 certain provisions of California law dealing with the
7 dissemination of personal financial information from taking
8 effect. Defendants Lockyer and Garamendi now move to dismiss
9 Plaintiff's complaint for failing to state a claim upon which
10 relief can be granted pursuant to Federal Rule of Civil Procedure
11 12(b)(6).¹ Plaintiffs have concurrently moved for summary
12 judgment, arguing that the California law in question is
13 expressly preempted by federal statute. Defendants Gould and
14 Wood, in response, have filed a cross-motion for summary judgment
15 on essentially the same grounds as the aforementioned Motion to
16 Dismiss filed on behalf of Defendants Lockyer and Garamendi.
17 Because all parties agree that this matter hinges on a legal
18 question of preemption with no disputed factual contentions,² the
19 Court elects to treat Lockyer and Garamendi's request for

21 ¹Unless otherwise noted, all references to "Rule" or "Rules"
22 are to the Federal Rules of Civil Procedure.

23 ²As pointed out in Plaintiffs' Opposition to Defendant Wood
24 and Gould's Cross-Motion for Summary Judgment (p. 1, n. 1),
25 Plaintiffs do not dispute the undisputed facts proffered by Wood
26 and Gould in support of said motion, and Wood and Gould, in turn,
27 do not dispute Plaintiffs' factual assertions, agreeing that the
28 facts here are uncontroverted, "thus leaving this case a question
of law." (Wood and Gould's Opposition to Plaintiff's Motion for
Summary Judgment, 5:12-15). In addition, Defendants Lockyer and
Garamendi concede that the same disputed legal issues are
dispositive of both Plaintiffs' Motion for Summary Judgment and
their Motion to Dismiss. (See Defendants' Reply memorandum, p.
1).

1 dismissal as a Motion for Summary Judgment under Rule 56, and
2 will resolve the matter by way of cross motions for summary
3 judgment. For the reasons set forth below, the Court determines
4 that Plaintiffs' lawsuit is legally untenable and accordingly
5 grants summary judgment in favor of the Defendants.

6
7 **BACKGROUND**
8

9 In 2003, California enacted the California Financial
10 Information Privacy Act, which becomes operative on July 1, 2004
11 as California Financial Code sections 4050-4059. Known popularly
12 as "SB1" after the Senate Bill which introduced the legislation,
13 SB1 imposes certain restrictions on the dissemination of personal
14 financial information both between affiliated business
15 institutions and as to non-affiliated third parties.

16 In requiring that consumers be given control over the
17 transmittal of such financial information, either through "opt-
18 out" provisions in the case of affiliated institutions or express
19 consent for disclosure to non-affiliates, SBI affords greater
20 privacy protection than federal legislation. Title V of the
21 Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-6809 ("GLBA"),
22 expresses congressional will that "each financial institution has
23 an affirmative and continuing obligation to respect the privacy
24 of its customers and to protect the security and confidentiality
25 of those customer's nonpublic personal information." 15 U.S.C. §
26 6801(a). The GLBA requires every financial institution to
27 provide, at least annually, a clear and conspicuous disclosure of
28 its policies and practices regarding the disclosure of customers'

1 personal information to both affiliates and to non-affiliated
2 third parties. 15 U.S.C. § 6803(a)(1). With respect to non-
3 affiliate disclosure, the GLBA requires that consumers be
4 afforded the opportunity to direct that their personal
5 information not be disclosed.

6 Because § 6807(b) of the GLBA expressly allows states to
7 enact consumer protection statutes providing greater privacy
8 protection, California contends that its passage of SB1 was
9 proper. GLBA's savings clause in that regard provides as
10 follows:

11 (b) Greater protection under State law. For purposes of
12 this section, a State statute, regulation, order, or
13 interpretation is not inconsistent with the provisions of
14 this subchapter if the protection such statute, regulation,
15 order, or interpretation affords any person is greater than
16 the protection provided under this subchapter....

17 Plaintiffs' complaint, on the other hand, seeks to
18 invalidate SB1 by arguing that its provisions are expressly
19 preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-
20 1681x ("FCRA"), and that consequently SB1 violates the Supremacy
21 Clause of the United States Constitution. Although the stated
22 purpose of the FCRA is to protect consumers from unfair or
23 inaccurate credit reporting, rather than information sharing more
24 generally, Plaintiffs seize on a preemption provision within the
25 statute that they argue prohibits state regulation of any
26 information sharing between affiliates:

27 "No requirement or prohibition may be imposed under the laws
28 of any State-

.....

