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Jason Shroff

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California: A Privacy Statute Meets the GLBA & FCRA

I. INTRODUCTION

One-stop financial shopping and financial privacy—these are two catch phrases that are not complimentary. Both provide different benefits. One-stop financial shopping provides convenience to consumers and allows financial institutions to operate more efficiently.¹ One-stop financial shopping is also a powerful marketing tool for financial institutions, as they may be more likely to sell different services to one consumer.² Conversely, financial privacy statutes may restrict the sharing of consumer information among affiliates and among non-affiliates.³ These catch phrases collided in the case of *American Bankers Association v. Lockyer*.⁴

In *Lockyer*, the Eastern District Court of California was asked to rule upon a California privacy statute (SB1) applicable to financial institutions.⁵ SB1's principal purpose is to restrict financial institutions' use of a consumer's "nonpublic personal information."⁶ SB1 deals with the sharing of nonpublic information by affiliates of financial institutions, as well as by unaffiliated third parties with which these institutions may choose to do business.⁷ SB1 prevents a financial institution from sharing nonpublic personal consumer information with

1. L. Richard Fischer & Oliver I. Ireland, *Federal Court Made Mistake in Calif. Data-Sharing Case*, AM. BANKER, Aug. 20, 2004, at 11 (stating that cross-marketing and sharing of consumer information provides benefits that could not be achieved without such use of information).

2. *Id.*

3. *See generally* CAL. FIN. CODE § 4051 (2004) (noting that California's restrictions on certain information sharing are broader than corresponding federal information sharing regulations).

4. *Am. Bankers Ass'n v. Lockyer*, No. CIV.S 04-0778 MCE KJ, 2004 WL 1490432 *1 (E.D. Cal. June 30, 2004) (holding that the California privacy statute would apply and thus prevent nationally chartered banks from sharing certain consumer information among their affiliates).

5. *See id.* at *1.

6. Barry A. Abbott & Clayton T. Coon, *Financial Privacy and the California Experience*, 23 ANN. REV. BANKING & FIN. L. 411, 415 (2004).

7. *See id.*

unaffiliated third parties unless consent to do so is obtained via an “opt in” provision in the financial institution’s privacy policy.⁸ In dealing with information sharing among affiliates, SB1 prohibits a financial institution from sharing personal consumer information with an affiliate unless a consumer is given an opportunity to “opt out” of such sharing annually.⁹ In passing SB1, the California legislature wanted to give state consumers more protection than was offered in the Gramm-Leach-Bliley Act of 1999 (GLBA).¹⁰ The trial court concluded that SB1 was not preempted and thus applied to nationally chartered banks within the state of California.¹¹ *Lockyer* thus eliminated benefits Congress intended for nationally chartered financial institutions and opened the door to different or inconsistent regulations for nationally chartered banks in individual states.¹²

Part II of this Note will discuss the background and history of preemption, the Gramm-Leach-Bliley Act (GLBA), the Fair Credit Reporting Act (FCRA) and the Office of the Comptroller of the Currency’s (OCC) role in interpreting the GLBA and FCRA.¹³ Part III will discuss in detail the facts and holding in *Lockyer*, and look at why the court’s analysis of the preemption issue presented in the case was inconsistent with existing preemption law.¹⁴ Part IV will discuss the potential practical impact of the *Lockyer* decision.¹⁵ Part V will discuss the current status of the *Lockyer* case.¹⁶

II. BACKGROUND & HISTORY OF PREEMPTION, GLBA, FCRA & OCC

A. *Preemption in General*

The Supremacy Clause states that “this Constitution and the Laws of the United States which shall be made in Pursuance thereof

8. *Id.* at 417.

9. *Id.* at 420.

10. See CAL. FIN. CODE § 4051 (2004).

11. See generally *Am. Bankers Ass’n v. Lockyer*, No. CIV.S 04-0778 MCE KJ, 2004 WL 1490432 (E.D. Cal. June 30, 2004) (holding that SB1 applies to state financial institutions as well).

12. See *infra* notes 125-49 and accompanying text.

13. See *infra* notes 17-68 and accompanying text.

14. See *infra* notes 69-24 and accompanying text.

15. See *infra* notes 125-49 and accompanying text.

16. See *infra* notes 150-55 and accompanying text.

shall be the supreme Law of the Land.”¹⁷ An effect of this provision is to invalidate state laws which “interfere with or are contrary to federal law.”¹⁸ In addition, any state legislation which hinders the effectiveness of a federal law will be deemed invalid as contrary to the rule announced in the Supremacy Clause.¹⁹

There are three ways the United States Supreme Court has recognized in which a federal law can preempt a state law: express preemption, field preemption, and conflict preemption.²⁰ Express preemption occurs when Congress explicitly intends to preempt state law in a certain field and states its intent in “an explicit statutory command that state law be displaced.”²¹ Field preemption occurs when a federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”²² Lastly, conflict preemption arises when it is impossible to comply with both the federal law and state law.²³ Conflict preemption can arise in a number of different situations, such as when compliance with both the federal and state law is impossible, when compliance with either the federal or state law means a violation of the other, or when compliance with the state law would frustrate the purposes of the federal law.²⁴ Additionally conflict preemption occurs when the state law “impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created.”²⁵

In light of the three types of preemption, when a preemption issue arises, a court will apply an assumption against preemption of the state regulation.²⁶ However, because there “is a history of significant

17. U.S. CONST. art. VI, cl. 2.

18. *In re Roger Allen*, 255 B.R. 25, 31 (2000).

