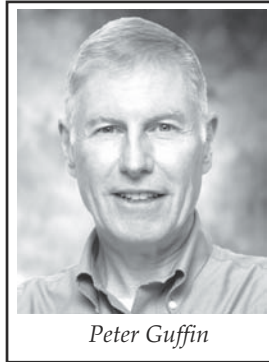


Maine's New Internet Privacy Law in Brief

by Peter J. Guffin, Esq. and Kyle M. Noonan, Esq.

Earlier this month, Maine enacted an internet privacy law requiring broadband internet service providers (ISPs) to obtain a customer's express, affirmative consent before using personal information, including browsing history. As the first state to enact such a law, Maine generated national headlines. But the new law reflects growing interest among state legislatures around the country in protecting the privacy rights of consumers in today's digital world, given the lack of a comprehensive federal data protection law.



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What does the new law do?

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0275&item=9&snum=129>

The new law, **An Act To Protect the Privacy of Online Customer Information** (LD 946, to be codified at 35-A M.R.S. c. 94), prohibits ISPs from using, disclosing, selling, or permitting access to the vast majority of information generated by a customer's use of internet service.

The Act protects a customer's web browsing history, application usage history, precise geolocation information, device identifiers, the origin and destination internet protocol addresses, personal identifying information, and the content of a customer's communications. Before an ISP may use, disclose, sell, or permit access to this customer information, it must obtain "express, affirmative consent." So, rather than giving customers the right to opt out of having their data utilized, the Act prohibits ISPs from utilizing customers' data unless and until a customer consents.

The Act also requires ISPs to provide customers a "clear, conspicuous and nondeceptive notice" of the ISP's obligations and a customer's rights.

Furthermore, the Act also prohibits ISPs from refusing to serve customers that withhold consent and bans ISPs from offering financial or other incentives for customers to opt-in. And the Act requires ISPs to take "reasonable measures" to protect customer information from unauthorized use (*i.e.*, being hacked and stolen).

Notably, the Act applies only to ISPs, and not to other internet actors that collect and use customer information, such as search engines and social networks.

The law resembles regulations that the Federal Communications Commission implemented in 2016. In 2017, however, Congress overturned these regulations under the Congressional Review Act, spurring a number of state legislatures, including Maine's, to explore their own internet privacy rules.

What does the new law mean for businesses that operate in Maine?

The Act only regulates Maine's approximately 80 broadband internet service providers. It applies only to ISPs serving customers "that are physically located and billed for service received in the State."

How will the new law be enforced?

The Act is silent as to who will enforce the law on behalf of Maine customers or what penalties apply for noncompliance. The Legislature considered, but failed to pass, an amendment that would have placed enforcement authority with the Office of the Maine Attorney General and authorized funds to hire enforcement staff.

This legislative history aside, some argue that the Attorney General may enforce the Act through the Maine Unfair Trade Practices Act (MUTPA). However, § 207 of the MUTPA states the Legislature's intent that "in construing this section," which defines the conduct prohibited by MUTPA, "the courts will be guided by the interpretations given by the

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Federal Trade Commission and the Federal Courts" to the FTC Act. 5 M.R.S. 207(1); *see also Bartner v. Carter*, 405 A.2d 194, 199–200 (Me. 1979) (in enacting MUTPA, "the Legislature sought to bring into Maine law the federal interpretations of 'unfair methods of competition and unfair or deceptive acts or practices'" and envisioned Attorney General as enforcer).

Of course, a violation of Maine's new ISP law is not a violation of the federal FTC Act. And if the Legislature intended the Attorney General to enforce the Act through the MUTPA, why not include a sentence in the Act stating that? Elsewhere in the Maine Code, statutes without a direct federal corollary — for example, the Home Construction Contracts Act and the Charitable Solicitations Act — make explicit that their violation also violates the MUTPA. *See* 10 M.R.S. § 1490; 9 M.R.S. § 5014.

What about the Public Utilities Commission? The new law is being incorporated into Title 35-A of the Maine Revised Statutes, which governs public utilities. But ISPs are not public utilities, *see* 35-A M.R.S. § 102(13), and neither the Act itself nor other provisions of Title 35-A authorize the Maine PUC to enforce the Act.

Nor does the Act explicitly create a private right of action. The Law Court is extremely reluctant to find that a statute implies a private cause of action, even where no other enforcement mechanism appears to exist. *See e.g., Wawenock, LLC v. Dep't of Transportation*, 2018 ME 83, 19 ("the mere presence of the words "must" and "shall" in a statute does not mean that a private right of action exists to enforce it"); *see also Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 101 (Me. 1984) ("if our Legislature had intended that a private party have a right of action under [statutes at issue], it would have either expressed its intent in the statutory language or legislative history or, more likely, expressly enacted one.").

Could the statute provide the standard of care for a negligence claim based on breach of the Act's requirements? Perhaps, though the Law Court's reluctance to infer a private right of action presents a challenge. Moreover, Maine's federal district court declined to find that a state statute requiring police to maintain the confidentiality of surveillance reports supported a negligence claim in which the statute provided the standard of care. *Hudson v. S.D. Warren Co.*, 608 F. Supp. 477, 481 (D. Me. 1985) (finding "no indication in Maine law that Maine would recognize a tort of negligent disclosure of confidential police information apart from the tort of invasion of privacy.").

What happens now?

The law takes effect on July 1, 2020. There are at least two grounds on which the law may be susceptible to legal challenges. First, it may be challenged on the grounds that it imposes unlawful discriminatory restrictions on the ISPs' First Amendment rights to engage in commercial speech. Second, it may be preempted by federal law, which also closely regulates telecommunications.

We are not aware of any legal challenges yet filed. In written comments to the Legislature in support of the Act, the Maine Attorney General stated that his office believes the law is legally defensible and would vigorously defend it on behalf of Maine's consumers.

A number of other states have considered, but failed to enact, similar legislation. California recently enacted a sweeping consumer privacy law that applies to a broad swath of for-profit businesses, including ISPs, but the California law provides that ISPs (and other covered businesses) may allow customers to opt out of allowing utilization of their data, rather than require customers to affirmatively opt in to allowing utilization of such data, as Maine does.

The Congressional Review Act prohibits a federal regulatory agency from instituting "substantially the same" regulations to those repealed under the Congressional Review Act "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." 5 U.S.C. § 801(b)(2). Thus, Congress would need to act before the FTC could re-institute regulations similar to those scuttled in 2017.

Strictly speaking, violation of the Home Construction Contracts Act constitutes *prima facie* evidence of a violation of the MUTPA.

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