



Avoiding Contempt: Responding to Non-Party Subpoenas

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A recent decision by the North Carolina Court of Appeals in *First Mt. Vernon Indus. Loan Ass'n v. ProDev XXII, LL*, 703 S.E.2d 836 (2011), heightens the danger of civil contempt for third parties who receive, but fail to provide timely or complete responses to, a third-party subpoena. Given the frequency with which banks and other financial services companies receive such subpoenas, this development is of particular significance to institutions in the financial industry.

Although the North Carolina Rules of Civil Procedure have long allowed for the imposition of civil contempt for inadequate responses to a third-party subpoena, North Carolina courts have traditionally been reluctant to enter contempt orders. However, in *First Mt. Vernon Indus. Loan Ass'n*, the Court of Appeals invigorated this rule by upholding a contempt order based on an inadequate response to a third-party subpoena. Specifically, the Court held a third party in contempt after he failed to comply with a subpoena and appear for a deposition without an adequate or properly documented excuse. In defending his failure to appear, the third party did not provide sworn testimony and relied solely on unsworn statements from his counsel. The Court of Appeals held that this was inadequate to justify non-compliance with a subpoena.

Although the recipient of the subpoena in *First Mt. Vernon Indus. Loan Ass'n* was an individual, the Court's ruling has significant implications for banks and financial institutions operating in North Carolina. Given the volume of third-party subpoenas that some banks receive, particularly in connection with the litigation arising out of the recent credit crisis, administrative management of the responses, both in terms of timing and substance, can be quite burdensome. The danger of an institution being held in contempt for failure to manage its third-party subpoena responses adequately has always been present, but is more immediate following *First Mt. Vernon Indus. Loan Ass'n*.

For a financial institution to manage such risk effectively, it must provide adequate and timely responses within the timeframe designated in the subpoena (typically, 10 days). North Carolina Rule of Civil Procedure 45 allows a subpoena recipient to raise certain objections or seek a protective order, but requires such actions to be taken before the response deadline. These

procedural mechanisms provide important substantive and strategic tools to use when assessing how to respond to a third-party subpoena. Following *First Mt. Vernon Indus. Loan Ass'n*, it is important to have a process in place, whether through in-house or outside counsel, to review and assess third-party subpoenas as quickly as possible in order to formulate an appropriate response, particularly given the short response time often contained in such subpoenas.

The importance of such prompt action is heightened by the recent amendment of Rule 45 to make electronic discovery an explicit requirement of a subpoena response. Once amended Rule 45 takes effect on October 1, 2011, financial institutions must account for and produce any electronically-stored information ("ESI") when responding to third-party subpoenas. Given the complexity and expense that can be involved in the production of ESI, particularly when collection and production occurs in a short period of time, institutions will want to consider having an appropriate mechanism in place to handle the e-discovery aspects of subpoena responses as cost-effectively as possible given the tight timeframes involved and the increased danger of contempt under *First Mt. Vernon Indus. Loan Ass'n*.

In sum, North Carolina has taken a decisive step towards enforcing third-party subpoenas through civil contempt orders. Although the court in *First Mt. Vernon Indus. Loan Ass'n* held that a contempt order could not include an award of attorneys' fees or costs, the threat of contempt remains potent given the broad discretion that judges have to craft appropriate penalties, including the discretion to jail individuals who are held in contempt. Banks and financial institutions operating in the State will want to take note of this newly-invigorated risk and evaluate their current procedures for handling subpoena responses in order to avoid any possibility of contempt. The Williams Mullen Subpoena Response Team will continue to monitor this issue and provide updates on any new developments.

For more information about this topic, please contact Ada Wilson, 919.325.4870 or , or Brian C. Vick, 919.981.4023 or .

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