Proceed with Caution: GLBA Considerations When Representing Insurers, Agents, and Brokers

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The Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801, et seq., places certain obligations on "financial institutions" to limit disclosure and use of their customers' personal information. The GLBA clearly applies to banks and investment companies, but not all are aware of its effects on insurance companies, agents, and brokers. Counsel representing such companies should be knowledgeable of the duties and responsibilities that the act places on these entities and cautious in how they handle requests for information that could trigger such duties.

Under the Financial Institution Privacy Protection Act of 2003, a business and its counsel's failure to comply with the GLBA could result in penalties of up to $100,000 per violation against the business and up to $10,000 against the officers and directors personally.

Consider, for example, a pre-litigation request by a claimant that an insurance company provide a copy of the tortfeasor's policy to verify available policy limits. Section 6802(e)(8) of the GLBA permits the disclosure of nonpublic personal information by a financial institution when that disclosure is made "to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena." However, the act does not carve out an exception to disclosure when no civil or agency proceeding has been initiated.

When this issue was presented to the Insurance Department of the State of New York, the Office of General Counsel issued an informal opinion finding that disclosure of limits was required. The insurer had initially refused to disclose bodily injury liability insurance limits as required by New York statutes because of a perceived conflict with the GLBA. The department cited the Section 6802(e)(8) exceptions in the GLBA requiring disclosure to "comply with Federal, State, or local laws, rules, and other applicable legal requirements." The department found that an insured who has supplemental uninsured/underinsured coverage has the right to obtain the bodily injury coverage limits from the insurance company of the party against which he or she has a claim. Had there been no New York statutes requiring this information to be released, however, it appears likely that disclosing this information may have run afoul of the GLBA because no pending investigation or subpoena existed. This scenario also presents a great example of the regulatory tightrope act that companies and counsel must undergo when failure to disclose would potentially violate a state statute, while disclosure could potentially trigger the penalties of the GLBA. Such a situation leaves no opportunity to err on the side of caution and emphasizes the importance of proper statutory interpretation.

Another situation in which the obligations of an insurer or broker can be murky is when an investigation or a subpoena appears to the company or its counsel not to be "properly authorized." Such circumstances beg this question: what obligation does a company or its

counsel have to push back against a request that they consider improper?

In *Chao v. Community Trust Co.*, 474 F.3d 75 (3d Cir. 2007), the Third Circuit addressed a financial institution's appeal after it was sanctioned for failing to comply with an agency subpoena from the United States Department of Labor. With regard to the issuance of an administrative subpoena, the court held that (1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry.

The court in *Chao* held further that an investigation is "properly authorized" only when the investigating agency has jurisdiction to conduct that investigation. Because the district court had not yet determined whether the U.S. Department of Labor had jurisdiction over the investigation, as required, the court found that the enforcement of the subpoena was improper. The court also added that the U.S. Department of Labor could have avoided this issue by agreeing to pay for redactions of personal information from the document production so that the GLBA would not have been implicated.

Although the *Chao* opinion addresses a scenario in which the subpoenaed entity seemingly took every precaution in challenging what it thought was an improper subpoena, the opinion also suggests what could have occurred had the entity not taken such precautions. The obvious recommendation given by the Third Circuit in *Chao* was to redact any personal information from the document production, but these actions can be difficult to implement when the document production is voluminous. The *Chao* opinion leaves unanswered the question of what penalties, if any, would be imposed when personal information is provided in response to an invalid subpoena. While it seems improbable for an entity to be subject to penalties for failing to recognize and challenge an unauthorized subpoena, the language of the GLBA does explicitly contemplate that the disclosure exception only applies when the subpoena is "properly authorized."

Despite nearing the completion of its second decade in existence, many of the intricacies of the GLBA have still not been addressed by court decisions. Extreme caution should be taken when information or documents are being requested that could result in the dissemination of a customer's personal information. Section 6802(e) carves out certain exceptions to the general rule of non-disclosure, but some are more easily applied than others. When it is feasible, simply obtaining the consent of a customer to release the personal information may be the most economical approach to safeguarding against GLBA penalties. As the examples discussed above indicate, however, many other scenarios exist that require careful legal analysis to avoid running afoul of the GLBA or other regulations.

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