19. *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

20. *St. Thomas-St. John Hotel & Tourism Ass'n Inc. v. United States*, 218 F.3d 232, 238 (3rd Cir. 2000).

21. *Id.*

22. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (holding, in a case not related to banking law, that Congress' legislative action left no room for states to act in the area regulated by the federal government).

23. *St. Thomas-St. John Hotel*, 218 F.3d at 238.

24. *See* ROBERT R. GLANZ, FINANCIAL SERVICES MODERNIZATION 2003: IMPLEMENTATION OF THE GRAMM-LEACH-BLILEY ACT, Am. Law Inst., 82 (2003).

25. *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (holding that there was no conflict between the special powers the Congress created for national banks and laws of Massachusetts).

26. *See United States v. Locke*, 529 U.S. 89, 108 (2000).

federal presence”²⁷ in the banking industry, the assumption against preemption of state regulation generally is not valid.²⁸ In attempting to determine congressional intent, the court will give a plain meaning construction of both statutes.²⁹ In interpreting federal statutes in a preemption analysis, courts use traditional methods of statutory construction, such as a plain meaning analysis.³⁰ Courts may also apply what is known as the *Chevron* analysis if they seek to interpret federal statutes by reference to construction of those statutes by the federal agencies designated to administer those statutes.³¹ Under this analysis, courts will give “considerable weight to an executive department’s construction of a statutory scheme it is entrusted to administer”³² and will generally defer to agency interpretations if they are reasonable.³³

B. *Gramm-Leach-Bliley Act of 1999 (GLBA)*

The purpose of the GLBA was financial modernization; GLBA specifically allows financial holding companies to do certain things they historically could not do.³⁴ Also included in the GLBA, though, are provisions which required financial holding companies to respect the personal information of their clients when it is shared with both affiliates and unaffiliated third parties.³⁵ The GLBA provides certain restrictions on the use of a consumer’s “nonpublic private information” by financial holding companies and requires banks to provide notice of such use to consumers.³⁶ When “nonpublic private information” is going to be shared with an unaffiliated third party, consumers must receive a notice informing them of their right to opt out of the financial holding company’s sharing program.³⁷ However, there are fewer

27. See *Flagg v. Yonkers Sav. & Loan Ass’n*, No. 04-1948-CV, 2005 WL 119867, at *3.

28. See *id.*

29. See *Locke*, 529 U.S. at 108.

30. See *generally id.*

31. *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

32. *Id.* at 844.

33. *Id.* at 845.

34. See David W. Roderer, *Tentative Steps Toward Financial Privacy*, 4 N.C. BANKING INST. 209 (2000).

35. See 15 U.S.C. § 6801(a) (2000).

36. See *Abbott & Coon*, *supra* note 6, at 421.

37. 15 U.S.C. § 6802(b)(1) (2000).

restrictions placed on financial holding companies when the customer's personal information is shared with one of the holding company's affiliates.³⁸ Under the GLBA, when a financial holding company shares "nonpublic personal information" with one of its affiliates, the only requirement is that the consumer be informed of the sharing policy.³⁹ However, the GLBA does require financial institutions, at least annually, to provide clear and conspicuous disclosures to their consumers of policies concerning the sharing of consumer information with both affiliates and unaffiliated third parties.⁴⁰

Of primary importance in *Lockyer* is the preemption clause of the GLBA which expressly provides for "greater protection under State law [since a] State statute, regulation, order, or interpretation is not inconsistent with the provisions of [the GLBA] if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under [the GLBA]."⁴¹ This clause, which Congress inserted into the GLBA, allows for states to enact more restrictive state privacy laws than the GLBA⁴² and was the justification used by the California legislature in passing SB1.⁴³

C. *Fair Credit Reporting Act (FCRA) & Fair and Accurate Credit Transactions Act (FACT)*

The FCRA is important in a privacy setting because it places constraints on how companies can share personal consumer information.⁴⁴ If the information involved is part of a consumer report,⁴⁵ then a consumer must first be given notice and the chance to opt out of the sharing.⁴⁶

The purpose of the FCRA is "to require that consumer reporting agencies adopt reasonable procedures for personal, insurance, and other

38. See 15 U.S.C. § 6803(a) (2000).

39. *Id.*

40. See *id.*

41. 15 U.S.C. § 6807(b) (2000).

