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SUPREME COURT OF THE STATE OF WASHINGTON

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Petitioner

v.

AMERIQUEST MORTGAGE COMPANY,

Respondent

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STATE OF WASHINGTON

ANSWER TO BRIEF OF AMICUS CURIAE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

The American Civil Liberties Union of Washington's ("ACLU") amicus brief largely provides helpful assistance to this Court in further underscoring the importance of the privacy protections of the Gramm-Leach-Bliley Act ("GLBA"). Mirroring many of Ameriquest's arguments, the ACLU also presents an accurate and important description of the GLBA's clear application to the Washington State Attorney General's Office ("AGO").

Most critical is that the ACLU is correct that the GLBA applies to the loan files at issue. However, the ACLU is incorrect when it suggests that disclosure of the consumer loan files can take place in this case if personal identifiers are redacted. In its desire to justify redactions, the ACLU falls short by ignoring the prohibitions of express federal regulation, 16 C.F.R. § 313.11, that precludes *any* modification or re-use of this information by the AGO, including redactions, without notice to the individual consumers.

II. ARGUMENT

A. The ACLU Agrees With Ameriquest That the GLBA Applies to the Loan Files.

As a threshold matter, the ACLU is correct that the GLBA applies to the AGO and the Public Records Act request for the loan files at issue. The ACLU reaches that conclusion, however, without regard to whether the GLBA applies by virtue of fundamental preemption principles or, as the AGO has argued, via the "other statutes" provision in RCW 42.56.070.

Ameriquet addresses these competing analyses in its Answer to the recent Brief of Amicus Curiae Washington Coalition for Open Government. That analysis is incorporated herein by reference.

B. The ACLU's Analysis and Application of the GLBA Largely Agrees With Arguments Long Made by Ameriquet.

The majority of the ACLU's arguments to apply the GLBA to these loan files adopt Ameriquet's historical position in this case.

1. ACLU Concurs With Ameriquet That, as a Non-Affiliated Third Party, the AGO Is Subject to the GLBA and Limited by Its Disclosure Rules.

The ACLU is correct that a nonaffiliated third-party that receives nonpublic personal information is also subject to the GLBA's notice obligations and reuse limitations.¹ 15 U.S.C. § 6802(c); see also ACLU Brief, p. 8. The AGO has admitted that it is a non-affiliated third party.² AGO's Supplemental Brief, p. 17 n.17. Accordingly, there can be no dispute that the GLBA applies to the AGO. This means that the AGO is unequivocally also subject to the strict restrictions on disclosure lauded by Congress and ultimately built into the GLBA. See, e.g., Ameriquet's

¹ While there are certain enumerated exceptions to the notice requirement, none of those exceptions apply to the AGO's disclosure of GLBA protected information in response to a PRA request. 15 U.S.C. § 6802(e).

² Given this concession, Ameriquet need not address the ACLU's argument in Section V.C.1 of the ACLU's brief regarding the Court of Appeals' rejection of the AGO's assertion that it was not a non-affiliated third party subject to the GLBA.

Answer to the Brief of Amicus Curiae Washington Coalition for Open Government, pp. 6-9. The ACLU is also correct that, as a non-affiliated third party subject to the GLBA, the AGO cannot disclose information beyond that which is permitted by the GLBA. ACLU Brief, pp. 12-13.

2. The GLBA's Federal Regulations' "Ordinary Course of Business" Exemption Does Not Apply.

Ameritrust also agrees with the ACLU that the GLBA's "ordinary course of business" exemption in 16 C.F.R. § 313.11(a)(1)(iii) does not operate to let the AGO avoid its non-disclosure obligations under the GLBA. ACLU Brief, p. 12. Ameritrust concurs with the ACLU that the AGO's substantive arguments under this exemption also fail, and incorporates the ACLU's arguments herein by reference.³

As Ameritrust and the ACLU are in agreement on these critical issues, the only remaining difference between Ameritrust and the ACLU is the ACLU's position that redacting portions of the loan documents without notice to the consumers passes muster under the GLBA. For the reasons explained below, the ACLU's offered solution will not work.

