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MEMORANDUM

June 20, 2005

To Our Clients and Friends

Re: ABA v. Lockyer: California SB 1 Preemption and the FCRA

The U.S. Court of Appeals for the Ninth Circuit today held that the Fair Credit Reporting Act (“FCRA”) preempts at least some part of California’s SB 1’s provisions relating to the sharing of information by financial institutions with affiliates. The court held that there is the possibility that some part of SB 1’s affiliate sharing restrictions may survive preemption and remanded the case to the district court to determine what type of information shared by affiliates will be subject to SB 1.

BACKGROUND

SB 1, the California Financial Information Privacy Act, requires financial institutions to provide California consumers with the opportunity to opt out before disclosing their personal information to affiliates. The FCRA, however, provides that no requirement or prohibition may be imposed under state law with respect to the exchange of information among affiliates. Accordingly, the plaintiffs argued that the FCRA preempts the affiliate sharing provisions of SB 1. (The provisions of SB 1 that limit sharing of information with nonaffiliated parties were not challenged.)

NINTH CIRCUIT’S DECISION

The Ninth Circuit noted that the FCRA preempts state requirements or prohibitions on the sharing of *information* between affiliates. In the court’s view, the term *information* as used in the FCRA has a narrow meaning and does not include *all* information. Rather, it includes only the type of information described in the definition of *consumer report*. The FCRA defines a *consumer report* as information:

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bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under [the FCRA].

The court indicated that it was reasonable to construe the term *information* as used in the FCRA's preemption clause as having the same meaning as the term does in the provisions relating to sharing of information among affiliates. Accordingly, the term *information* in the preemption provision refers to information described in the definition of *consumer report*. The court found support for its position in the language of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").

The court held that the FCRA preempts SB 1 only insofar as it attempts to regulate the communication of information shared between affiliates concerning consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, employment purposes or other authorized purpose. The case was remanded to the district court, which, after applying the restricted definition of *information*, is to determine whether any portion of the affiliate sharing provisions of SB 1 survive preemption.

A copy of the court's decision can be found at http://www.schwartzandballen.com/whats_new.html.

If you have any questions, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.