42. See Abbott & Coon, *supra* note 6, at 422.

43. See generally CAL. FIN. CODE § 4051 (2004) (noting that the legislature relied upon the GLBA anti-preemption clause).

44. See Abbott & Coon, *supra* note 6, at 412.

45. 15 U.S.C. § 1681a(d)(1) (2000) (noting that a consumer report is "any written, oral, or other communication of any information by a consumer reporting agency).

46. *Id.*

information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information.”⁴⁷ As a result, the FCRA created standards for collecting and disseminating consumer information, including rules about credit reports.⁴⁸ The rules were created to cover a broad scope of activity dealing with customer information, including aspects of a customer’s financial background.⁴⁹ One important FCRA provision allows affiliates to share consumer report information as long as customers receive notice of such sharing and are given the opportunity to opt out of the sharing policy.⁵⁰ Affiliates can share consumer information because of the definition of “consumer reports” and the information which may be contained in a “consumer report” as defined by the FCRA.⁵¹ These definitions are important because in *Lockyer* the trial court read the term “consumer reports” into the applicable FCRA and FACT Act provisions.⁵² The FCRA states that a consumer report is “any written, oral, or other communication of any information by a consumer reporting agency.”⁵³ A consumer reporting agency is defined as “any person which, for monetary fees, dues, or on cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers.”⁵⁴ The OCC has further interpreted a consumer reporting agency as “any person that regularly collects and communicates this information to third parties.”⁵⁵ Important to note is that the FCRA excludes from the definition of a consumer report “communication of information among persons related by common

47. 15 U.S.C. § 1681(b) (2004).

48. See Brief for OTS, OCC, FDIC, FRB, NCUA and FTC at 3, *Am. Bankers Ass’n v. Lockyer*, No. CIV.S 04-0778 MCE KJ, 2004 WL 1490432 (E.D. Cal. June 30, 2004) [hereinafter Agency Brief].

49. See generally 15 U.S.C. § 1681a (2000); Agency Brief, *supra* note 48, at 3 (discussing several statutory definitions that result in broad regulatory activity).

50. See 15 U.S.C. § 1681s-3 (2000) (allowing for affiliate sharing of consumer information for marketing purposes).

51. See 15 U.S.C. § 1681a (2000) (defining the term consumer report and the information in consumer report in a general manner).

52. See *Lockyer*, 2004 WL 1490432 *1 (E.D. Cal. June 30, 2004) (relying on the notion that consumer reports are an important distinguishing factor between the FCRA, GLBA and SB1).

53. 15 U.S.C. § 1681a(d)(1) (2000).

54. 15 U.S.C. § 1681a(f) (2000).

55. See Agency Brief, *supra* note 48, at 3.

ownership or affiliated by corporate control.”⁵⁶ FCRA allows for “communication of other information among persons related by common ownership or affiliated by corporate control.”⁵⁷ As a result the FCRA creates a situation which allows financial institutions to share customer information with affiliates, so it would seem that express preemption would apply to SB1.⁵⁸

Lastly, there is a preemption clause in the FCRA, which provides that “no requirement or prohibition may be imposed under the laws of any State with respect to the exchange of information among persons affiliated by common ownership or common corporate control.”⁵⁹ There is an interaction between this FCRA preemption clause and the preemption clause contained in the GLBA, which was discussed earlier.⁶⁰ The GLBA preemption clause does not affect or alter the preemption clause found in the FCRA, as a result the FCRA preemption clause can apply in a situation where the GLBA does not apply. The FCRA preemption clause was set to expire on January 1, 2004, but the adoption by Congress of the FACT Act deleted the sunset provision in the FCRA’s preemption clause; as a result, the FCRA’s preemption clause will continue to apply unless Congress takes action to restrict its future application.⁶¹

In addition to extending the applicability of the FCRA’s preemption clause, the FACT Act contained many other amendments to FCRA.⁶² The FACT Act prohibits the sharing of information for marketing purposes unless it is both clearly and obviously disclosed to the customer that their information can be shared with others for the purposes of soliciting the customer; and the customer must be given an opportunity and manner to prevent the solicitations by such persons.⁶³ This FACT provision is important in the privacy setting because financial holding companies have been known to share consumer

56. 15 U.S.C. § 1681a(d)(2)(A)(ii) (2000) (sharing of information among affiliates is not completely restricted).

57. 15 U.S.C. § 1681a(d)(2)(A)(iii).

58. See Agency Brief, *supra* note 48, at 4.

59. 15 U.S.C. § 1681t(b)(2) (2000).

60. See *supra* notes 34-43 and accompanying text.

61. See Abbott & Coon, *supra* note 6, at 425.

62. *Id.* (noting that some of the amendments included a program to deal with identity theft, a program that entitled consumers to get their credit report for free, and an extension of the statute of limitations for FCRA violations).