(2) with respect to the exchange of information among
persons affiliated by common ownership or common corporate
control, except that this paragraph shall not apply with

1 respect to subsection (a) or (c)(1) of section 2480e of
2 title 9, Vermont Statutes Annotated (as in effect on
September 30, 1996).....

3 15 U.S.C. § 1681t(b)(2).

4 Plaintiffs further seek injunctive relief to prevent SB1
5 from becoming operative on July 1, 2004.

6
7 **STANDARD**
8

9 The Federal Rules of Civil Procedure provide for summary
10 judgment when "the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with
12 affidavits, if any, show that there is no genuine issue as to any
13 material fact and that the moving party is entitled to a judgment
14 as a matter of law." Fed. R. Civ. P. 56(c). One of the
15 principal purposes of Rule 56 is to dispose of factually
16 unsupported claims or defenses. Celotex Corp. v. Catrett, 477
17 U.S. 317, 325 (1986).

18 Summary judgment is appropriate where, as here, a case
19 hinges solely on questions of law. See Edwards v. Aquillard, 482
20 U.S. 578, 595-96 (1987).

21
22 **ANALYSIS**
23

24 In arguing that SB1 is expressly preempted by federal law,
25 Plaintiffs have to show either that Congress has explicitly
26 defined the extent to which its enactments displace state law
27 (English v. Gen. Elect. Co., 496 U.S. 72, 78-79 (1990)), or
28 alternatively that in the absence of such explicit language it

1 can nonetheless be inferred that preemption should occur because
2 federal regulation on the subject is "so pervasive as to make
3 reasonable the inference that Congress left no room for the
4 States to supplement it." (citation omitted.). Bank of America
5 v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir.
6 2002). In determining whether federal law preempts state law,
7 this Court's task is to "ascertain the intent of Congress. Id.
8 at 557-58. Indeed, congressional purpose is the "ultimate
9 touchstone" of preemption analysis. Oxygenated Fuels Ass'n Inc.
10 v. Davis, 331 F.3d 665, 668 (9th Cir. 2003), citing Lorillard
11 Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

12 In addition, because the provisions of SB1 relate to
13 consumer protection vis-a-vis personal financial information (so
14 as to prevent unfair business practices), the subject matter of
15 the legislation extends to the state's historic police powers.
16 See Cal. v. ARC Am. Corp., 490 U.S. 93, 101 (1989). This
17 triggers a heightened presumption against preemption. Cipollone
18 v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (In analyzing
19 whether or not federal law expressly preempts state law, courts
20 "must construe [the federal law] provisions in light of the
21 presumption against the pre-emption of state police power
22 regulations," thereby requiring a "narrow reading" of the federal
23 law provision); Cal. v. ARC Am. Corp. 490 U.S. at 101
24 ("appellees must overcome the presumption against finding pre-
25 emption of state law in areas traditionally regulated by the
26 States..."); Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d
27 Cir. 1990) ("Because consumer protection law is a field
28 traditionally regulated by the states, compelling evidence of an

1 intention to preempt is required in this area.").

2 With these guidelines in mind we now turn to the federal
3 statutory scheme claimed by Plaintiffs to preempt SB1. The
4 stated purpose and scope of the Fair Credit Reporting Act, as set
5 forth in the first section entitled "Congressional findings and
6 statement of purpose," is to regulate consumer reporting agencies
7 and ensure the accuracy and fairness of credit reporting. 15
8 U.S.C. § 1681. To that end, the FCRA monitors the compilation,
9 dissemination and use of "consumer reports," a term defined as
10 including any communication by a consumer reporting agency of
11 information bearing on specified characteristics used or expected
12 to be used or collected in whole or part as a factor in
13 determining a consumer's eligibility for credit, insurance,
14 employment, or other specifically enumerated permissible
15 purposes. 15 U.S.C. § 1681a(d)(1). The FCRA defines a consumer
16 reporting agency as "any person which... regularly engages in...
17 the practice of assembling or evaluating consumer credit
18 information or other information on consumers for the purpose of
19 furnishing consumer reports to third parties..." 15 U.S.C. §
20 1681a(f).