³ As shown below, however, this exemption (aka the "reuse restrictions") actually is dispositive on whether the AGO is able to redact or manipulate the loan files.

C. The Type of Redactions Proposed by the ACLU Are Not Supported by the Language of the GLBA, and Its Position Is Contrary to the Case Law Prohibiting Disclosure of “Personally Identifiable Financial Information.”

To lay the foundation of Ameriquest’s disagreement with the ACLU’s suggestion of redactions, a further explanation of the breadth of the GLBA’s privacy protections is required.

1. GLBA’s Broad Privacy Protections Protect All Information Provided by Financial Institution Customers.

There is no question that the GLBA defines “personally identifiable financial information” extremely broadly. Indeed, the term “financial information” itself is construed as incredibly broad and includes *any* information requested by a financial institution when providing a financial product or service. FTC Final Rule, 65 Fed. Reg. 33658.⁴ This definition of “financial information” is necessarily expansive because of the broad range of information that has both “a bearing on the terms and availability of a financial product” or “is used by a financial institution in connection with providing a financial product.” *Id.* The FTC recognized that by having such a broad definition it would protect information from

⁴ Ameriquest has previously explained the interplay between the GLBA’s statutory provisions and the implementing regulations by, among others, the FTC. Opening Brief, pp. 23-24. Ameriquest will not repeat that explanation here, except to say that the implementing regulations by the FTC have withstood challenge and now serve as the law. See Trans Union LLC v. Fed Trade Comm’n, 295 F.3d 42 (D.C. Cir. 2002); Individual Reference Servs. Group, Inc. v. Fed. Trade Comm’n, 145 F. Supp. 2d 6, 18 (D.C. Cir. 2001).

disclosure that ordinarily might not be considered financial. Id. During the rule making process there were numerous detractors who wanted the FTC to draft a far narrower definition. The FTC refused to narrow the definition and explained:

[F]inancial institutions rely on a broad range of information that they obtain about consumers, including information such as addresses and telephone numbers, when providing financial products or services. Location information is used by financial institutions to provide a wide variety of financial services, from the sending of checking account statements to the disbursing of funds to a consumer. Other information, such as the maiden name of a consumer's mother often will be used by a financial institution to verify the consumer's identity. *The Commission concluded that it would be inappropriate to carve out certain items of information that a particular financial institution might rely on when providing a particular financial product or service.*

Individual Reference Servs. Group, Inc. v. Fed. Trade Comm'n, 145 F. Supp. 2d 6, 22 (D.C. Cir. 2001) (emphasis added) (citing 65 Fed. Reg. 33658). For the GLBA, context is everything; if the information is given to the financial institution in the financial context, it wears the shroud of GLBA protections.

Congress recognized that the status of particular types of information may vary according to the context in which it is used. *Information used in or derived from a financial context is nonpublic personal information under § 6809(4)(C)(i)*; the same information in another context, however, may not be [nonpublic personal information]. *Thus, it is the context in which information is disclosed-rather than the intrinsic nature of the information itself-that determines whether information falls within the GLB Act.*

Id. (emphasis added). “Personally identifiable financial information” also includes “any list, description, or other grouping of consumers (and publicly available information pertaining to them) *that is derived using any nonpublic personal information* other than publicly available information.” Id. at § 6809(4)(B) (emphasis added);⁵ see also ACLU Brief, p. 6.

2. “Reuse” Restrictions Prevent Any Non-affiliated Third Party From Manipulating or De-Identifying Information Without Notice to Consumers.

Against this legal backdrop (with which the ACLU does not appear to disagree), the ACLU is clearly attempting to be helpful when it offers its version of a solution to the Court – specifically that if all personally identifying information is redacted from the loan files, disclosure can occur without notice. For this solution, the ACLU relies on the federal GLBA regulations, which exempt from the definition of “personally identifiable financial information,” the following:

Information not included. Personally identifiable financial information does not include:

...