63. 15 U.S.C. § 1681s-3(a)(1)(A)&(B) (2000).

information between both affiliates and unaffiliated third parties for marketing purposes.⁶⁴

D. *Office of the Comptroller of the Currency (OCC) & Other Regulatory Agencies*

One purpose of the OCC is to provide a system of national banks in which there is stability and confidence.⁶⁵ The OCC administers the GLBA, FCRA and FACT Act.⁶⁶ Recently the OCC supported preemption arguments for nationally chartered banks in opinion letters.⁶⁷ This could be important upon appeal when the court considers if SB1 is preempted or not. The OCC has also issued a regulation under which the OCC can issue rules which preempt state law in order for the OCC to effectuate its purpose and duties for nationally chartered banks,⁶⁸ however, a court has not yet ruled on this regulation.

III. THE *LOCKYER* CASE

A. *The Fact & Holdings of Lockyer*

A primary issue in *Lockyer* was whether the California Financial Information Privacy Act (SB1) could require certain financial institution disclosures regarding privacy policies and that customers be given optional participation rights with regard to those information sharing policies.⁶⁹

SB1 requires that consumers be given control over certain financial information by requiring an opt-out provision for the sharing of information with affiliate institutions and requiring opt-in provisions to share information with non-affiliated institutions.⁷⁰ In enacting SB1,

64. Fischer & Ireland, *supra* note 1, at 11.

65. *See generally* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904-18 (Jan. 13, 2004) (codified at 7 C.F.R. parts 7 & 34) (noting that that a function of the OCC is to regulate national bank operations).

66. Agency Brief, *supra* note 48, at 12.

67. E. EDWARD BRUCE ET AL., NATIONAL BANK PREEMPTION LITIGATION, Practicing Law Inst. (2004).

68. 12 C.F.R. pts. 7 & 34 (2004).

69. *Lockyer*, 2004 WL 1490432, at *1 (E.D. Cal. June 30, 2004).

70. *Id.*

the California state legislature was worried that the GLBA did not provide sufficient protection for the use of the financial information of Californians,⁷¹ so SB1 created more privacy protection for Californians than was granted under federal legislation.⁷²

The American Bankers Association (ABA) sought to invalidate SB1 by asserting that it was expressly preempted by the FCRA and as a result, that SB1 violated the Supremacy Clause of the United States Constitution.⁷³ Thus, the ABA argues, FCRA's preemption clause gave states no ability to enact law regulating the sharing of information between banks and their affiliates or unaffiliated third parties.

The trial court in *Lockyer* granted summary judgment⁷⁴ on behalf of Lockyer because the ABA failed to show that the SB1 was expressly preempted,⁷⁵ or that preemption could be inferred because federal regulation in the area of financial institutions sharing of customer information was so pervasive.⁷⁶ The court concluded, giving a narrow reading of statutory construction, that the preemption clause in FCRA was not applicable to SB1.⁷⁷ As a result, SB1 was not preempted and thus applied to financial institutions within the state.⁷⁸ The court, in reaching this conclusion, held that the GLBA permitted for laws like SB1 to be passed by states⁷⁹ and that the GLBA expressly authorized states to pass more restrictive laws on such sharing of information.⁸⁰

B. *Analysis of the Decision in Lockyer*

Faced with the issue of preemption, the first thing the *Lockyer*

71. *Id.*

72. *Id.* at *2.

73. *Id.*

74. *Lockyer*, 2004 WL 1490432, at *1 (E.D. Cal. June 30, 2004) (noting that the case must be decided in summary judgment because the issue involved was purely a matter of law).

75. *Id.* at *6.

76. *Id.* at *5.

77. *Id.* at *4 (noting that the court used cannons of statutory construction to determine that the FCRA was not applicable).

78. *See generally id.* at *6 (noting that summary judgment was granted against the ABA and that SB1 was valid).

79. *Id.*

80. *See generally id.* (assuming that the state regulation is not inconsistent with GLBA or another federal statute, then it will not be preempted; if it is inconsistent, then the state regulation will be preempted.)

court did was to apply a presumption against state preemption basing its decision on the notion that consumer protection legislation falls within a state's historic police powers.⁸¹ As a result, the court concluded that there was "a heightened presumption against preemption [of California's state law]."⁸² Thus, the court gave a narrow reading of the FCRA.⁸³ The result of this narrow reading of the statute was to further enhance the probability that the SB1 would not be preempted.⁸⁴

The court then attempted to determine the congressional intent of the federal statutes (GLBA, FCRA and FACT Act) at issue by applying a narrow reading of the statutes.⁸⁵ The narrow reading of the GLBA, FCRA and FACT Act allowed the court to conclude that SB1 was not expressly preempted, SB1 was not preempted by any federal law that covers the field, application of SB1 would not defeat the purpose of the federal laws, and compliance with one does not preclude compliance with the other.⁸⁶