21 Information not constituting a "consumer report" is not
22 governed by the FCRA. See, e.g., Individual Reference Serv.
23 Group, Inc. v. Fed. Trade Comm'n, 145 F.Supp.2d 6, 17 (D.D.C.
24 2001) ("The FCRA does not regulate the dissemination of
25 information that is not contained in a 'consumer report.'"),
26 aff'd, Trans Union LLC v. Fed. Trade Comm'n, 295 F.3d 42 (D.C.
27 Cir. 2002). As noted by the Seventh Circuit in Ippolito v. WNS,
28 Inc., 864 F.2d 440 (7th Cir. 1988),

1 "not all report containing information on a consumer are
2 "consumer reports." To constitute a "consumer report," the
3 information contained in the report must have been "used or
4 expected to be used or collected in whole or in part" for
5 one of the purposes set out in the FCRA."

6 864 F.2d at 449.

7 The Ippolito court goes on to unequivocally conclude, on the
8 basis of pertinent legislative history, that the FCRA does not
9 apply to reports collected for "business, commercial or
10 professional purposes" that do not fall within the purview of the
11 FCRA as a "consumer report." Id. at 452.

12 In addition, the provisions of the FCRA itself make this
13 distinction. The definition of a "consumer report" subject to
14 the FCRA was amended in 1996 to exclude communication among
15 affiliates of any report containing information solely as to
16 transactions or experiences between the consumer and the person
17 making the report. 15 U.S.C. § 1681(d)(2)(A)(ii). By excluding
18 such information from the definition of a "consumer report,"
19 Congress made it clear that such information was not subject to
20 the FCRA's requirements, which are not intended to regulate the
21 simple sharing of information between affiliates.

22 The FCRA preemption provision upon which Plaintiffs premise
23 their argument in this case must necessarily be viewed in the
24 context of the statutory framework as a whole, especially since,
25 as discussed above, in a preemption case like this one the
26 preempting statute must be read both narrowly and with a

27 //

28 //

//

//

1 presumption against finding preemption.³ While Section
2 1681t(b)(2) does indicate on its face that "no requirement or
3 prohibition may be imposed under the laws of any State... with
4 respect to the exchange of information among persons affiliated
5 by common ownership or common corporate control," it is a
6 "fundamental canon of statutory construction that the words of a
7 statute must be read in their context and with a view to their
8 place in the overall statutory scheme." FDA v. Brown &
9 Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), quoting Davis
10 v. Mich. Dept of Treasury, 489 U.S. 803, 809 (1989); Exxon Mobil
11 Corp. v. U.S. EPA, 217 F.3d at 1249 ("in interpreting the intent
12 of Congress it is essential to consider the statute as a
13 whole.").

14 To interpret the FCRA preemption provision as preventing any
15 state regulation of information sharing between affiliates, as
16 argued by Plaintiffs, ignores the fact that the FCRA expressly
17 removed such information from the purview of the FCRA in Section
18

19 ³Although Plaintiffs urge the Court to focus solely on the
20 "plain language" of the FCRA preemption statute, in isolation,
21 the Supreme Court has recognized in a case involving statutory
22 interpretation that "the meaning of words depends on their
23 context." Shell Oil Co., v. Iowa Department of Revenue, 488 U.S.
24 19, 25 (1988). Shell Oil goes on to quote Judge Learned Hand's
25 apt remark in this regard: "Words are not pebbles in alien
26 juxtaposition; they have only a communal existence; and not only
27 does the meaning of each interpenetrate the other but all in
28 their aggregate take their purport from the setting in which they
are used..." Id. at 25, fn. 6 (citations omitted). Moreover,
and even more specifically for purposes of the present case, in
Medtronic v. Lohr, 518 U.S. 470, 485, the Supreme Court
reiterated that while the analysis of the scope of [a] preemption
statute begins with its text, the court's interpretation "does
not occur in a textual vacuum." Also relevant is "the structure
and purpose of the statute as a whole," as revealed by
congressional purpose. Id. at 486. See also Dept. of Revenue of
Oregon v. ACF Industries, 510 U.S. 332, 343-44 (1994).

1 1681a(d)(2)(A)(ii).⁴ It makes no sense to exempt such
2 information sharing in one part of the statute, then argue
3 through a later preemption provision that the FCRA, though not
4 governing such exchange, nonetheless prevents states from doing
5 so. Instead, the only reasonable reading of the FCRA preemption
6 provision is that it prevents states from enacting laws that
7 prohibit or restrict the sharing of consumer reports among
8 affiliates.⁵ This comports with the stated purpose of the FCRA
9 as regulating consumer reporting agencies to ensure the accuracy
10 and fairness of credit reports. 15 U.S.C. § 1681. Contrary to
11 the position espoused by Plaintiffs, the FCRA preemption
12 provision does not broadly preempt all state laws regulating
13 information sharing by affiliates, whatever the purpose or
14 context.

