ADDITIONAL DEVELOPMENTS—PRIVACY LAW

AMERICAN BANKERS ASSOCIATION V. BROWN

541 F.3d 1214 (9th Cir. 2008), cert. denied, 129 S.Ct. 2893 (2009)

After nearly six years of federal preemption challenges, the State of California won its right to prohibit financial institutions that do business with California residents from sharing nonpublic consumer financial information with affiliates. In *American Bankers Association v. Brown*, the Ninth Circuit held that federal law did not preempt SB 1, the affiliate-sharing provisions of the California Financial Information Privacy Act. The court did restrict, however, the scope of the provisions to exclude the regulation of "consumer report information," as defined by the federal Fair Credit Reporting Act (FCRA).

SB 1, which was enacted in 2003 and took effect in July 2004, restricted the ability of financial institutions to share consumer information with affiliates. The Act required that institutions provide annual written notices informing consumers that their non-public personal information may be shared and that they have the opportunity to "opt-out" of having such information disclosed. Shortly after the enactment, the financial services industry challenged the state's authority to regulate affiliate sharing practices, claiming that FCRA preempted California law.

In July of 2005, the Ninth Circuit held that FCRA preempted SB 1, but limited the preemption to the FCRA's coverage of consumer report information. The court distinguished between FCRA's restrictions, which cover only consumer report information, and SB 1's affiliate sharing provisions, which apply broadly to nonpublic personal information. The Ninth Circuit found that FCRA's preemption clause prevents states from regulating the sharing of consumer report information among affiliates. The case was remanded to resolve the question of whether any portion of SB 1 survived preemption if the court's restricted meaning of "information" was applied, and if so, whether the surviving portion can be severed from the preempted portion. On remand, the district court enjoined the enforcement of all the affiliate sharing provisions of SB 1 by holding that all the provisions were preempted and that the preempted portions could not be severed. The Ninth Circuit reversed the district court on appeal, holding that California's affiliate sharing statute can be severed to exclude the regulation of consumer report information preempted by federal law. As a result, SB 1's affiliate-sharing rules cover information that falls outside the definition of "consumer report" information under the FCRA.

The Ninth Circuit based its decision on California laws that allow a court to alter a statute if it concludes that revising, rather than invalidating, the statute would further the Legislature's intent in passing SB 1. After considering the statute's severability clause, legislative findings, as well as declarations of intent, the court found that the Legislature enacted SB 1 in order to give consumers notice of, and control over, the disclosure of their private personal information. Limiting the statute's reach to exclude consumer report information would still advance the Legislature's goals, even if the scope was not as broad as the Legislature originally intended.

IRS SEEKS US TAXPAYER INFORMATION FROM UBS

On August 19, 2009, the United States government and the Swiss Confederation entered into an agreement outlining the process by which the Swiss government would turn over to the IRS information about Americans with UBS accounts located in Switzerland. The process agreed to by both parties would comply with the U.S. tax goals as well as Swiss' privacy standards.

This new agreement allowed the U.S. Internal Revenue Service (IRS) to audit Americans with UBS accounts in Switzerland who were also suspected of offshore tax evasion. It came about as a result of a John Doe Summons filed against UBS in June 2008 asking for the account information of a "John Doe" class of as many as 52,000 U.S. taxpayers with undeclared accounts at the bank in Switzerland.

The agreement allowed for a two-part resolution. First, the U.S. is to drop its enforcement of the John Doe Summons against UBS by filing a Stipulation of Dismissal in return for access to the information. However, the U.S. remains free to enforce the summons if it found the information provided by the Swiss government to be inadequate. Second, the IRS is to submit a treaty request to the Swiss government; once the request is received, the Swiss government would direct UBS to notify account holders that their information had been included in an IRS request. UBS would then produce account information on a rolling basis to the Swiss Federal Tax Administration (SFTA), which would review the information and decide what it would pass onto the U.S. government.

It is estimated that it could take up to a year for SFTA to decide what information to give to the United States. Furthermore, UBS would inform customers that they had the right to appeal to the Swiss Federal Administrative Court to keep their accounts secret. UBS also informed account holders that under the Voluntary Disclosure Program, account holders can submit a waiver to the UBS or the SFTA in return for the possibility of reduced penalties.