The court did not plainly construe the FCRA provision which states that "[n]o requirement or prohibition may be imposed under the laws of any State with respect to the exchange of information among persons affiliated by common ownership or common corporate control,"⁸⁷ which by its plain language specifically preempts any state law which attempts to impose regulations upon affiliates sharing information.⁸⁸ Instead, the court read this provision in a manner which allowed it to conclude that California's restrictions on affiliate sharing of information were authorized by federal law. The court also looked at the FCRA and FACT Act generally and concluded that the FCRA and FACT Act only apply when the information shared is in "consumer reports."⁸⁹ However, the term "consumer reports" is absent from the

81. *Id.* at *3.

82. *Id.* (reaching this conclusion, the court mentioned that because SB1 related to an area of consumer protection, the states historical police power covers this area so a presumption against state preemption applies).

83. *See id.* at *4 (analyzing the statute based on a narrow reading).

84. *See generally* Lockyer, 2004 WL 1490432, at *4 (E.D. Cal. June 30, 2004) (noting that the statute must be read narrowly and against finding preemption; this increased the likelihood that the trial court would conclude SB1 was valid).

85. *See id.* at *5.

86. *See supra* notes 17-33 and accompanying text.

87. 15 U.S.C. § 1681t(b)(2) (2000).

88. *See Agency Brief, supra* note 48, at 16.

89. *See generally* Lockyer, 2004 WL 1490432 (E.D. Cal. June 30, 2004) (relying on the

relevant parts of the FCRA and FACT Act,⁹⁰ furthermore the term “consumer reports” does not appear in the FCRA preemption provision; as a result one would expect that the preemption provision would not be limited only to “consumer report” information. However, the trial court asserted that because the California statute deals with the sharing of information not in “consumer reports” the FCRA and FACT Acts are not applicable and could not create preemption.⁹¹ While ultimately the court attempts to circumvent any problem with its conclusion by noting that the FCRA only applies to “consumer reports,”⁹² it is interesting to note that no such “consumer reports” term is found in FCRA preemption provision.⁹³ This is because the preemption provision was not meant to be limited to just information contained in consumer reports.⁹⁴

The court’s reading of the preemption provision to include the term “consumer reports” allowed the court to find that SB1 was not preempted;⁹⁵ it was the conclusion that SB1 was not being preempted conclusion which was controversial. In other preemption provisions when Congress deemed necessary, it specifically included the terms “consumer reporting agency” and “consumer reports” in such provisions.⁹⁶ In the *Lockyer* case, the court implied that Congress accidentally omitted or implied the terms “consumer reporting agency” and “consumer reports,” and as a result there was a need to read such into the statute.⁹⁷ So the terms were read into the FCRA and FACT Act seemingly in direct contradiction of Congress’ previous actions to include the terms when only when it thought doing so was necessary.⁹⁸

notion that consumer reports are an important distinguishing feature).

90. See 15 U.S.C. § 1681t(b)(2) (2000) (noting that the preemption is not limited to the type of information shared only in consumer reports); see generally *Lockyer*, 2004 WL 1490432 (E.D. Cal. June 30, 2004) (noting that if the legislature had intended the statute to apply to only “consumer report” information, Congress would have imposed such a restriction, and because it did not, such a restriction should not be included).

91. See generally *Lockyer*, 2004 WL 1490432 (E.D. Cal. June 30, 2004).

92. See *id.*

93. See *supra* notes 44-64 and accompanying text.

94. See U.S.C. § 1681t(b)(2) (2000) (noting that the preemption clause is not just limited to consumer reports).

95. See generally Agency Brief, *supra* note 48, at 17.

96. See generally 15 U.S.C. § 1681t(b)(1) (2004) (excluding and including the term consumer reports into the statute when it was necessary).

97. See *Lockyer*, 2004 WL 1490432 (E.D. Cal. June 30, 2000).

98. See *id.*

The courts also relied upon the GLBA's anti-preemption clause in reaching its decision.⁹⁹ The court concluded that the GLBA anti-preemption clause can prevent a state law from being preempted by the FCRA preemption clause.¹⁰⁰ The trial court concluded this despite the provision in the GLBA which directly states that the anti-preemption clause does not cover the FCRA.¹⁰¹ Also, the GLBA privacy section provides "that nothing in this title [the GLBA] shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act."¹⁰² As a result of this provision, the GLBA cannot be read to alter or supercede any provision in the FCRA,¹⁰³ including the preemption provision.

