

Best Practices in Processing Subpoenas, Garnishments and Tax Levies

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39th Annual
Consumer Compliance Conference

March 11, 2026

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Customer Confidentiality

The Bank's obligation to maintain **customer confidentiality** must be considered and balanced with the bank's obligation to respond to legal requests

The concern with subpoenas and requests directed at a bank that seek documents relating to a bank customer is customer confidentiality.

Unlike individual or other companies responding to subpoenas, banks have an affirmative obligation to keep customer information confidential.

However, if a bank does not comply with a subpoena or other legal request, the failure to respond exposes the bank to legal fees and sanctions.

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Gramm-Leach-Bliley Act

Gramm-Leach-Bliley Act (15 USC. 6801 et seq.; 12 CFR 1016 (Reg P)):

Each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information.

Florida has a corresponding provision to the GLBA in the Financial Institutions Code:

Fla. Stat. 655.059(2)(b):

The books and records pertaining to trust accounts and deposit accounts and loans of depositors, borrowers, members, and stockholders of any financial institution ***shall be kept confidential by the financial institution*** and its directors, officers, and employees and may not be released except upon ***express authorization of the account holder as to her or his own accounts, loans, or voting rights.***

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Gramm-Leach-Bliley Act Purpose

The primary purpose behind the GLBA—and the corresponding Florida Statute—is to prohibit a financial institution from profiting from selling customer information without customer consent.

The purpose/intent of the GLBA is not to restrict the bank's ability to respond to a subpoena or legal request.

However, because the language of the GLBA prohibits disclosure of customer information to any third parties, it is broad enough to be construed to prohibit a bank from responding to a subpoena or other similar request.

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Exceptions

The GLBA contains **exceptions** that, *if applied properly*, allow a bank to disclose consumer information under the following circumstances:*

- (1) To comply with Federal, State, or local laws, rules, and other applicable legal requirements.
- (2) To comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities.
- (3) To respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

15 USC 6802(e)(8); 12 CFR 1016.15(a)(7)

Florida Statutes adopt the exceptions in the GLBA.

* There are several other exceptions in the GLBA; however, this discussion is limited to those exceptions that are applicable to subpoenas and legal requests.

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Under the exceptions, a bank can provide customer information in response to a subpoena that is **properly authorized** by a **government authority**:

“to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons **by Federal, State, or local authorities**”

“to respond to judicial process **or government regulatory authorities** having jurisdiction over the financial institution **for examination, compliance, or other purposes as authorized by law.**”

What about responding to a subpoena from an individual in civil litigation?

Examples:

-- Someone is suing the bank's customer and sends a subpoena to the bank for the customer's records.

-- Customer is suing the bank for alleged TILA violations and requests bank records regarding **other** customers to prove the violations.

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Subpoenas

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Generally speaking, a subpoena is a court order requiring someone to produce documents or appear for oral testimony.

Rule 1.410 of the Florida Rules of Civil procedure:

Subpoenas for testimony before the court, subpoenas for production of tangible evidence, and subpoenas for taking depositions may be issued by the clerk of court or by any attorney of record in an action.

Rule 45(a)(3) of the Federal Rules of Civil Procedure:

An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

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Civil Subpoenas

Courts have generally held that the 1st and 2nd GLBA exceptions do **not** apply:

- (1) “Federal, State, or local laws, rules, and other applicable legal requirements” is referring to complying with regulatory requirements on the financial industry, not civil process.
- (2) “properly authorized civil, criminal, or regulatory investigation or subpoena” is limited to those “by Federal, State, or local authorities” and thus doesn’t apply to civil litigants.

What about the 3rd exception---”to respond to **judicial process** or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.”

→ Does a civil subpoena fall under the judicial process exception?

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Civil Subpoenas

Question: Does a civil subpoena fall under the judicial process exception?

Answer: Maybe?!

Different courts have reached different conclusions:

-- The judicial process exception permits a bank to disclose non-public personal financial information of its customers to comply with a subpoena/discovery request. (WV)

-- The judicial process exception permits a bank to disclose to comply with a **court order**. (AL)

-- The judicial process exception permits a bank to disclose pursuant to a subpoena, but a protective order will govern the disclosure. (MA)

-- No Florida cases

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Best Practices: Civil Subpoenas

Since there is no clear answer, and no Florida cases, how should a bank handle civil subpoenas?

It is generally accepted that the “judicial process” exception will apply.

However, the point made by the MA court is well taken—there must be protections in place to protect the customer information.

Thus, the best practice is to obtain a court order or consent of the customer.

This can often be accomplished by mutual agreement of the parties.

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Best Practices: Civil Subpoenas *cont.*

If the customer is one of the parties to the litigation, the customer may already have objected to the request and a court order may be entered pursuant to that objection.

If the request is a broad request for information of multiple customers who are not parties to the litigation, then extra care should be taken to ensure a protective order is in place.

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Garnishments

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Garnishments in General

Any judgment creditor can obtain a writ of garnishment against a judgment debtor.

The judgment creditor must obtain a writ from the Clerk of Court.

