

No. 82690-1

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 36245-7-II

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Petitioner

v.

AMERIQUEST MORTGAGE COMPANY,

Respondent

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STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT
AMERIQUEST MORTGAGE COMPANY

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I. INTRODUCTION

The only issue for review is “whether federal law preempts or precludes disclosure of information in the loan files held by the Attorney General.” See Order Granting Petition for Review. On this issue, the Court of Appeals got it right. The federal Gramm-Leach-Bliley Act (“GLBA”), not the Washington Public Records Act (“PRA”), governs the obligations of the Attorney General’s Office (“AGO”) with respect to the customer loan files. Although the conflict between the GLBA and the PRA is an issue of first impression before this Court, the Court of Appeals’ decision was based on well-established preemption principles — principles already affirmed by this Court.

The issue for review can be distilled down to two very simple points: (1) The GLBA directly conflicts with the PRA in fundamental purpose and in substance; and (2) under the GLBA, the customer loan files are protected from disclosure. No GLBA exception exists that would permit disclosure.

At the heart of this case is confidential personal financial information provided to Ameriquest by its customers during the course of the loan process. When the AGO began an examination into Ameriquest’s lending practices, the AGO requested certain customer loan files. Ameriquest fully cooperated and provided the loan files now at issue.

The Intervenor in this matter, Melissa Huelsman, filed a Public Records Act request broadly requesting all Ameriquest documents. The AGO was ready and willing to hand the customer loan files over. Ameriquest

immediately filed for an injunction to prevent this confidential information from being released arguing, inter alia, that the federal Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq. barred the disclosure of the customer loan files. The trial court disagreed and, in a single line with no analysis, ruled that the GLBA does not preempt the PRA. See Order Denying Plaintiff's Motion for Preliminary Injunction, at 3 (CP 322). Ameriquest sought interlocutory review of the trial court's ruling.

Throughout its briefing below, the AGO has maintained that the loan files should be produced despite the GLBA protections because: (1) the GLBA did not preempt the PRA based on the exception in the GLBA that permits disclosure "to comply with Federal, State, or local laws, rules, and other applicable legal requirements;" (see Defendant's Response to Motion for Preliminary Injunction, at 6 (CP 187)); and (2) even if the GLBA does preempt the PRA, the AGO's redaction policy for "personal information" as defined by Hearst v. Hoppe, 90 Wn.2d 123, 133, 580 P.2d 246 (1978), would satisfy the GLBA's prohibitions on disclosure. Id. at 5, 6 (CP 186-87); Declaration of David Huey, Exh. 5, at 39-40 (CP 180-81).

The Court of Appeals rejected these arguments. In Ameriquest Mortgage Co. v. State Attorney Gen., 148 Wn. App. 145, 199 P.3d 468 (2009) ("Ameriquest"), the Court of Appeals held, "[t]his federal provision [the GLBA] prohibiting disclosure of information directly conflicts with Washington's PRA and thus, the GLBA's nondisclosure provisions preempt the PRA." Id. at 162. The court relied on well-established preemption principles in Washington law and the case Hodes

v. U.S. Dep't. of Hous. and Urban Dev't, 532 F. Supp. 2d 108 (D.D.C. 2008),¹ which dealt specifically with the GLBA.

Then, when it filed a Petition for Review (“PFR”) with this Court, the AGO’s target started moving. In the PFR, the AGO claimed that the Court of Appeals had conducted its preemption analysis without trying to “harmonize” the two statutes. PFR, pp. 3-4. Suddenly, in the AGO’s opinion, the GLBA and the PRA “are not incompatible.” Id., p. 5 (emphasis added). This statement is stunning. Adopting this view requires wholesale disregard of the fundamental purposes behind each statute — privacy on the one hand, and disclosure on the other. Simply put, the GLBA prohibits disclosure of customer loan files and the PRA favors disclosure. “Not incompatible”? These two statutes could not be more incompatible. Indeed, that is the crux of this entire dispute: to disclose or not to disclose? The GLBA says no, and the PRA says yes. The AGO’s arguments were unavailing at the Court of Appeals and find no legal support before this Court.