C. *A Possible Different Result in Lockyer*

In light of the above discussions about preemption generally,¹⁰⁴ the relevant statutes¹⁰⁵ and the facts of *Lockyer*,¹⁰⁶ one would expect that the court in *Lockyer* would have concluded that SB1 should be preempted.¹⁰⁷

One would have expected the court's analysis in *Lockyer* to have been different. Initially addressing the issue of presumptions in a preemption case one would have anticipated that the *Locke* case¹⁰⁸ would have controlled this issue. *Locke* states that in the field of banking law, because there is such a great historical federal presence, the general presumption against state preemption does not apply.¹⁰⁹ As a result, one would have expected that the *Lockyer* court would not have applied a presumption against preemption of SB1, as the court in fact

99. See generally *id* (relying on the GLBA anti-preemption clause as a basis for its decision).

100. See Agency Brief, *supra* note 48, at 21.

101. 15 U.S.C. § 6806 (2000).

102. *Id.*

103. See generally 15 U.S.C. § 6806 (2000) (interpreting the section by its plain language).

104. See *supra* notes 17-33 and accompanying text.

105. See *supra* notes 34-64 and accompanying text.

106. See *supra* notes 69-80 and accompanying text.

107. See *Abbott & Coon*, *supra* note 6, at 411.

108. *United States v. Locke*, 529 U.S. 89, 108 (2000).

109. *Id.*

did in the case.¹¹⁰

Even assuming that the court incorrectly applied a presumption against preemption of SB1, one would have expected the court, in its attempt to determine congressional intent with respect to the federal statutes at issue, would give plain meaning to the relevant statutes.¹¹¹ If the *Lockyer* court would have given SB1, the GLBA, and the FCRA a plain construction according to their terms, all three statutes in some way should have been expected to render SB1 preempted.

The GLBA requirements of disclosure are not as strict as those mandated by SB1.¹¹² Specifically, SB1 prevents a financial institution from sharing nonpublic personal consumer information with unaffiliated third parties unless consent to do so is obtained via an “opt in” provision in the financial institution’s privacy policy.¹¹³ SB1 prohibits a financial institution from sharing personal consumer information with an affiliate unless a consumer is given an opportunity to “opt out” of such sharing annually.¹¹⁴ However, the GLBA does require financial institutions to disclose to customers its policy on sharing nonpublic personal information with affiliates.¹¹⁵ The GLBA preemption provision provides that the GLBA “shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State.”¹¹⁶ A plain meaning interpretation could result in this being read as meaning to preempt laws that came into affect after the passage of the GLBA and to not preempt laws that were preexisting at the time.¹¹⁷ If such a reading were given to the GLBA preemption provision, it would preempt the California legislature from enacting SB1. Also, the GLBA anti-preemption clause does not mention the FCRA.¹¹⁸ As a result, the GLBA anti-preemption clause cannot be used as a justification for states to enact stricter laws in conflict with the

110. See *Am. Bankers Ass’n v. Lockyer*, No. CIV.S 04-0778 MCE KJ, 2004 WL 1490432 *1 (E.D. Cal. June 30, 2004).

111. See *supra* notes 17-33 and accompanying text.

112. See *Abbott & Coon, supra* note 6, at 411; see also *supra* notes 34-43, 69-80 and accompanying text.

113. See *Abbott & Coon, supra* note 6, at 411.

114. *Id.*

115. See *id.*

116. 15 U.S.C. § 6807(a) (2000).

117. *Id.*

118. See 15 U.S.C. § 6807(b) (2000) (noting that the statute omits any mention of FCRA).

FCRA provisions. So if a court finds that the FCRA provisions are implicated, then the FCRA preemption provision governs.

At the very least one would anticipate that because of the FCRA preemption provision, the portion of SB1 which deals with the restriction on the sharing of nonpublic personal information with affiliates would be preempted. That is because the FCRA preemption provision provides that no state law may be imposed to limit the exchange of information among affiliates.¹¹⁹ Also, the plain meaning of the FCRA preemption provision does not allow for states to act in the area of financial institutions sharing information with affiliates, and this is not limited to information in consumer reports. As a result it would seem that SB1, which attempts to regulate sharing of information with affiliates, should be preempted by the FCRA, if a plain meaning interpretation is given to the preemption provision and SB1.¹²⁰

One would also expect the court to undertake what is known as the *Chevron* analysis—giving weight to the executive department's construction of the GLBA, FCRA and FACT Act.¹²¹ Based upon the six agency¹²² amicus brief submitted¹²³ and opinion letters which supported the preemption argument, one would have anticipated the court to give deference to the agencies charged with implementing the statutes, and to find that SB1 was indeed preempted. However, as discussed above, this was not the result that the court actually reached in *Lockyer*.¹²⁴

IV. IMPACT OF *LOCKYER*

A. *Consumer and State Benefits*

The result of the *Lockyer* case for consumers in California is that they now have greater control over their financial information under certain circumstances, if the case is upheld upon appeal.¹²⁵ In California, consumers can opt out of sharing their information with