One consequence of this agreement is the creation of a new office to monitor the "global high wealth industry"; this office would handle incoming accounts as well as violations of tax treaties. A more significant consequence is the undetermined impact this agreement will have on offshore accounts and the level of privacy Americans with such accounts will be able to expect from foreign banks in the future. This agreement may heighten the duties of overseas financial institutions to detect and report tax evasion.

TOFFOLONI V. LFP PUBLISHING GROUP, LLC
572 F.3d 1201 (11th Cir. 2009)

The United States Court of Appeals for the Eleventh Circuit considered whether nude photographs not central to a corresponding news article qualified for the newsworthiness exception to the right of publicity. Overturning the lower court's decision, it held that a brief biographical piece accompanying nude, personal photographs did not exempt a defendant from violating a plaintiff's right of publicity.

The plaintiff, Maureen Toffoloni, was the mother and representative of the estate of her deceased daughter Nancy Benoit. In June of 2007, Nancy and her son were killed by Nancy's husband, Chris Benoit, in a murder-suicide. Both Chris and Nancy had been professional wrestlers, and their deaths gained national media attention.

In February of 2008, Toffoloni brought suit against LFP Publishing, seeking an injunction against the publication of the photos as well damages for violation of her daughter's right to publicity. Toffoloni alleged that her daughter had asked photographer Mark Samansky to destroy the nude photos and video after a shoot and that Nancy believed that Samansky had done son. Instead, Samansky kept the video and extracted nude photos from the stills that he passed on to *Hustler* magazine, which is published by LFP Publishing. *Hustler* had run the photos in their March 2008 issue along with a short article about Nancy.

The state of Georgia, which had been Nancy's residence at the time of the murder, recognizes a right of publicity. The courts had also adopted a "newsworthiness" exception to the right of publicity in order to balance rights of privacy and publicity with the rights of freedom of speech and of the press.

In *Toffoloni*, the court held that the nude photos were not central to the murder of Nancy Benoit and therefore, were not newsworthy. The court noted that the heart of the article was the publication of the nude photos and not the corresponding biography. Furthermore, the court observed that there are "timeliness or relatedness boundaries" that circumscribe the depth of an incident of public interest. Here, the published photos were in no way related to the "incident public concern" or "drama" of Benoit's death.

VERIZON CALIFORNIA, INC. V. FEDERAL COMMUNICATIONS COMMISSION
555 F.3d 270 (D.C. Cir. 2009)

The District of Columbia Court of Appeals declined to review the Federal Communications Commission's (FCC) ruling that Section 222(b) of the Telecommunications Act, which mandates that a telecommunications carrier that receives information from another carrier in order to provide a telecommunications service, may only use that information for that purpose, applied to a carrier receiving such information but not itself providing the telecommunications service.

When a telephone user seeks to terminate her old provider and "port" her existing phone number to a new provider, the new service transmits a Local Service Request (LSR) to the old provider in order for the new one to perform the necessary technical action. Verizon California, Inc. (Verizon) received LSRs from other voice service providers. Yet before the number port could be completed, Verizon would use the LSR information to contact its defecting customers and offer them incentives not to join the new provider.

In 2008, the FCC determined that Verizon violated Section 222(b) of the Telecommunications Act by using LSRs from other carriers to market to its departing customers and ordered Verizon to cease and desist. Verizon petitioned the D.C. Circuit to grant review of the FCC's order, arguing that Section 222(b) applied only to carriers that themselves provided the requested telecommunications service. Verizon asserted that it was exempt from Section 222(b)'s restrictions, since it merely received the LSR information from the other provider but did not itself perform the requested number port,

The D.C. Circuit denied the petition to review, finding that the FCC's interpretation did not unambiguously contradict the statutory language. First, the panel addressed an FCC precedent stating that Section 222(b) applied to a carrier receiving information even though the service in question was provided solely by the carrier submitting the information. Verizon argued that the precedent was inapplicable because in that ruling, the FCC justified its interpretation of the statute as promoting carrier competition, whereas in the Verizon order the FCC sought to use the interpretation to restrain competition (between carriers submitting LSRs and Verizon receiving them).

Though the court expressed some misgivings about the "oddities" of the FCC's reliance on the precedent, it nevertheless concluded that the "Commission's concern is really to assure the losing carrier's neutral role in the execution process (here, execution of porting)." Moreover, the FCC's record showed that Verizon's use of the LSR information was in fact interfering with other providers' number porting. Accordingly, the panel deferred to the FCC's administrative order applying Section 222(b) to Verizon as a carrier receiving information from another carrier but not itself performing a requested service.