Knowing that this direct conflict mandates preemption, the AGO’s position starts to shift and newly-minted arguments appear. As discussed in the Answer to the Petition for Review, the AGO’s new theories find no basis

¹ The court in Hodes, a case repeatedly ignored by the AGO, dealt squarely with the issue of whether the GLBA prohibited the disclosure of nonpublic personal information provided to a nonaffiliated third party, such as the AGO, through a FOIA request (the federal equivalent to a PRA request). The court in Hodes found that the GLBA “nowhere exempts government entities from its confidentiality provisions, nor would doing so comport with the purpose of the [GLBA], which is to safeguard consumer information.” Id. at 116. The AGO has stubbornly refused to acknowledge the Hodes case.

in the law. This Court has already answered the “other statutes” argument the AGO asserts here in the case Progressive Animal Welfare Soc’y v. Univ. of Wash. (“PAWS”), 125 Wn.2d 243, 884 P.2d 592 (1994). The AGO’s eleventh hour argument that the loan files should be disclosed in the AGO’s “ordinary course of business” is also devoid of any legal support.

II. SUPPLEMENTAL STATEMENT OF THE CASE

The factual history of the events leading to this appeal are outlined in Ameriquest’s (then “Appellant’s”) Opening and Reply Briefs, submitted to the Court of Appeals and now before this Court, and will not be reiterated in detail here. Ameriquest will reiterate only those points germane to this Court’s issue for review.

A. The Contents of the Customer Loan Files at Issue.

As noted above, the AGO initiated an examination into Ameriquest’s lending practices. Declaration of Diane Tiberend in Support of Ameriquest’s Motion for Preliminary Injunction (“Tiberend Decl.”), ¶ 2 at 1 (CP 117). In the course of the examination, the AGO requested from Ameriquest consumer loan files containing confidential personal financial information. Id., ¶¶ 3-5 at 2-3 (CP 118-19). Ameriquest fully cooperated with the AGO’s request for information, and provided copies of the customer loan files. Id. These files included:

- a customer’s full legal name
- social security number (possibly an actual copy of the social security card as well)
- driver’s license number (possibly a copy of the actual license as well)

- date of birth
- credit (FICO) score
- credit report (which would identify mortgages and consumer credit information such as name of credit card company, amount charged, amount paid, outstanding balance, timeliness of payments)
- monthly income
- sources of monthly income (which could include a copy of the borrower's paystub, W2, personal and business tax returns, business profit and loss statement)
- employer's name
- employer's address
- length of employment
- nature of employment
- name and age of any children
- checking and savings account information (bank statements, deposit verification)
- identification of other assets (stocks, bonds, life insurance net cash value, retirement fund holdings, net worth of business)
- residential address
- residential telephone number
- personal wireless telephone number
- all terms and conditions of the customer's transaction (e.g., loan amount, interest rate etc.).

Id., ¶ 3 at 2 (CP 118). When the Intervenor requested this customer loan files through a PRA request, the AGO agreed to disclose them. This dispute resulted.

B. Both the AGO and the Trial Court Acknowledge that the Loan Files Contain Confidential Personal Information; The Trial Court Disagrees that the GLBA Preempts the PRA and Orders Disclosure After the AGO Redacts the Documents.

The AGO opposed Ameriquest's motion for preliminary injunction. See Defendant's Response to Motion for Preliminary Injunction ("AGO Response"), at 1-9 (CP 182-190). In its response, the AGO affirmed that loan files contain confidential personal financial. *Id.* at 5 (CP 186). Additionally, the AGO did not contest Ameriquest's assertion that it is a financial institution subject to GLBA .

