

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO, SECRETARY : CIVIL ACTION  
OF LABOR, UNITED STATES :  
DEPARTMENT OF LABOR :  
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 v. :  
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COMMUNITY TRUST COMPANY : NO. 05-mc-18

MEMORANDUM AND ORDER

McLaughlin, J.

May 5, 2005

This action was brought by the Secretary of Labor (the "petitioner") to compel Community Trust Company ("CTC" or the "respondent") to comply with the subpoena duces tecum issued and directed to CTC on December 23, 2004, by the Acting Regional Director of the Philadelphia Region of the Employee Benefits Security Administration ("EBSA"), United States Department of Labor ("DOL" or the "Department"), in an investigation being conducted pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA").

On January 25, 2005, the Secretary filed the Petition to Enforce Administrative Subpoena. On February 25, 2005, the Court issued an Order requiring the respondent to show cause why it should not be required to produce the requested records and scheduled a hearing for March 31, 2005. On February 28, 2005, the respondent filed a Motion to Dismiss the Petition to Enforce Administrative Subpoena or, in the alternative, to Transfer to

the Middle District of Pennsylvania.<sup>1</sup>

The first question before the Court is whether the standard for enforcing the subpoena has been satisfied. The second question before the Court is whether enforcement of the administrative subpoena would intrude on any individual privacy rights under the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., or the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.

The requirements for the enforcement of an administrative subpoena duces tecum are as follows: "(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." United States v. Westinghouse Elec. Corp., 638 F.2d 570, 574 (3d Cir. 1980) (citation omitted).

The standard for enforcing subpoenas has been met in the instant matter. First, the inquiry is within the authority of the DOL. The Secretary of Labor has broad authority to conduct investigations to determine whether any person has violated or is about to violate Title I of ERISA. 29 U.S.C. § 1134. Senior Investigator Fred Siegert states in his declaration that he was assigned to conduct an investigation of the Regional

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<sup>1</sup> The respondent informed the Court at the hearing on March 31, 2005, that it was withdrawing the motion to transfer. (Tr. at 3-4.)

Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan (the "Plan") to determine if any violations of Title I of ERISA have occurred or are about to occur. (Siegert Decl. ¶ 2.) Second, the request for production is definite. The documents, and the date and location that the documents were to be produced, are stated in the subpoena. Finally, the documents are relevant to EBSA's investigation. CTC is the trustee of the Plan. The subpoena requests documents pertaining to the operation and administration of the Plan, as well as any trust agreements or bank accounts established with CTC in connection with the Plan.

The respondent argues that the Plan is not covered by ERISA; therefore the Secretary did not have authority to issue the subpoena and this Court does not have jurisdiction to enforce the subpoena. The respondent cites the Seventh Circuit's decision in Reich v. Great Lakes Indian Fish and Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993), in support of its position that the subpoena is overbroad and should be limited to determining whether the Plan is covered by ERISA.

In Reich, the Seventh Circuit upheld the district court's decision to deny enforcement of an administrative subpoena issued by the Department of Labor against the Great Lakes Indian Fish and Wildlife Commission (the "Commission") seeking evidence that the Commission was violating the Fair Labor

Standards Act by not paying law enforcement officers for overtime. Id. at 491-92. The district court refused to enforce the subpoena on the ground that the Commission is not subject to the Act. Id. The Department of Labor argued on appeal that the court should have deferred the question of statutory coverage until the Department proceeded against the Commission for violations of the Act. Id.

The Seventh Circuit stated that the Department's position would be right if the question of statutory coverage could not be resolved without the information sought by the subpoena. Id. The court decided, however, that the issue of statutory coverage was purely a question of law that could be addressed at the subpoena-enforcement stage because it was ripe for decision at that stage. Id. The court based its decision, in part, on the special status assigned to Indian tribes as "quasi-sovereigns" that have traditionally managed their own governments, courts, and police. Id. at 494-95. The court was unwilling to construe the Fair Labor Standards Act as imposing regulatory requirements on the Commission without a strong indication that Congress intended to intrude on the affairs of tribal government. Id.

The Seventh Circuit's decision in Reich is not applicable to the matter presently before the Court. As a general matter, an administrative agency is not required to

demonstrate in a subpoena enforcement action that the matter or entity it seeks to investigate "is covered by the enabling statute since the '(a)uthority to investigate the existence of violations . . . include(s) the authority to investigate coverage.'" Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982) (citations omitted). Nothing in the Seventh Circuit's decision suggests that the court intended to modify this basic proposition or limit production at the subpoena-enforcement stage to documents related to coverage where the question of coverage was not purely a matter of statutory interpretation.

