

You AUTO KNOW®

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Robert A. Poklar, Esq.
Weston Hurd LLP
The Tower at Erieview
1301 East 9th Street
Suite 1900
Cleveland, Ohio 44114-1862
p: 216.687.3243
f: 216.621.8369

rpoklar@westonhurd.com

www.westonhurd.com



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SHOULD YOU RESPOND TO THAT SUBPOENA?

Scenario:

Your dealership receives a court subpoena requesting information on various customers who have either purchased specific extended service contracts and/or financed their vehicles from a certain financial institution. It must be noted that your dealership is not a defendant or a party in the lawsuit. Should you respond and comply with the request?

First, I am still surprised at how many dealerships respond to a subpoena without questioning it. Typically, the type of subpoena in this scenario is one that would be found in a class action lawsuit and plaintiffs' counsel are seeking, ostensibly, information to support their positions, or in reality, looking for additional party-plaintiffs.

As we all agree, privacy is regarded as a personal freedom; however, the law at times will demonstrate the need or willingness to subordinate that privacy to other policy interests. Numerous laws have been passed in order to assure the right to privacy. Briefly, in 1970, the Fair Credit Reporting Act was passed due to the fact that customers believed there were abusive practices and lack of responsiveness on the part of credit bureaus and other entities that collect and disseminate information.

In 2003, the Fair Accurate Credit Transactions Act ("FACT Act") amended the Fair Credit Reporting Act in order to help fight against identity theft. In essence, the FACT Act wants financial institutions to "know" their customers by focusing on the information it has regarding its customers as opposed to the disclosure of information. For example, it must disclose to its customers that it will share the customer information with affiliate institutions about product services, unless the customer opts out. It must be noted that the affiliates can utilize the customer information without limitation if the customer does not opt out.

In 1978, the United States Congress passed the Right to Financial Privacy Act ("RFPA") in response to the United States Supreme Court ruling which stated that the Internal Revenue Service could access a customer's information from a third party - for example, his or her accountant. The RFPA prohibits financial institutions from disclosing information without first notifying the customer and allowing the customer to fight the release of the information.

In 1999, the Gramm-Leach-Bliley Act ("GLBA") was passed. The purpose of the GLBA was to protect the customers' non-public personal information. Non-public personal information, pursuant to 15 U.S.C. §6809 is information that is fully, personally identifiable to that specific customer or group of customers, utilizing personal identifiable information. It must be noted that the GLBA only protects customers' privacy as to consumer transactions.

After September 11, 2001, Congress passed the Patriot Act. As you know, the Patriot Act expanded the authority of law enforcement agencies, and in particular the FBI, to gain access to business records, medical records, educational records, library records, stored electronic data and other communications regarding an individual. This is specifically why, when you open a bank account, the bank needs your name, date of birth, address, identification number (such as a Tax Identification Number, or your Social Security Number) and a picture ID.

The law that dealerships contend with regarding a subpoena is a Gramm-Leach-Bliley Act matter. Under the GLBA, financial institutions (which can include automobile dealerships), have restrictions on what customer information can be provided to a third party. Obviously, there are strict regulations regarding the dissemination of non-public financial information.

Again, as in the FACT Act, the GLBA will provide customers the opportunity to opt out of the dissemination of information to affiliated or non-affiliated third parties. However, utilizing a subpoena to obtain personal information requires that the subpoenas be classified under two varieties - one governmental authority and one non-governmental authority. If the subpoena is issued pursuant to a governmental authority, then other Acts will come into play, for example the RFPA and/or the Patriot Act. If the government is not involved, for example, the subpoena in a court case, then only the GLBA will apply. In this situation, the GLBA does not provide the opportunity for the dealership and/or financial institution to notify the consumer that their private information has been requested. This is called the judicial process exception under the GLBA opt out requirement.

In many situations, the GLBA is still a work in process relative to the disclosure of information pursuant to a subpoena. In the vast majority of cases that have challenged subpoenas under the GLBA, the courts have found a method to get around the restrictions of the GLBA and to, in some limited fashion, comply with the request of the subpoena. The courts have rejected a blanket exception of the GLBA, but have generally stated the dealership and/or banks have to respond to the subpoena, but have limited the scope of the subpoenas.

The courts have generally taken the position that they have a right to balance the interest of all parties and to limit the information that is available. The GLBA defines non-public information to include personally identifiable financial information that a customer may utilize to purchase or obtain a financial product or service or resulting from any transaction involving a financial product or service or obtained by a customer in connection with a financial product or service. It excludes any publicly available information.

It must be noted that there is no definitive case law to determine what or what not to provide.

As I indicated at the beginning of this article, I am amazed that dealerships simply comply with the requested information before reviewing the subpoena, in detail, and requesting guidance from legal counsel. You have to remember that you are responsible for your customers' personal, non-public information and the voluntary release of that information could subject you to a lawsuit from your customers.

There are methods to comply with a subpoena, while at the same time, shielding yourself from your customers' legal retribution. In the future, if you receive a subpoena, please contact legal counsel in order to address how to respond, without exposing yourself to additional liability from your customers.

**CONTACT INFORMATION**

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As always, these are highlights of the law and are not to be construed as containing the entire law. This is not to be construed or relied upon as a legal opinion. If you are presented with this problem, contact your legal counsel for advice.

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Having been a Chevrolet dealer, Robert A. Poklar's business background and experience in the automotive industry aid him in his representation of numerous Ohio automotive dealerships. He also represents after-market service companies, trade organizations, dealers, advertising associations and corporations. Pursuant to certain ethical standards, this may be construed as advertising.