The trial court denied Ameriquest's motion for preliminary injunction. See Order Denying Plaintiff's Motion for Preliminary Injunction, at 1-4 (CP 320-323). In a single sentence, without citation to authority, the trial court concluded that the GLBA did not preempt the PRA. *Id.*, at 3 (CP 322). The court also acknowledged that the records contained "exempt personal and confidential information." *Id.*, at 4 (CP 323). The court went on to rule that disclosure was to occur once the AGO had performed redactions under the PRA. *Id.* Thereafter, the AGO determined what it believed the level of adequate PRA redactions. However, even after the AGO's purported redactions, the following information would still remain in the loan file:

- a customer's full legal name,
- credit information such as name and address of creditor,
- sources of monthly income,
- employer's name,
- employer's address,
- length of employment,
- nature of employment,

- name and age of any children,
- identification of other assets (stocks, bonds, life insurance net cash value, retirement fund holdings, net worth of business),
- residential address,
- residential telephone number,
- personal wireless telephone number,
- as well as all terms and conditions of the customer's transaction,

as well as a myriad of other information such as the borrower's maiden name, information regarding current and prior marriages, full employment history, mortgage delinquency information, payment histories, appraisals (some with pictures of home interiors), etc. Tiberend Decl., ¶ 3 at 2 (CP 118). All of this information would remain even if the redactions the AGO proposed were done correctly.²

C. The Court of Appeals Analyzes Preemption Under Washington Law and in the Confines of the GLBA, Holding that the GLBA Directly Conflicts with and Thus Preempts the PRA.

The Court of Appeals considered Washington case law on preemption, including this Court's opinion in PAWS, (quoting this Court's opinion in Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122

² Serious errors occurred with the AGO's initial redaction efforts. Upon review of only one loan file Ameriquest's counsel identified extensive redaction errors and noted those at the May 1, 2007 preliminary injunction hearing — counsel found “the social security number of the borrower 26 times on 22 different loan documents. [Counsel] found their date of birth four times. The entire credit report was in the file with account numbers and account balances. The borrower's credit score was in the file on eight different documents. The driver's license, complete copy was in the file. Another driver's license number, their date of birth, the monthly income.” VRP (May 1, 2007); 12:2-13.

Wn.2d 299, 858 P.2d 1054 (1993) (“Fisons”)) and reviewed the two confidentiality provisions of the GLBA. Ameriquet, 148 Wn. App. at 158-62. Given the record before it, the Court of Appeals concluded that the AGO was a non-affiliated third party subject to the GLBA’s non-disclosure provision. Thus, the AGO’s duty under the PRA conflicted with its duty under the PRA, and the GLBA preempted the PRA. Id. at 162. The AGO’s PFR followed.

III. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals’ Preemption Analysis Rests on Well-Settled Preemption Principles.

The AGO accuses the Court of Appeals of conducting an “uncritical application of preemption.” PFR, p. 4. This is an unfair characterization of the Court of Appeals’ analysis, which relied on PAWS, a case cited by the AGO in support of its various positions. The Court of Appeals correctly observed that there are three types of preemption: express preemption, field preemption and conflict preemption. Ameriquet, 148 Wn. App. at 158. The Court of Appeals further acknowledged that there is a strong presumption against finding preemption, but only in an ambiguous case. Id. The Court of Appeals then cited the GLBA provision that “preserves only a state ‘statute, regulation, order or interpretation’ that is not ‘inconsistent’ with [the] GLBA.” Id. at 159 (citing 15 U.S.C. § 6807(a) and (b)). Given the plain language of the statute, the Court then analyzed whether the GLBA and

the PRA conflict, concluding that they did because one statute mandates disclosure of the documents while the other statute prohibits disclosure.