15 Examination of Title V of the Gramm-Leach-Bliley Act of
16 1999, which sets forth basic privacy protections that must be
17 provided to consumers by financial institutions, demonstrates
18 that it, and not the FCRA, encompasses the kind of information
19 sharing at issue in this case. The GBLA applies to information
20 sharing by both affiliate organizations and non-affiliated third
21

22 ⁴In addition, the fact that the FCRA preemption statute
23 specifically excludes a pre-existing Vermont credit reporting
24 statute supports the proposition that the FCRA statute was not
25 intended to preempt information sharing in non-credit reporting
26 situations, since otherwise there would have been no need to
27 reference the Vermont statute.

28 ⁵Plaintiffs argue that because other preemption provisions
of the FCRA, unlike Section 1681t(b)(2), do specifically
reference consumer reports (see, for example, Section
1681t(b)(1)), Section 1681t(b)(2) must necessarily be read more
broadly. That argument fails, however, simply because the FCRA
does not regulate affiliate information sharing.

1 parties. With regard to affiliates, the GLBA requires that
2 financial institutions disclose their policies and practices
3 regarding the disclosure of customers' personal information. 15
4 U.S.C. § 6801(a)(1).⁶ While the same requirement also applies to
5 non-affiliates, at Section 6801(b) the GLBA further requires that
6 financial institutions give consumers the ability to direct that
7 information not be provided to non-affiliates at all.

8 Significantly, the GLBA also contains a savings clause
9 preserving the ability of states to afford more protection
10 against dissemination of financial information than that
11 specifically mandated by the GLBA itself. 15 U.S.C. § 6807
12 provides that a "state statute... is not inconsistent with the
13 provisions of this subchapter if the protection such statute...
14 affords is greater than the protection provided under this
15 subchapter."

16 While the language of Section 6807 is clear in permitting
17 states to enact stricter financial privacy laws like SB1,
18 examination of the legislative history further confirms Congress'
19 intent to allow more rigorous state regulation. The Conference
20 Report for GLBA, which provides reliable evidence of
21 congressional intent because it "represents the final statement
22 of the terms agreed to by both houses" (Northwest Forest Res.

23
24 ⁶While the Northern District's decision in Bank of America
25 v. City of Daly City, 279 F.Supp.2d 1118 (N.D. Cal. 2003) has
26 been vacated by the Ninth Circuit and consequently lacks
27 precedential authority (Durning v. Citibank, N.A., 950 F.2d 1419,
28 1424 n. 2 (9th Cir. 1991), its reasoning is faulty in any event.
In finding the GLBA inapplicable, Daly City incorrectly
determined that the GLBA does not regulate affiliate information
sharing. This Court finds that the GLBA, unlike the FCRA, does
in fact encompass general sharing of consumer information between
affiliates.

1 Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996), confirms
2 that "[o]n privacy, States can continue to enact legislation of a
3 higher standard than the Federal standard." 145 Cong. Rec.
4 S13913, at S13915 (Nov. 4. 1999). Senator Sarbanes, who authored
5 the state law savings clause that ultimately became Section 6807,
6 explained as follows:

7 [W]e were able to include in the conference report an
8 amendment that I proposed which ensures that the Federal
9 Government will not preempt stronger State financial privacy
10 laws that exist now or may be enacted in the future. As a
11 result, States will be free to enact stronger privacy
12 safeguards if they deem it appropriate.

13 145 Cong. Rec. 213788, at S13789 (Nov. 3, 1999) (statement of Sen.
14 Sarbanes).⁷

15 Consequently it is clear that Congress intended that states
16 be afforded the right to regulate consumer financial privacy on
17 behalf of their citizens in adopting statutes more protective in
18 that regard than the provisions of the GLBA.⁸ This permits state
19 law like SB1, and weighs heavily against the preemption argument

20 ⁷As summarized in the Points and Authorities in Support of
21 Defendants Lockyer's and Garamendi's Motion to Dismiss (at 19:6-
22 18), members of the House of Representatives interpreted the GLBA
23 state-law savings clause in the same way. Representative
24 LaFalce, the Ranking Member of the House Banking & Financial
25 Services Committee, for example, stated that "the conference
26 report totally safeguards stronger state consumer protection laws
27 in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. 1,
28 1999) (statement of Rep. La Falce).