119. See 15 U.S.C. § 1681t(b)(2) (2000).

120. See Abbott & Coon, *supra* note 6, at 411.

121. See *supra* notes 17-33 and accompanying text.

122. See *infra* notes 150-55 and accompanying text.

123. See *supra* notes 65-68 and accompanying text.

124. See *supra* notes 69-80 and accompanying text.

125. See generally *Federal Court Rules California Privacy Statutes Take Precedence Over FACT Act*, 28 EFT REP., July 7, 2004, at 2004 WL 62675944.

affiliates and can refuse their SB1-required consent to the sharing of information shared with unaffiliated third parties.¹²⁶

States also gain an aspect of control, as they can now potentially regulate certain areas to protect their citizens' financial information without fear of preemption by the GLBA or FCRA.¹²⁷ Statutes, like SB1, which are passed by states, will apply to nationally chartered banks and will apply to out-of-state chartered banks to the extent that such banks do business in states with statutes like SB1. The *Lockyer* decision also reaffirms that states can continue to act in the consumer protection area, as they have historically, without the worry of preemption,¹²⁸ so long as the state statute does not clearly conflict with a textual provision of a federal statute.

The main benefit to individual consumers and states as a result of *Lockyer* is more control over the sharing of financial information.¹²⁹ While this may be positive, the impact on the banking industry is anything but positive.

B. *Impact on the Banking Industry*

The immediate impact of *Lockyer* was surprise, because most financial holding companies were not expecting to have to comply with the new California statute.¹³⁰ It is the financial industry's ability to cross market which is most directly impacted by the decision.¹³¹ Cross marketing enables large financial holding companies and banks with operating financial subsidiaries to use their customer bases to provide "one-stop shops" for their customers' financial needs.¹³² Cross marketing also allows these institutions to sell consumer information to unaffiliated third parties. This cross marketing benefit was recognized by Congress when it passed the GLBA and thereby reduced the barriers

126. *See id.*

127. *See generally* Hannah Bergman & Vivek Shankar, *In Brief: Feinstein Fights OCC Preemption Rules*, AM. BANKER, Sept. 29, 2004, at 20.

128. *See generally* Lockyer, 2004 WL 1490432 *1 (E.D. Cal. June 30, 2004).

129. *See supra* notes 125-129 and accompanying text.

130. *See* EFT REP., *supra* note 125.

131. *See generally* Jaikumar Vijayan, *Banks Balk at Info-Sharing Provision in Privacy Law; Claim compliance with Calif. SB 1 will raise IT costs*, COMPUTERWORLD, Aug. 2, 2004, at 8.

132. *See* Fischer & Ireland, *supra* note 1, at 11.

for sharing information on financial institutions.¹³³ However, with the result in *Lockyer*, at least in California, this benefit no longer exists, or at least may remain in only a severely impaired form, as some companies that operate within California have gone as far as to shut down all cross-marketing activities because they are unaware of the nuances associated with complying with SB1.¹³⁴ In addition, the lack of cross-marketing could potentially impact the profits of large financial institutions operating in California, as revenues generated by selling consumer information to unaffiliated third parties is no longer an option, and as financial institutions are more restricted in their ability to cross sell to consumers, even from the financial institutions' affiliates.¹³⁵

In considering what financial institutions can and/or will do when it comes to cross marketing, there is the added consideration, in California, of cost of compliance with SB1.¹³⁶ The added cost will result from the implementation of a dual system to internally govern how consumer information is shared with affiliates and nonaffiliated third parties. Additionally, as it is not known if alternatives or ways to elude the requirements of SB1 exist, this further compounds banks' inability to cross-market because the scope and reach of SB1 is still undetermined.¹³⁷ If cross marketing resumes for financial institutions, there will be the added cost to these financial institutions of implementing new policies between their affiliates in order to ensure compliance with SB1.¹³⁸ These costs will be expensive, because in most large financial institutions, opt-in and opt-out provisions for customers are often complex, time-consuming, and expensive for the institutions to maintain.¹³⁹

The cross marketing dilemma created by the *Lockyer* case is a problem which may not be limited to banks operating in California for long, because the problem will exist wherever a bank does business in a

133. *See id.*

134. *See Vijayan, supra* note 131, at 8.

135. *See Fischer & Ireland, supra* note 1, at 11.

136. Leonard Bernstein, *SB-1: The California Financial Information Privacy Act—Interim and Permanent Compliance Considerations*, MONDAQ BUS. BRIEFING, Sept. 27, 2004.

137. *Id.*

138. *See Vijayan, supra* note 131, at 8.