Here, the question of statutory coverage is not ripe for decision because it is not a legal issue, but rather one that depends on the information sought by the subpoena. The Court finds, therefore, that the Secretary's subpoena is not overbroad because the Secretary is not required to demonstrate that the Plan is covered by ERISA prior to seeking enforcement.

The respondent further contends that the Secretary is required to show "reasonable cause" to believe a violation exists. The Secretary is only required to show reasonable cause when seeking to enter places for the purpose of inspecting books and records and questioning persons on the premises. 29 U.S.C. § 1134(a)(2). The requirement does not apply where, as here, the Secretary is seeking production of documents in response to a subpoena. 29 U.S.C. § 1134(a)(1).

The petitioner has made a prima facie showing of statutory authority, legitimate purpose, and relevance. The burden shifts to the respondent to provide compelling reasons why the subpoena should not be enforced. Marshall v. Amalgamated Ins. Agency Servs., Inc., 523 F. Supp. 231, 233 (N.D. Ill. 1981); see also United States v. Powell, 379 U.S. 48, 57-58 (1964). In a subpoena enforcement matter, a hearing on the merits of an investigation is not proper unless the respondent convinces the Court that the agency is acting in bad faith or for an improper purpose. See United States v. Aero Mayflower Transit Co., 831 F.3d 1142, 1145-47 (D.C. Cir. 1987).

The respondent claims that the DOL is overreaching its regulatory authority because CTC is a state chartered financial institution and the Secretary of Labor does not have authority to regulate banking activity. As trustee of the Plan, CTS falls into the category of third parties with knowledge that may be relevant to the investigation. See United States v. Oncology Servs. Corp., 60 F.3d 1015, 1019-20 (3d Cir. 1995). The Secretary is not attempting to regulate banking activity; rather, the Secretary seeks documents in the possession and control of CTC as the Plan trustee.

For the above reasons, the Court finds that the standards for enforcing the subpoena have been met in the instant matter. The Court must consider, then, whether enforcement of

the subpoena would intrude on individual privacy rights afforded by the Gramm-Leach-Bliley Act (the "GLBA") or the Right to Financial Privacy Act (the "Financial Privacy Act").

First, the respondent argues that the Court should not enforce the subpoena because the GLBA prohibits CTC from disclosing a customer's personal information without prior notice. See 15 U.S.C. § 6802(a). The petitioner contends that the GLBA does not apply in the present situation because CTC's customer, the REAL VEBA, does not fall within the definition of a customer under the Act. Further, the petitioner argues that the GLBA provides at least two explicit exemptions from disclosure that apply in this situation.

Because the Court finds that at least one of the exceptions applies, it does not reach the question of whether the subpoena requests documents pertaining to a customer as defined in the GLBA. The GLBA explicitly exempts a financial institution from the notice requirements where disclosure of personal information is required "to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities." 15 U.S.C. § 6802(e)(8). As the Court stated above, the Secretary is conducting a properly authorized regulatory investigation to determine if any person has or is about to violate Title I of ERISA. Thus, the GLBA does not apply to disclosure of documents

required by the subpoena.

Second, the respondent argues that the Financial Privacy Act forbids CTC from releasing the financial records of its customers until the Department has certified in writing that it has complied with the Act's notice requirements. See 12 U.S.C. § 3403(a). The petitioner contends that notice is not necessary because the Financial Privacy Act pertains only to the bank account information of individuals, not to corporate or business account information or to the records of employee benefit plans.

The key issue here is whether the Secretary is seeking the financial records of a bank customer as defined in the Financial Privacy Act. The Financial Privacy Act defines a customer as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5). A "person" is defined as an "individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4).

The respondent contends that the definition of "customer" should be read disjunctively so that the phrase "in relation to an account maintained in the person's name" applies only in the situation where the financial institution is acting

or has acted as a fiduciary. The respondent argues that the requirement that the account be maintained in the person's name does not apply in this situation because CTC is not acting as a fiduciary. During oral argument, the respondent represented to the Court that this is a matter of first impression because there is no case law or legislative history that addresses the issue.<sup>2</sup>

The Court cannot accept such a strained reading of the provision. A common sense and logical approach to the grammatical structure of the provision requires the Court to interpret the definition of a customer as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution. . .in relation to an account maintained in the person's name."