- Once the writ is issued, the judgment creditor will serve it on the bank.
- This is done **without notice** to the judgment debtor (i.e. the bank's customer).
- It is without notice so that the judgment debtor doesn't have the opportunity to deplete or move the funds before the bank receives the writ.

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Garnishment: Bank's Obligations

Upon receipt of the writ, the bank **must freeze** the account and may not release any funds to the account holder.

Except: If the amount in the account is more than double the judgment amount as stated in the writ, the bank must release the amount that is in excess of the double amount.

The law does not prohibit a bank from notifying its customer of the garnishment/freeze, as long as the bank doesn't release any funds to the customer.

The bank must serve an **answer** to the Writ within **20 days** after service of the Writ.

Fla. Stat. 77.04; 77.19

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Garnishment: Bank's Liability

The bank is liable for the amount in the accounts in the bank's possession at the time of the service of the writ or at any time between service and the time of the garnishee's answer.

The service of the writ on the bank creates a lien on the account (or other property/debts).

Fla. Stat. 77.06

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Garnishment: Bank's Answer

The bank's answer must state:

1. Whether the bank is indebted to the defendant (i.e. holds accounts in the name of the defendant) at the time of the answer, **or** was indebted at the time of service of the writ, plus up to 1 business day for the garnishee to act expeditiously on the writ **or** at any time between such times.
2. The amount owed to the defendant (i.e. amount in the account(s))
3. What tangible or intangible personal property of the defendant the bank has in its possession or control at the time of the answer **or** at the time of service of the writ **or** at any time in between such times.
e.g. Safe deposit boxes.
4. Whether the bank knows of any other person indebted to the defendant or who may have any of the property of the defendant in his or her possession or control.

Fla. Stat. 77.04

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Garnishment: Bank's Answer

5. The name or names and addresses, if known to the bank, of the defendant and any other persons having or appearing to have an ownership interest in the involved property.
6. If there are federal benefits payments in the account and the Bank is not freezing those amounts pursuant to federal law (see subsequent slides), include that information in the answer also.

Fla. Stat. 77.04; 77.06(2)

The defendant is served with notice of the writ and the bank's answer and then has an opportunity to move to dissolve the writ and claim exemptions.

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Look-back and Federal Benefits/Exemptions

Although state law governs when and how a writ of garnishment can be obtained, and the procedure for the bank's answer, **federal law** governs **exemptions** and how the bank must answer when there are **federally protected funds in the customer's account**.

Types of Federal Exemptions ("Benefit Payments"):

- ❖ Social security benefits & supplemental security income benefits
- ❖ Veterans benefits
- ❖ Federal railroad retirement, unemployment, and sickness benefits
- ❖ Civil service retirement system benefits & federal employee retirement system benefits

Lookback Period: **2 month** period beginning on the day before the date of the account review.

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Look-back and Federal Benefits/Exemptions

If benefits payments were deposited into the account during the lookback period:

- ❖ Bank must calculate the protected amount and must not freeze the protected amount.
- ❖ Protected amount is lesser of all benefits payments during the lookback period or the account balance.
- ❖ Bank must notify the account holder (form of notice is in the CFR statutes).

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Dissolution or Final Judgment

The freeze will maintain the status quo until the garnishment is disposed of, either by dissolution or by final judgment.

Dissolution – The court may dissolve the writ if the court finds that the writ was improperly issued, there are exemptions that apply, or the account is a joint account not subject to garnishment.

The dissolution has the effect of dissolving the writ and terminating the freeze. The bank can release funds to its customer and operate per business as usual.

Final Judgment - The final judgment will find in favor of the judgment creditor and direct the bank to release the funds to the judgment creditor.

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What about rights of offset?

- ❖ If the Bank has a right to offset and the loan is in default at the time of the Bank's receipt of a writ of garnishment, the Bank can exercise the offset with priority over the rights of the garnishee.
- ❖ The offset and amount should be disclosed in the answer.
- ❖ If there is any uncertainty on the default—was notice provided if required, etc.—then the Bank should review carefully and consult counsel.

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What about rights of offset and federal exemptions?

- ❖ Do the federal exemption rules regarding benefits payments apply to the Bank's right of offset?
- ❖ Can the Bank offset funds in a deposit account to pay a defaulted loan if the Bank can tell the funds in the deposit account are federally protected benefits payments funds?
- ❖ The answer is uncertain: The statute does not state that it applies to a bank's right of offset.
- ❖ However, the same logic for the protection in a garnishment extends to an offset.

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Tax Levies

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Florida Department of Revenue (FDOR) Freeze

The Florida DOR has a garnishment procedure available to it to collect the unpaid taxes of a taxpayer. The DOR garnishment procedure has some similarities to civil garnishment procedure, but there are some major differences.

The DOR is not required to obtain a writ or any order from Court. The FDOR, as a government agency, has the authority itself.