⁵ The definition of “personally identifiable financial information” in the Regulations is virtually identical to the definition in the GLBA itself. Pursuant to 16 C.F.R. 313.3(n)(1), nonpublic personal information means personally identifiable financial information *and* includes any “any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.” Cf. 15 U.S.C. § 6809(4)(B).

- (B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

16 C.F.R. § 313.3(o)(2)(ii)(B).

The ACLU focuses on this exemption to argue that removal of the personally identifying information from the loan documents through redaction would remove GLBA privacy concerns and, therefore, permit disclosure without notice to the consumers. See ACLU Brief, pp. 13-15. This argument may be initially attractive, but it is wrong. The ACLU oversimplifies the analysis and ignores the “reuse” restrictions of Sec. 313.11. To be clear, redaction is “reuse,” which is expressly prohibited by the GLBA.

Generally speaking, the GLBA’s legislative history reveals that the privacy provisions were also enacted to “prohibit repackaging of consumer information. Consumer information remains protected. It cannot be resold or reshared by third parties or profiled **or repackaged to avoid privacy protections.**” Individual, 145 F. Supp. 2d at 35 (emphasis added; citations omitted).

These general policy concerns have been addressed specifically in the “reuse” restrictions. 16 C.F.R. § 313.11.⁶ The FTC’s “reuse” regulations place strong prohibitions on non-affiliated third parties that receive nonpublic personal financial information from a financial institution under one of the exceptions to consumer notice. Any attempt by the AGO to “de-identify” this information would be a direct violation of these prohibitions. The language of these “reuse” restrictions states:

Sec. 313.11 Limits on redisclosure and reuse of information.

(a)(1) Information you receive under an exception. If you receive nonpublic personal information from a nonaffiliated financial institution under an exception in Sec. 313.14 or 313.15 of this part, your disclosure and use of that information is limited as follows:

(i) You may disclose the information to the affiliates of the financial institution from which you received the information;

(ii) You may disclose the information to your affiliates, but your affiliates may, in turn, disclose and use the information only to the extent that you may disclose and use the information; and

(iii) **You may disclose and use** the information pursuant to an exception in Sec. 313.14 or 313.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information.

(2) Example. If you receive a customer list from a nonaffiliated financial institution in order to provide account processing services under the exception in Sec. 313.14(a), you may disclose that

⁶ Somewhat ironically, these “reuse” restrictions which serve to prohibit the AGO’s manipulation of this data are the same “ordinary course of business” regulations that the AGO argues permits its disclosure. See Petition for Review, pp. 7-11.

information under any exception in Sec. 313.14 or 313.15 in the ordinary course of business in order to provide those services. You could also disclose that information in response to a properly authorized subpoena. You could not disclose that information to a third party for marketing purposes or use that information for your own marketing purposes.

16 C.F.R. § 313.11 (bold added.) Accordingly, any nonaffiliated third party is prohibited from disclosure **and use** of the information that is inconsistent with the exception through which it received the information. The policy reason behind these tight reuse restrictions on third parties that receive personally identifiable financial information through Secs. 313.14 and .15 is because consumers begin to lose control over their most private financial information when that information is shared without notice.

In issuing the Final Rules, the agencies imposed use restrictions on receiving third parties only where that entity had obtained nonpublic personal information pursuant to a [Secs. 313.14 & .15] exception – the only instances where the consumer has not authorized the disclosure of his personal information.

Individual, 145 F. Supp. at 36. The strict controls prevent a third party from making an end-run around the GLBA's notice provisions.

When [a third party] receives information from a financial institution under [Sec. 313.14 and .15] and the consumer has not had an opportunity to opt out, [the third party] is taking advantage of an exception to the Act's provisions that otherwise give consumers control over their nonpublic personal information. Without exception, [the third party] would only be able to obtain - and use - this information if the consumer had chosen not to opt out. It cannot, therefore, use the exception to swallow the statute.

Id.