This analysis is consistent with this Court's prior preemption analyses. In PAWS, this Court confirmed the circumstances under which a federal law will preempt state law:

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

125 Wn.2d at 265 (emphasis added). This is the “express, field and conflict preemption” analysis that the Court of Appeals relied on in Ameriquet. This analysis is also identical to this Court's earlier analysis in Fisons, 122 Wn.2d at 326-27. This is the very same framework the Court of Appeals applied here and that Ameriquet urges this Court reaffirm as the law of preemption in Washington. The AGO's reliance on PAWS and Fisons to support its position is misplaced.³ Applying the conflict preemption principles this Court applied in PAWS and Fisons to the facts in this case, the result is quite simple: where the PRA's

³ The AGO conspicuously fails to acknowledge how the unique facts of PAWS and Fisons determined the outcome in those cases. PAWS involved the federal Freedom of Information Act, which could not, by its express terms, preempt state law as it only applied to federal agencies, and not to the state university at issue in the case. 125 Wn.2d at 265-66. As discussed in note 10 below, the GLBA expressly applies to the AGO as a non-affiliated third party, so PAWS is inapposite on its facts. The Fisons court found no preemption because the Federal Food, Drug and Cosmetic Act did not contain a private cause of action, so there was no reason to infer that Congress intended it to preempt a state statute that did. 122 Wn.2d at 329.

disclosure mandate conflicts with the GLBA's directive not to disclose, the GLBA preempts the PRA. This is wholly consistent with this Court's prior holdings, and the AGO's attempt to muddle the issue should fail.

B. The AGO Ignores Congress' Intent that the GLBA Preempt Any State Statute that Purports to Offer Fewer Protections than the GLBA; There Is No Need to "Infer" Anything in this Case.

The AGO seems to imply that the language in 15 U.S.C. § 6807(a) (which is entitled "Relation to State Law") is not "specific" enough to establish Congress' intent to preempt in the area of disclosure. PFR, p. 4 n.1. This passing challenge to the GLBA's "savings" clause is yet another red herring, meant to distract from the basic discussion of disclosure versus non-disclosure. In Note 1, the AGO suggests that there is insufficient evidence that the GLBA is meant to preempt less protective state law. *Id.* (citing cases). The AGO appears to completely ignore both the plain language of the GLBA and the evidence that Congress intended the GLBA to act as a "floor," or minimum level of protection for the records at issue.⁴ Even a cursory review of the language of the statute itself shows that it is intended to preempt less protective state laws: preserving only a "statute, regulation, order or interpretation" that is not "inconsistent" with the provisions of the GLBA. 15 U.S.C. § 6807(a). Specifically referring to construction with state statutes, Congress clarified

⁴ To reiterate, the AGO is not challenging that the loan files at issue are subject to the GLBA. AGO Response, at 5 (CP 186); see also 15 U.S.C. § 6809(4) (defining "non-public personal information").

its intent that a state statute is inconsistent with the GLBA if the state statute provides lesser protections:

For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute . . . affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Federal Trade Commission, after consultation with the agency

15 U.S.C. § 6807(b). Where the PRA requires disclosure and the GLBA prohibits it, the PRA is “inconsistent” with the GLBA as defined by Congress. And there is no need to attempt to read the minds of the members of Congress. In its Opening Brief, Ameritrust provided a citation to a letter from the Secretary of the Federal Trade Commission (“FTC”) that answers the very question at issue here:

In adopting Section 507, Congress established the privacy protections in the GLB Act as a “floor,” or minimum protections for consumer privacy, that could be exceeded by the states. See 145 Cong. Rec. S13890 (daily ed. Nov. 4, 1999) (statement of Sen. Rod Grams); 145 Cong. Rec. S13789 (daily ed. Nov. 3, 1999) (statement of Sen. Paul S. Sarbanes).⁵

See Appellant’s Opening Brief, p. 22 (citing Letter from Donald S. Clark, Sec. of FTC, to Gary D. Preszler, Comm. Dept. of Banking and Financial Institutions, State of North Dakota (June 28, 2001) (“Opinion Letter”),

⁵ Since the enactment of the GLBA, the FTC has expanded its regulations protecting consumer privacy and addressing the ever-growing problem of identify theft. The FTC’s enactment of the Red Flags Rule requiring businesses to implement a written Identify Theft Prevention Program illustrates how serious an issue this has become. Fighting Fraud With the Red Flags Rule. <<http://www.ftc.gov/bcp/edu/microsites/redflagsrule/index.shtml>>.

available at <http://ftc.gov/os/2001/06/northdakotaletter.htm>) (emphasis added). In its Opinion Letter, the FTC applied the identical preemption analysis applied by this Court in PAWS and Fisons and applied below by the Court of Appeals.⁶ The AGO, in its urgency and single-mindedness of disclosure misapplies the existing law, ignores the language of the statute itself, and stubbornly refuses to admit that the GLBA and the PRA inherently conflict, and that the GLBA preempts the PRA. The Court of Appeals got the analysis right.