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Florida Department of Revenue Notice of Freeze

RE: [REDACTED]

FEIN: [REDACTED]
SSN: [REDACTED]
Business Partner #: [REDACTED]
Contract Object #: [REDACTED]

[REDACTED] BANK
[REDACTED]

[REDACTED]

This is to notify you that the person or business identified above has a delinquent liability for taxes, penalties, interest, costs, surcharges, and fees owed to the Florida Department of Revenue (FDOR). Due to this delinquency and pursuant to section 213.67, Florida Statutes, as of the date you receive this Notice you may not transfer, dispose of, or return any credits, debts, or other personal property owned/controlled by, or owed to, this taxpayer which are in your possession or control or become under your control prior to expiration of this Notice up to the amount of [REDACTED]. However, you may transfer, dispose of, or return any credits, debts, or other personal property which exceed the amount indicated above, indicated above.

This freeze remains in effect until you receive a notice from FDOR that taxpayer satisfied the delinquent liability, or until 60 consecutive calendar days elapse from the date of receipt of this *Notice of Freeze*, whichever comes first. This Notice supersedes any prior Notice of Freeze.

Florida law requires you to advise the FDOR of any credits, debts, or other personal property owned by or owed to this taxpayer which are in your possession or control. You must furnish this information to the office listed below within five (5) days after your receipt of this Notice. In addition, you must notify FDOR within five (5) days of your receipt of assets belonging to the taxpayer that come within your possession or control prior to expiration of this Notice.

Your failure to comply with this Notice may make you liable for the amount owed, up to the value of the credits, debts, or personal property transferred.

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FDOR Garnishment: Bank's Obligations

Upon receipt of the FDOR notification, the bank **must freeze** the account and may not release any funds to the account holder *up to the amount stated in the FDOR notification*.

The law does not prohibit a bank from notifying its customer of the garnishment/freeze, as long as the bank doesn't release any funds to the customer.

The bank must serve a response to the FDOR notice within **5 days** after receipt of the notice.

Fla. Stat. 213.67(1)&(2)

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FDOR Garnishment: Length of Time

The DOR freeze is effective until the bank receives notice from FDOR that the taxpayer has satisfied the delinquent liability or until 60 consecutive calendar days from the date of the bank's receipt of the notice of freeze, whichever comes first.

If the delinquent taxpayer contests the intended levy in circuit court or under chapter 120, the notice under this section remains effective until that final resolution of the contest.

Fla. Stat. 213.67(1)&(2)

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FDOR Garnishment: Bank's Liability

If during the effective period of the notice to withhold, any person so notified makes any transfer or disposition of the property or debts required to be withheld under this section, he or she is liable to the state for any indebtedness owed to the department by the person with respect to whose obligation the notice was given to the extent of the value of the property or the amount of the debts thus transferred or paid if, solely by reason of such transfer or disposition, the state is unable to recover the indebtedness of the person with respect to whose obligation the notice was given.

Any financial institution receiving such notice maintains a right of setoff for any transaction involving a debit card occurring on or before the date of receipt of such notice.

Fla. Stat. 213.67(1)

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FDOR Garnishment: Levy & Contest

During the last 30 days of the 60-day freeze period, FDOR can levy upon the accounts/debt.

The levy is done by delivery of notice via registered mail, personal service, or electronic means including facsimile.

The levy is effective at the time of service/receipt by the bank.

Upon receipt of the notice of levy, the bank must transfer the funds to the FDOR.

Fla. Stat. 213.67(3)-(5)

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FDOR Garnishment: Levy & Contest

Prior to the levy, the FDOR is required to notify the taxpayer, including giving the taxpayer notice of their alternatives and administrative and judicial appeals available to them.

The taxpayer can file an action to contest the levy, in the time period allowed. If that is done, the freeze must stay in effect during the duration of the legal action.

Fla. Stat. 213.67(6)

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What about tax levies and garnishments from states other than Florida?

A judgment or lien obtained outside the State of Florida (a “foreign judgment”) generally must be domesticated in the State of Florida, through a process set forth in the Florida Statutes, before the foreign judgment can be enforced against a Florida resident.

A bank formed under the laws of the state of Florida is a Florida resident for this purpose since it is organized under the laws of Florida.

If the judgment or state tax levy was not domesticated in the state of Florida, this becomes a jurisdiction issue – does the bank have minimum contacts in the other state?

Responding to foreign judgment that has not been domesticated or for which there is otherwise no jurisdiction can expose the bank to additional claims by the bank’s customer.

At the same time, the bank must protect itself if the judgment or tax levy is in fact enforceable. Careful consideration must be given to a freeze to protect the status quo while further legal analysis is done.

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Putting it all
Together:
Concluding
Thoughts

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Best practices for immediate action upon the bank's receipt of a subpoena, garnishment, or tax levy

1. Take immediate action to preserve the status quo as required (e.g. garnishment freeze). You can always reverse the freeze later, but once the funds are gone, there is no going back.
2. Verify the validity of the Court Order and if there is jurisdiction.
3. Flag the account & notify appropriate personnel.
4. Determine if customer can be notified and scope of notification. Consider limiting who may communicate with the Customer.

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5. Calendar the deadline for the formal/legal response.
6. REMEMBER: Notwithstanding the general rules, every garnishment, subpoena, and court order is different and must be examined closely!

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Thank you!

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