Although the United States Court of Appeals for the Third Circuit has not addressed the issue presently before the Court, it has discussed the definition of a "customer" in the Financial Privacy Act. In Pittsburgh National Bank v. United

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<sup>2</sup> The respondent cited two cases but then stated that the cases are not on point. The first case cited by the respondent, Donovan v. National Bank of Alaska, 696 F.2d 678 (9th Cir. 1983), is not helpful to the Court's analysis of this issue. In Donovan, the Ninth Circuit did not reach the question of whether the administrative subpoena issued by the DOL requested records within the scope of the Financial Privacy Act because the factual record before the court was insufficient to make such a determination. Id. at 683-84. The Court will discuss the second case cited by the respondent, Pittsburgh National Bank v. United States, 771 F.2d 73 (3d Cir. 1985), in the body of this memorandum.

States, 771 F.2d 73 (3d Cir. 1985), the Court of Appeals considered whether the government was required to reimburse a bank for costs incurred in the production of a corporation's financial records where the government investigation related to three individuals who were also customers of the bank. Id. at 74. The reimbursement provisions of the Financial Privacy Act provide that the government must pay the financial institution for costs incurred in assembling or providing "financial records pertaining to a customer." Id. at 76 (citing 12 U.S.C. § 3415).

The Court of Appeals first decided that the definition of "customer" under the Act could not be expanded to include corporations because the Act was drafted to limit applicability of its procedural protections to individual customers. Id. at 75. The court then addressed whether the bank was entitled to reimbursement because the corporation's records pertained to three individual customers. After reviewing a portion of the legislative history relating to the definitions section of the Act, the Court of Appeals decided that the bank was not entitled to reimbursement because the Financial Privacy Act "mandates the procedures by which *an individual account holder* may authorize or contest government access *to his own financial records.*" Id. at 77 (emphasis added).

The same legislative history which was cited by the Court of Appeals in Pittsburgh also supports the Court's

interpretation of the definition of a "customer" with respect to the Act's notice requirement. "The definition of 'financial records' and 'customer' taken together, are intended to preclude application of the bill to anyone other than the person to whose account information the government seeks access." Id. at 76-77 (citing H.R. Rep. No. 1383, 95th Cong., 2nd Sess. 49). Just as the Court of Appeals decided that the government is not required to reimburse a bank for production of corporate documents even where the corporate documents contained information related to individuals, the Court finds that the government is not required to give notice to individual customers unless the government is seeking access to financial records related to an account maintained in the individual's name.

Here, CTC's customer is the REAL VEBA. (Russell Aff. § 14.) The respondent does not contend that the REAL VEBA is an individual or a partnership of five or fewer individuals. The respondent argues that the Financial Privacy Act applies because the REAL VEBA is the authorized representative of individuals; however, the respondent does not contend that CTC maintains accounts in the names of individual customers. Rather, the respondent argues that the Plan's documents contain the personal financial information of specific individuals including information that identifies the individual's name, policy number, insurance company, premium payment amount, and employer name.

(Russell Aff. § 17.) The respondent conceded at oral argument, however, that the Financial Privacy Act would not apply if the Court interpreted the definition of customer as requiring that the account be held in the individual's name. (Tr. at 20.)

As CTC does not maintain accounts in the individual employee's names, the documents held by CTC pertaining to the Plan are not subject to the Financial Privacy Act and the Secretary is not required to comply with the notice provisions of the Act before it may subpoena the documents. Additionally, the petitioner represented to the Court during oral argument that the Secretary is not seeking records related to accounts that are maintained in individuals' names. The petitioner stated that the DOL has procedures for complying with the requirements of the Financial Privacy Act when the Department seeks account information of individuals. The petitioner represented, however, that this is not such a case. (Tr. at 26-27.)

For the above reasons, the Court finds that the subpoena is enforceable as clarified by the petitioner at oral argument. An appropriate Order follows.

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COMMUNITY TRUST COMPANY : NO. 05-mc-18

ORDER

AND NOW, this 5th of May, 2005, following a hearing in the above captioned case held on March 31, 2005, and upon consideration of the Petition to Enforce Administrative Subpoena (Docket No. 1), the response thereto, the Respondent's Motion to Dismiss the Petition to Enforce Administrative Subpoena or, in the alternative, to Transfer to the Middle District of Pennsylvania (Docket No. 3), and the response thereto, IT IS HEREBY ORDERED that the Petition to Enforce Administrative Subpoena is GRANTED; the Respondent's Motion to Transfer to the Middle District of Pennsylvania is DENIED as moot; and the Respondent's Motion to Dismiss is DENIED for the reasons given in a memorandum of today's date.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. McLAUGHLIN, J.