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Gathering Information... Pretexting from the FTC's Point of View



Many professional investigators have expressed their concerns and confusion about utilizing the investigative practice of pretexting. Whether it is a simple pretext to confirm if a subject is home, or a pretext to acquire case information discretely from neighbors, the practice of pretexting has been an indispensable tool used by investigators and law enforcement for decades.

The Gramm-Leach-Bliley Act (GLB) signed into law in 1999 specifically addresses pretexting as an illegal act punishable under federal statutes. However, the Act specifically addresses pretexting only as it pertains to its use in acquiring financial information from consumers or financial institutions.

One would then assume that any pretexting not dealing with such financial information would be permissible. Unfortunately, that's not the case. Merely by its definition, to pretext is to pretend that you are someone who you are not, telling an untruth, or creating deception.

When a business entity, such as a private investigator, SIU insurance investigators and an adjuster — just to name a few — conducts any type of “deception,” it falls under the authority of the Federal Trade Commission (FTC). This federal agency has the obligation and authority to insure that consumers are not subject to any unfair or deceptive business practices.

That's where the Federal Trade Commission Act comes into play. Section 5 of the FTCA states, in part: “Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect...”

In an effort to get a definitive definition of pretexting and the potential risks and penalties for conducting pretexts, *PI Magazine* was granted an interview with Joel Winston, Associate Director of the FTC, Division of Financial Practices.



His office has the responsibility to monitor and regulate the use of pretexting.

The following interview clearly outlines several areas of pretexting normally conducted by investigators. I would suggest that you read the answers carefully and refer to them often.

PIM: What is the FTC's definition of "pretexting" as it pertains to the GLB? (Gramm-Leach-Bliley Act)

Winston: First, we should dispel the misimpression, if there is one, that the pretexting provisions of GLB only apply if the pretexter is getting "financial information." Actually, what the statute says is if you are getting any personal, non-public information from a financial institution or the consumer, that is covered by the statute. It relates to the consumer's relationship with the financial institution. So, if for example, the pretexter is using false pretenses to get from the consumer's bank, the consumer's address, that would be covered. Or, if they are going to the consumer and getting the name of their bank through false pretenses, that would be covered. The determining principle is that it's only pretexting if the information is obtained through false pretenses. That is, some false statement, misrepresentation, or fraud. The message is if you are trying to get this sort of information; then you can not use improper means, you can not tell lies in order to get this information.

PIM: What if I already have a unique identifier, such a date of birth or Social Security number, and I speak to a person, under false pretenses, only to confirm that the person I am speaking to is my subject? Would that be allowed?

Winston: I don't think that would be pretexting, because it is not relating to a financial institution. Conceivably, it could be considered a deceptive practice, but we would have to consider it on a case-by-case basis. It doesn't seem like a matter the FTC would be concerned with, but if you were calling the bank to get information, that would be pretexting.

PIM: What If I call a bank to determine the approximate balance in an account? I properly identify myself by name and ask if a check will clear, with me providing them the account number and they give it to me. Is this a GLB violation?

Winston: As long as you have not said that you are the customer, or said anything that isn't true, or used false pretenses, it would not have violated the GLB Act. If you don't actually have a check and you are trying to discern whether there is money in the account, then you are pretexting. If you are not telling the truth when speaking to the bank, you are pretexting.

PIM: Law enforcement and professional investigators have used simple pretext as a means of acquiring information. Is it the FTC's position that all pretexts are unlawful even when it is not related to personal financial information?

Winston: The only thing the GLB Act covers is financial information, information from a financial institution, or a customer's relationship with that financial institution. The other statute that might apply is the FTC Act itself, which prohibits deceptive practices. Now that's a very broad concept and covers a wide range of falsehoods and misstatements. I suppose it's possible that a PI that's going around to a neighbor posing as someone who he isn't in order to learn the location of the target would be engaged in some form of deception. However, that's really not a matter that the FTC would consider a priority. It is not our priority to be challenging the functions of a PI that are conceivably deceptive during a one on one transaction with someone, as opposed to looking at some broad practices that might cause harm to numerous individuals.

PIM: What steps has the FTC taken to identify pretexters?

Winston: We have in the past been quite busy surfing the net and looking

at advertisements. A couple of years ago we had a program ("Operation Detect Pretext") where we identified people who appeared to be advertising pretexting service. We sent out warning letters to them and followed up. In some cases, we brought a series of cases to litigation. We remain interested in situations where there is an ongoing pattern of pretexting. We continue to investigate improper cases and do forward cases to the Justice Department for criminal prosecution, if we feel the behavior is sufficiently serious. We don't have any one specific way by which we identify pretexters. We rely on tips from the industry, our monitoring efforts, and consumer claimants. Information can come to us from any source, such as an article in a newspaper.

PIM: What type of penalties can violators of the GLB expect as it pertains to pretexting for financial information?

Winston: What we have done in some of our pretexting cases is require that the pretexter give back the money, the profits, made from the pretexting. In the cases involving particularly egregious behavior, there are criminal provisions and we would refer them to the Department of Justice for possible criminal prosecution.

PIM: How does the FTC address pretexting under the unfair business or deceptive practices clause?

Winston: There are legal definitions of what deceptive and unfair practices are, which are available on our website. Traditionally, a deceptive practice is when you misrepresent a fact to the consumer in the course of selling them something. What makes pretexting a little different is that obviously, the pretexter is not selling anything to the consumer. So, there has been a fair amount of discussion about how exactly does the theory of deception apply to a pretexting situation. Part of that is because the person who is the recipient of the misrepresentation is different from the person who is hurt by it. In other words, the pretexter is telling a falsehood to the bank, but the person who actually suffers the harm is the consumer. So, it's an issue which we feel falls within the definition of deception, but it's never really been tested in the courts. There is also a separate theory of unfairness, which is essentially where you are undertaking a practice that causes substantial injury to a consumer. The issue of pretexting would then be, if you are pretexting, what harm does that cause the consumer and that would be determined by the facts in a particular case.

PIM: Do you classify the acquisition of telephone toll records as a clear violation of deceptive business practices?



Winston: It's not what we traditionally look at as deception because you're deceiving party A, but party B is the actual party being harmed. But, we believe that, even though it has not been tested in the courts, that acquiring toll records through false statements constitutes deceptive business practices.

PIM: Is this an area that the FTC is going to start looking into?

Winston: We are aware that there have been some concerns about that and we're continuing to consider it.

PIM: Can clients who hire investigators or info brokers who violate GLB be prosecuted?

Winston: Yes, under the law they can, but there has to be a showing of knowledge. If the person who hired the pretexter had no idea how the information was going to be acquired or didn't specifically know that pretexting was going to be used, then no, they would not have violated GLB. However, when a PI subcontracts to another investigator, the PI should insure that the subcontractor is not violating GLB. The PI should not just rely on the subcontractor's word, but should know how the information will be acquired.

Jimmie Mesis is the editor-in-chief of PI Magazine.com, the trade magazine for private investigators. He is an internationally recognized and award winning private investigator with 28 years of investigative experience. Jimmie trains more than 3,000 private investigators each year at conferences and seminars throughout the USA and the United Kingdom.