C. The GLBA Protects All Nonpublic Personally Identifiable Financial Information In the Loan Files — Selective Redaction Is Not an Option.

There is a significant distinction between the GLBA's comprehensive privacy protections and broad prohibition on disclosure and the PRA's significantly narrower privacy protections coupled with its zealous mandate for broad disclosure — distinctions which cannot be reconciled and are repeatedly ignored by the AGO. The AGO argues that, because it is redacting some confidential information from the loan files under the PRA,

⁶ The Secretary of the FTC confirmed: "Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Cf. Opinion Letter (citation omitted) with PAWS, 125 Wn.2d at 265 ("Federal preemption of state law may occur when state law acts as an obstacle to the accomplishment of the federal purpose.") and Fisons, 122 Wn.2d at 326-27 (same).

“any potential harm to the interests of Ameriquest borrowers is ameliorated.” (AGO Response Brief, p. 18). Setting aside for a moment the AGO’s glaring redaction errors, even after the AGO’s proposed PRA redactions, a substantial amount of GLBA protected information remains. Opening Brief, pp. 25-27. Moreover, the FTC has made clear that redaction is simply not an alternative for personally identifiable financial information: “The Commission concluded that it would be inappropriate to carve out certain items of information that a particular financial institution might rely on when providing a particular financial product or service.” Privacy of Consumer Financial Information, 65 Fed. Reg. at 33,658 (emphasis added). The AGO has never acknowledged the case of Individual Reference Servs Group, Inc. v. Fed. Trade Comm’n, 145 F. Supp. 2d 6, 26 (D.C. Cir. 2001) (cited at Appellant’s Opening Brief, pp. 23-26) or this specific guidance from the FTC⁷, and has instead woven from whole cloth the right to circumvent the GLBA by providing redactions nowhere permitted in the GLBA.⁸ This Court

⁷ The interplay between the Individual case and the FTC guidance is critical. The court in Individual acknowledged that, while the GLBA provided no definition of personally identifiable financial information, the regulations promulgated by the agencies, including the FTC, filled in this gap as intended. This is consistent with the mandate in the GLBA that directs the FTC, the federal banking agencies, and others to prescribe “such regulations as may be necessary to carry out the purposes of [the Act]” 15 U.S.C. § 6804.

⁸ Again, the GLBA does not contemplate redactions. If the information is covered under the GLBA, the entire document is protected from disclosure — this is a critical point as demonstrated by the AGO’s early failed
(continued . . .)

would be moving far afield to adopt the AGO's "selective redaction" approach.

D. The AGO's New Arguments Are Not Supported by or Are Contrary to the Law.

1. The GLBA Applies Via Preemption, Not Through the "Other Statutes" Provision of the PRA. The AGO has utilized a variety of arguments to attempt to circumvent the application of the GLBA.⁹ Having lost on these fronts, the AGO now makes completely new arguments to this Court.¹⁰ But like its predecessors, these new arguments do not affect the correct result in this case. For example, the AGO's argument that the PRA's "other statutes" provision somehow applies to "incorporate" the GLBA is novel, but it ultimately has no relevance to the application of the

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redaction efforts which left borrower's social security numbers on numerous documents.

⁹ The AGO argued vehemently below that it was not a non-affiliated third party as defined by 15 U.S.C. § 6809(5). AGO's Response Brief, pp. 25-30. The Court of Appeals quickly and thoroughly dispensed with that argument. Ameriquist, 148 Wn. App. at 160-62 (in addressing the AGO's claims that it was not a non-affiliated third party, the Court of Appeals confirmed that those assertions were "legally incorrect"). The AGO does not argue against this holding on review, nor can it reasonably do so. As a non-affiliated third party, the AGO is subject to the confidentiality provisions of the GLBA. Id. at 13.