139. *See id.*

state that has passed a privacy statute such as SB1.¹⁴⁰ As contended by the federal agencies, *Lockyer* opens the door to banks being subject to different privacy regulations within each state.¹⁴¹ Therefore, not only are banks that operate in California impacted by the cost of compliance with SB1, but these banks are also affected by the cost of compliance associated with forty nine other potential state privacy statutes, if other states decided to enact such legislation. One of Congress' intentions in establishing a national charter for banks was to provide uniform standards for banks.¹⁴² The benefits of such a uniform standard include a reduction in the cost of credit, an increase in economic activity, and increased efficiency for these institutions.¹⁴³ All these benefits are eliminated when a state-by-state approach to privacy regulation is taken.¹⁴⁴

Even more problematic is what will happen when mergers or acquisitions occur between banks.¹⁴⁵ The problems associated with compliance will be magnified because the combining banks may have different systems for dealing with certain consumer information.¹⁴⁶ The issue here is that banks usually maintain separate systems for mortgages, credit cards, and deposit accounts,¹⁴⁷ so, when a combination occurs, the multiple systems, in the multiple states, with various privacy regulations may require large costs to reconcile.¹⁴⁸ All of this shows that a move toward individual state regulation of the information sharing policies of nationally chartered banks impacts banks in several negative ways.¹⁴⁹

140. See generally CAL. FIN. CODE § 4052.5 (2004); *Lockyer*, 2004 WL 1490432 *1 (E.D. Cal. June 30, 2004) (noting that the California Statute can be applied to financial institutions within the state).

141. See generally Arthur D. Postal, *After California Court Decision, Industry pushes for Uniform Standards*, NAT'L UNDERWRITER LIFE & HEALTH-FIN. SERV. EDITION, July 19, 2004.

142. See generally OCC Bank Activities and Operations; Real Estate Lending and Appraisals, 12 C.F.R. pts. 7 & 34 (2004).

143. See Agency Brief, *supra* note 48, at 12.

144. See *id.*

145. See Vijayan, *supra* note 131, at 8.

146. See generally *id.*

147. See *id.*

148. See generally *id.*

149. See *supra* notes 130-48 and accompanying text.

V. *LOCKYER* CURRENTLY

Currently the *Lockyer* case is on appeal.¹⁵⁰ Six federal agencies, including the Office of Thrift Supervision (OTS), Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System (FRB), the National Credit Union Administration (NCUA), and the Federal Trade Commission (FTC) (six federal agencies) have filed a joint brief on the issue of preemption of SB1, urging the Court of Appeals for the Ninth Circuit to overturn the trial court's decision.¹⁵¹ Most believe the support of these federal regulatory agencies will help the financial groups in the appeal process,¹⁵² because on appeal, the amicus brief submitted by the six federal agencies, will be given strong consideration in support of the argument for overturning the lower court's decision.¹⁵³ The Bush administration has also gotten involved, and has urged that the appellate court reverse the decision of the lower court;¹⁵⁴ Senator Dianne Feinstein of California; however, has urged that the trial court's decision be upheld by publicly supporting California's right to act in this area.¹⁵⁵

VI. CONCLUSION

When the buzz words and political agendas for supporting or attacking such statutes are set aside and the real issues in *Lockyer* are examined one conclusion is left—the case was incorrectly reasoned and the impact on the financial industry could be huge.¹⁵⁶

The analysis by the district court in *Lockyer* appears to have some potential flaws which may give rise to a reversal upon appeal.¹⁵⁷

150. News Release, Federal Trade Commission, Aug. 17, 2004, at 2004 WL 1835159 (noting that the case is on appeal in U.S. Court of Appeals of the Ninth Circuit).

151. See Agency Brief, *supra* note 48, at 1 (mentioning in the brief the statutes involved and their interpretations of such).

152. Damian Paletta, *Agencies' Backing Could Help Banks In Privacy Battle*, AM. BANKER, Aug. 13, 2004, at 3 (stating that agencies' opinions are usually given serious consideration by courts).

153. BRUCE ET AL., *supra* note 67.

154. Don Thompson, *Bush Backs Bank's Appeal of State's Financial Privacy Law*, SAN JOSE MERCURY NEWS, Aug. 12, 2004.

155. See Bergman & Shankar, *supra* note 127, at 20

156. See *supra* notes 125-149 and accompanying text.

157. See *supra* notes 125-149 and accompanying text.

The original presumption against preemption was wrong, the analysis of the relevant statutes was wrong, and ultimately the decision was wrong.¹⁵⁸ However it will be the impact of the decision on the financial industry in general which highlights the flaws of the decision. Congress determined that it no longer made sense to establish a national banking industry which also allowed states to provide a patched framework of privacy rules to which these banks were required to comply.¹⁵⁹ The *Lockyer* decision, however, imposes just this structure on the banking industry. The decision also places banks in different states on different playing fields,¹⁶⁰ and in addition adds costs of compliance issues.¹⁶¹ In summation, one can see the reason why the *Lockyer* case created such uproar, and one can also see the reasons why the decision must be changed.¹⁶²

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158. See Postal, *supra* note 141.

159. See *id.*

160. See *id.*

161. See *supra* notes 125-49 and accompanying text.

162. See *supra* notes 81-103 and accompanying text.

