

Relevance of Previous BV Reports to Current Court Case

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The Question as Presented:

I practice in North Carolina and have been serving as an expert in a domestic case for equitable distribution. I have provided five business valuation reports and have been deposed in great length on the same. My subpoena for deposition requested that I provide copies of previous BV reports I have prepared for similar industries in the last five years. The attorneys for the plaintiff - by whom I have been employed - advised me against providing such information because in their opinion, I would be breaching confidentiality with prior clients.

At a recent interim distribution hearing, defendant's counsel requested an order from the judge to make me comply with their previous request by subpoena for prior reports. Plaintiff's counsel objected on my behalf and a discussion ensued. Plaintiff's attorney was not prepared to argue Federal Law 16 CFR Part 313 et seq., which counsel has now advised me I would be in violation of if I comply with the judge's order to provide reports with only names removed from the reports. My counsel advises me that if I provided financial information with my reports, I would be in violation of above referenced federal law. Your comments please.

Facts:

The Federal Trade Commission (FTC) is responsible for promulgating the rules on the privacy of consumer financial information under the Gramm-Leach-Bliley Act (GLB Act), which was signed into law by President Clinton in November 1999. Among other things, the GLB Act specifically permits states to enact privacy protection that may give individuals even *greater* protection than those available under the federal law.

A significant portion of the appraiser population consists of Certified Public Accountants (CPAs). CPAs, like all providers of personal financial services, are required by law to inform their clients of their privacy policies regarding client information. However, CPAs are bound not only by the GLB Act, but by the state's and The American Institute of Certified Public Accountants' (AICPA's) ethical requirements as well. The Uniform Standard of Professional Appraisal Practice (USPAP) also recognizes the GLB Act's privacy provisions.



It is our understanding that the FTC has not been asked, nor has it ruled on whether business valuation services are considered subject to the GLB Act. However, it appears very likely that business valuation services are included within the provisions based on the Act's broad application.

There are exceptions and exemptions to the FTC's rules. An important exemption appears to exist in that services that are *not* performed for a client's personal, family, or household purposes are not covered by the FTC rules. However, business valuation services performed for personal estate planning or divorce purposes may be subject to the rules unless they are exempted by other factors. Another relevant factor is whether or not a "customer relationship" exists. A customer relationship may be loosely defined as a continuing relationship with the consumer. It appears defensible that any one-time valuation engagement would be exempt from the Act.

Practice Tip

I would suggest that appraisers maintain a summary log of specific valuation components for every valuation engagement. At a minimum, this log should report: the industry, growth rate assumed, discount and capitalization rate, minority discount or control premium, marketability discount, valuation approaches and methods used, purpose of the appraisal, intended use, type of report issued, retaining counsel, opposing counsel, and any specific case facts that may be pertinent. This log, similar to the requirements for providing a listing of all cases in which testimony has been given during the past four years, could be produced in response to a request for business valuation reports prepared for similar industries.

The Answer

I have read Federal Law 16 CFR Part 313 and the GLB Act. Interpretation of the various provisions and their application in the performing of an appraisal requires a legal conclusion.

If you have, in fact, been ordered to provide reports with only the names removed from the valuations, and both you as a professional and your legal counsel believe that the information contained within those reports would place you in violation of the GLB Act, I would produce to the courts or opposing counsel an extremely detailed log as discussed above under the practice tip paragraph.

For CPA's, I would carefully and respectfully explain how CPAs are bound by ethical and confidentiality requirements that can only be waived by our client. I would go on to explain that everything pertinent to the appraisal work completed is set forth within the above-described log. I would also gently try to equate the production of the log to the



requirement to produce a *listing* (not our actual testimony) of the cases in which testimony was given. Finally, I would make sure that you have good legal counsel available to support this position in this particular matter as it is likely that if a customer relationship cannot be established and if the nature of the valuation services provided was not *personal* in nature, then you may be forced to produce your reports instead of just such a log.

Work Cited

Please call for references.