¹⁰ Throughout the trial court action and on appeal the AGO vehemently disagreed with all of Ameriquist's arguments as to why the GLBA's privacy provisions governed the private loan files and not the PRA. It is only after a resounding defeat on appeal that the AGO is acknowledging the authority of the GLBA and claiming the "other statutes" application.

GLBA to the customer loan files — and, therefore, serves no purpose other than to confuse and obfuscate. The correct conclusion in this case remains that the GLBA governs and requires the protection of the customer loan files in this case. Principles of preemption, not the PRA’s “other statutes” provision, is the correct path to this result.

The AGO’s “other statutes” argument fails for at least two reasons. First, the issue of how to analyze federal law in relationship to the PRA has long been settled by this Court in PAWS. As discussed more fully in Ameriquest’s Answer to Petition for Review, this Court’s approach in PAWS confirmed that, when addressing whether a federal statute limits disclosure under the PRA, a court must analyze the federal statute under preemption principals and not under the PRA’s “other statutes” provision. 125 Wn.2d at 265, Answer to PFR, pp. 7-8. PAWS clearly instructs that federal laws are analyzed under preemption principles and state laws are analyzed under the PRA’s “other statutes” provision. The Court of Appeals properly applied a preemption analysis when it determined that the GLBA preempts the PRA.

Second, the AGO’s argument suffers from being unnecessarily circular. If the GLBA did not conflict with the PRA, the GLBA would have no application at all to these customer loan files — through the “other statutes” provision or otherwise – the disclosure of the loan files by a state agency would be governed solely by the PRA. Yet, to analyze

whether the GLBA conflicts with the PRA, the analysis would necessarily utilize preemption principles. Therefore, the analysis is the same, and at the end of the day, so is the result — the GLBA would govern. This Court should not be distracted by the AGO’s invocation of the “supremacy clause” that the Court sanctions this “form over substance” argument.¹¹ Indeed, the AGO is needlessly complicating what is actually straightforward. PAWS provided the roadmap for both the Court of Appeals and this Court. Analyzing this case under preemption follows established precedent.

2. The Newly-minted “Ordinary Course of Business” Argument Is Nonsensical and Completely Devoid of Merit. Throughout this case, the AGO has thrown out a variety of differing exceptions and arguments all attempting to argue against the application of the privacy protections of the GLBA.¹² None of these arguments ever had any merit and this Court should reject them.

¹¹ The AGO has not made any argument of how the GLBA’s application is the least bit affected in any substantive sense by whether it applies via preemption or via the “other statutes” provision.

¹² Before the trial court, the AGO argued that a GLBA exception allowing financial institutions to comply with “Federal, State, or local laws,” could be expansively read to allow the AGO to disclose the documents under the PRA. (CP 187). The AGO did not raise this argument on appeal, nor is it supported by law. During oral argument the AGO argued that “at best, the applicability [of the GLBA] is very derivative,” and that by not demanding a civil investigative demand, it was Ameriquest, not the AGO, who has

(continued . . .)

The AGO continues its practice of trying to find something that will stick by creating its new “ordinary course of business” argument, pointing to the “ordinary course” language in an FTC regulation, 16 C.F.R. § 313.11(a)(1) to justify the disclosure of the documents. Ameritrust examined the “ordinary course of business” argument at length in its PFR Answer. See Answer to Petition for Review, pp. 9-13. Bottom line, this FTC regulation provides that if a financial institution, like Ameritrust, discloses GLBA protected information to a non-affiliated third party, like the AGO, the AGO is restricted to using that information in the “ordinary course of business” for which it obtained that information. Here, the AGO obtained the loan files to examine Ameritrust’s lending practices, not for the purpose of responding to a PRA request. The AGO’s reliance on 16 C.F.R. § 313.11(a)(1) is myopic, and begs the fundamental question of what is the proper result when the two statutes conflict.