Here, it is undisputed that the AGO obtained the loan files pursuant to an exception found in 16 C.F.R. § 313.15 (specifically sec. 313.15(a)(7)) (i.e., “to comply with a properly authorized civil, criminal, or regulatory investigation,” or “to respond to judicial process or government regulatory authorities having jurisdiction over you for examination, compliance, or other purposes as authorized by law.”). By receiving the loan files under this exception, the AGO is subject to the “reuse” restrictions of Sec. 313.11(a)(1)(iii). These restrictions, in turn, bar the AGO from any “use” that is inconsistent with the reason it received the information in the first place. That “use” would include any manipulation or repackaging of the information – **including any de-identification through redaction.**

3. Individual v. FTC -- The One Court to Squarely Address the Same Argument the ACLU Advances Here Rejected It.

The conclusion that the “reuse” restrictions prohibit a non-affiliated third party from manipulating, including de-identifying, consumer financial information was endorsed by the court in Individual.⁷ In Individual the plaintiff, Trans Union (a credit reporting agency) wanted to sell consumer information which was derived from various sources

⁷ Cited repeatedly by Ameriquest throughout this litigation, Individual v. FTC represents the most comprehensive analysis of the congressional intent behind the GLBA and the interpretation of the FTC’s implementing regulations.

including information that it received from financial institutions. 145 F. Supp. 2d at 14. As part of its many arguments challenging the federal GLBA implementing regulations, Trans Union challenged the “reuse” restrictions of Sec. 313.11.

Clearly reading the “reuse” restrictions consistently with the interpretation urged by Ameritrust, Trans Union complained that these restrictions as promulgated by the FTC would prevent Trans Union from disclosing blind aggregate information, i.e., information which did not identify a particular consumer but which was derived from the use of consumer personally identifiable financial information. Id. at 38. Trans Union argued that the “reuse” restrictions should be struck down by the court because, as written, the regulations were inconsistent with the GLBA’s statutory definition of “nonpublic personal financial information” which does not include “aggregate or blind data.” Id. Trans Union’s argument was summarized by the court as follows:

The use restrictions, plaintiffs argue, would prohibit Trans Union from disclosing aggregate information which does not identify any particular customer or disclose specific information regarding a customer. Yet ... there is no privacy interest in the disclosure of such data, which is expressly exempted from [the] definition of “personally identifiable financial information.” See, e.g., 16 C.F.R. § 313.3(o)(2)(ii)(B).

Id. (emphasis added).

But notwithstanding the relative simplicity of the argument, the Individual court found that the “reuse” regulation was consistent with the overall policies of the GLBA in protecting consumer information. Even in a situation where the data that was proposed to be shared was blind aggregate data and de-identified from any individual, the court found that the consumer’s GLBA privacy rights were still implicated because the personal information was being used to create the aggregate data and the consumer had a privacy right in this “initial use” of their private information.

[W]hether there is a privacy interest in the release of a set of aggregate data is a different question from whether consumers have a privacy interest in the initial use of their nonpublic personal information for the creation of aggregate data-the scenario which is the focus of the Regulations.”

Id. (emphasis added).⁸ The court continued:

It would be inappropriate to undermine the key privacy requirements of the Act that ensure a consumer can generally control the disclosure of his or her nonpublic personal information by allowing the recipient of nonpublic personal information under

⁸ This operation of the “reuse” regulations was confirmed by the D.C Circuit when hearing the appeal of the Individual decision. See Trans Union v. Federal Trade Commission, 295 F.3d 42, 51 (D.C. Cir. 2002) (court characterizes the “reuse” restrictions of 16 C.F.R. § 313.11 as prohibiting a credit reporting agency from “using ‘aggregated information’ about consumers which contains no ‘personally identifiable’ information.”). Note, however, that while the D.C. Circuit confirmed the operation of the “reuse” restrictions and affirmed the Individual decision, it found Trans Union’s challenge of the restrictions not ripe for determination.

the [Secs. 313.14 and .15] exception to **reuse the information for any purpose**, including marketing.

Id. at 39 (emphasis added). “Any purpose,” as mentioned by the court, also includes responding to a PRA request.