29 ⁸While Plaintiffs contend that the savings clause of Section
30 6807 is limited only to Title V of the GLBA (given the statutory
31 reference to "this subchapter"), that argument is of no real
32 moment since the FCRA preemption clause is inapplicable to the
33 subject matter presently before the Court in any event. Hence
34 the cases cited by Plaintiffs for the proposition that a savings
35 clause expressly limited to one act does not apply to other
36 statutes (see, e.g., United States v. Locke, 529 U.S. 89, 106
37 (2000)) are inapplicable. In addition, as indicated above, the
38 legislative intent in permitting states to enact more protective
39 privacy regulations appears clear.

1 advanced by Plaintiffs. See Exxon Mobil Corp. v. U.S. EPA, 217
2 F.3d at 1254.

3 Plaintiffs attempt to portray the GLBA as inapplicable
4 because of a preemption clause recognizing the FCRA. That
5 argument fails. Although Title V of the GLBA does recognize that
6 "nothing in this title shall be construed to modify, limit, or
7 supersede the operation of the Fair Credit Reporting Act," (15
8 U.S.C. § 6806), as demonstrated above the FCRA does not apply to
9 general sharing of information by financial institutions with
10 either affiliates or third party nonaffiliates.⁹ Consequently
11 Section 6806 was intended only to preserve the FCRA's specific
12 consumer protections with respect to consumer reporting, and does
13 not operate to limit the GLBA's explicit preservation, at Section
14 6807, of states' rights to enact more stringent financial privacy
15 laws.

16 17 **CONCLUSION** 18

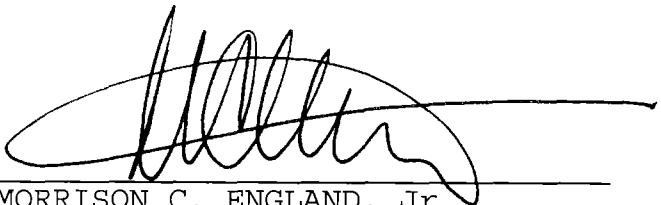
19 The Court finds that the provisions of SB1 are not preempted
20 by the FCRA, whose overriding purpose is to regulate the use and
21 dissemination of consumer reports. Instead, limitations on the
22 sharing of personal financial information between financial
23 institutions in non-credit reporting situations are specifically
24

25 ⁹Similarly, Plaintiffs' reliance on the Fair and Accurate
26 Credit Transactions ("FACT") Act, which amended certain
27 provisions of the FCRA in 2003, is also misplaced. While the
28 FACT Act does impose restrictions on consumer solicitations for
marketing purposes (at 15 U.S.C. § 1681s-3), it does not purport
to regulate, like the GLBA, affiliate information sharing in
general and does not evince any congressional intent to do so.

1 contemplated by the provisions of the GLBA, which allows states
2 to enact more stringent privacy regulations in that regard,
3 therefore permitting state laws like SB1. Plaintiffs' claim that
4 SB1 must be invalidated consequently fails. Because Plaintiffs'
5 entire lawsuit is premised on that contention, summary judgment
6 on behalf of the Defendants is hereby granted.

7
8 IT IS SO ORDERED.

9
10 DATED: JUN 30 2004

11 
12 MORRISON C. ENGLAND, Jr.
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
for the
Eastern District of California
June 30, 2004

* * CERTIFICATE OF SERVICE * *

2:04-cv-00778

American Bankers

v.

Lockyer

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 30, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Richard Allen Jones
Covington and Burling
One Front Street
35th Floor
San Francisco, CA 94111

AS/MCE

CF/KJM

E Edward Bruce
PRO HAC VICE
Covington and Burling
1201 Pennsylvania Avenue N W
Washington, DC 20004-7566

Keith A Noreika
PRO HAC VICE
Covington and Burling
1201 Pennsylvania Avenue N W
Washington, DC 20004-7566

Stuart C Stock
PRO HAC VICE
Covington and Burling
1201 Pennsylvania Avenue N W
Washington, DC 20004-7566

Catherine Z Ysrael
Attorney General's Office

110 West A Steet
Suite 1100
San Diego, CA 92101-3702

Robyn Cerny Smith
Attorney General's Office
Department of Justice
300 South Spring Street
Fifth Floor
Los Angeles, CA 90013-1204

Kimberly Louise Gauthier
State of California Department of Corporations
1515 K Street
Suite 200
Sacramento, CA 95814

Jack L. Wagner, Clerk

BY:



Deputy Clerk