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risked the disclosure of the information under the PRA. All arguments which the AGO has long ago abandoned. VRP (May 1, 2007) 24:15-25; 25:1-6 On appeal, the AGO argued that it did not fall within the GLBA’s definition of non-affiliated third party. The AGO also argued in the alternative that even if it was a non-affiliated third party it could readily disclose documents pursuant to a PRA request because the public was affiliated with the AGO. AGO Response, pp. 25-30. Both arguments were soundly rejected by the Court of Appeals and were not raised again by the AGO in its PFR.

The AGO attempts to outwit this Court on the obvious tension between the two statutes — disclosure versus non-disclosure. Even if the GLBA plainly states that it provides the minimum protection of this private consumer information, and even if the AGO might even concede that the GLBA’s provisions are incorporated through the “other statutes” provision (which Ameriquest denies and this Court rejected in PAWS), the AGO contends that the entire discussion is moot because it can disclose the loan files under the generic “ordinary course of business” exception under the GLBA. The AGO not only misapprehends the purpose of the “ordinary course of business” language but, yet again, ignores Hodes, 532 F. Supp. 2d 108, which provides that information protected under the GLBA should not be disclosed in response to a FOIA request, even where the Court acknowledged that Congress enacted FOIA for the purpose of introducing transparency to government activities. Id. at 112.

The AGO also misses the bigger picture. The idea is completely nonsensical that the GLBA would be designed as the minimum protection for this type of private consumer information but, at the same time, contain an exception so far-reaching that any agency that obtained this type of information in the “ordinary course of business” was exempt from the GLBA’s rigid protections. This is the very position that the court in Individual rejected, confirming that exceptions should not be used to

swallow the statute. 145 F. Supp. 2d at 36. Notably absent from the AGO's PFR is any mention of Hodes or Individual. Instead, the AGO relies on a strained reading of "ordinary course of business" from Washington's Uniform Commercial Code, RCW 62A.1-201(9). PFR, p. 8. The AGO skips blithely from this analysis and retreats to the notion that its drive to disclose is mandated by the PRA. Again, this begs the fundamental question of preemption. If disclosure is required by the PRA, this conflicts with the GLBA, and the GLBA preempts. The AGO cites to not one single case wherein the "ordinary course of business" exemption applies in this circumstance.¹³

¹³ In support of its argument, the AGO also says, "[t]aken to extreme, [a limited view of the ordinary course exception] would mean the information furnished under the exception could not be used at trial, even though one ultimate purpose of all civil investigations of this type is to develop evidence for use at trial if one is called for." PFR, p. 9. This statement is remarkable as it completely ignores the presence of the judicial process exception in 15 U.S.C. § 6802(e)(8). The existence of the judicial process exemption was briefed before the Court of Appeals. The Court of Appeals spent no less than seven paragraphs of its opinion explaining how the loan files could be compelled in discovery, subject to judicial limitation. Ameriquet, 148 Wn. App. at 162-64 (concluding "we . . . hold that the phrase 'judicial process' in 15 U.S.C. § 6802(e)(8) includes a court order entered in civil litigation). That the AGO would claim that the loan files could not be used in discovery shows that the AGO is simply employing a "the sky is falling" approach to distract from what should otherwise be a very straightforward proposition.

IV. CONCLUSION

Ameriquest's position on the remaining aspects of the issue on review appears in Ameriquest's Answer to Petition for Review and its briefing below. That being said, this Court should recognize that this case does not require a nuanced or novel analysis. This case is about applying well-settled preemption principles as between one statute — the GLBA, which expressly provides that state statutes that provide less protection are inconsistent with the GLBA — and the PRA, which could, absent the GLBA, permit disclosure of these customer loan files. This is an issue of first impression in Washington to the extent that this is the first time these two statutes in particular have been analyzed under Washington case law regarding preemption. But in all other ways, this is well-tread ground for this Court.

For all of the reasons stated above, this Court should affirm the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 6th day of August, 2009.

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