Again, the focus of the “reuse” restrictions is not on the character of the information when ultimately disclosed by the third party, rather the focus is on the protected nature of the information when initially provided to the financial institution by the consumer. As the information moves from the financial institution to a third party through a Sec. 313.15 exception, the controls grow tighter. As stated by Individual:

Whether this [nonpublic personal] information is homogenized-transformed into identifying information that has been stripped of intrinsically financial data-it was still provided by the consumer to a financial institution to obtain financial services. Its use and disclosure, therefore, still threatens a consumer’s privacy rights . . .

Id. at 39.⁹

In short, the ACLU’s proposed disclosure of the loan files with personal identifiers removed is no different than the proposed disclosure of the blind aggregate data discussed in Individual – it is not authorized

⁹ Likewise, these “reuse” restrictions would also prevent the AGO from stripping any “publicly available” information from the loan documents and attempting to disclose that information. The regulations permit such disclosure by a **financial institution**, but only if it jumps through several specific hoops. See, e.g., 16 C.F.R. § 313.3(p)(2)(i) & (ii). Critically, however, through the operation of Sec. 313.11, the AGO does not have the same ability to undertake this exercise as a nonaffiliated third party who received the information through a Sec. 313.15 exception.

under the GLBA. Here, the consumer's personal information is being used to create the aggregate data (i.e., loan files). The fact that the loan files may no longer identify a consumer does not obviate the consumer's privacy interest in the use of their personal information within the loan files.

4. Redactions, if Done at all, Must Come After Notice, Not in Lieu of It.

Notice and an opportunity to opt out are necessary under the GLBA. 15 U.S.C. § 6802(a) and (b). So, if the consumers whose private financial information is at issue here, are given notice and do not object to the use and disclosure of that information, or do not object following redaction or de-identification, or aggregating, or something else, the GLBA permits disclosure under those conditions. But what is not permitted in the letter or the spirit of the GLBA, is that a nonaffiliated third party who received information under a Sec. 313.15 exception determines for itself what information is or is not disclosed by way of redaction without any notice to the consumers. Therefore, the ACLU's position that redaction obviates the need for notice puts the proverbial cart before the horse.

Here, the Court of Appeals was correct in requiring notice to the consumers at issue.¹⁰ Unless and until those consumers have had a chance to opt in or opt out of disclosure pursuant to the GLBA, any discussion of redaction is premature.

D. If Notice Must Be Provided, It Is the AGO's Obligation.

If notice is to be provided, the ACLU suggests that *either* the AGO or Ameriquest could be saddled with the cost of such notice. While Ameriquest agrees with the ACLU that it is not the burden (either logistically or financially) of the Requestor to provide such notice, see ACLU Brief, p. 17, Ameriquest disagrees that it should have any such burden.

It is the AGO that has concluded it is committed to disclosure. Id. While Ameriquest has an obligation to respect the privacy of its customers' information, Ameriquest does not have a general duty to monitor the AGO's use of information that the AGO received from Ameriquest through an exception to the GLBA notice requirements. 65 Fed. Reg. 33668. Thus, it is for the AGO **as the disclosing party** to notify the affected consumers. Yet, the AGO has not acknowledged, let alone assumed responsibility for, its obligation to provide notice under the

¹⁰ The Court of Appeals correctly required notice, but did not clarify that such notice would need to comply with the opt-out requirement of the GLBA, 15 U.S.C. § 6802(a) and (b).

GLBA. To effectuate the purpose of the GLBA and to carry out the directive of the Court of Appeals, the AGO rightfully bears the burden of providing notice to the affected consumers.

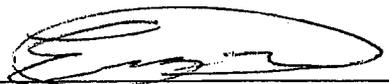
III. CONCLUSION

For all of the reasons stated above, this Court should clarify that none of the loan files may be disclosed -- with or without information redacted -- unless the AGO has provided the affected consumers with notice and after they have been given an opportunity to opt out of disclosure pursuant to the GLBA's requirements.

RESPECTFULLY SUBMITTED this 30th day of April, 2010.

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