

INTRODUCTION

We are in the heart of an identity (ID) theft crisis. 28.3 million people, nearly 13% of the American adult population, have become victims of ID theft in the last three years alone.¹ Over this period the total losses associated with ID theft have continued to increase from \$53.2 billion in 2003 to \$56.6 billion in 2005,² and the average fraud amount per victim has increased from \$5,249 to \$6,383.³ The old methods of stealing identities⁴ are giving way to more sophisticated methods of data theft.⁵ Data breaches involving the theft of over 86 million identities have taken place in since March of 2005,⁶ including the recent theft of the identities of 26.5 million veterans, reservists and active duty personnel.⁷

The environmental factors that contribute to the rise in ID theft are not difficult to identify.⁸ Since personal information is the "lifeblood" of ID theft, activities which make that information available to ID thieves are essentially to blame. One primary ID theft facilitator is our information age which has put enormous amounts of personal information in the hands of data brokers, financial institutions, credit bureaus (CRAs),⁹ retailers and other

¹10.1 million in 2003, another 9.3 million in 2004 and yet another 8.9 million in 2005 *Id.* See Javelin Strategy and Research, *2006 Identity Fraud Survey Report* (Jan. 2006). A consumer copy of this study can be requested from <http://www.javelinstrategy.com/research>. This data, however, does not indicate how many individuals have been victims of identity theft more than once.

² *Id.*

³ *Id.*

⁴ The traditional methods include:

1) the acquisition of lost or stolen wallets, checkbooks or credit cards; 2) theft by friends, relatives or acquaintances; 3) information accessed as part of an offline transaction; 4) corrupt employees misappropriating company data; 5) stolen paper mail or fraudulent address changes; and, the perennial favorite, 6) rummaging through garbage, or "dumpster diving." See Javelin Strategy and Research, *2005 Identity Fraud Survey Report* (Jan. 2005).

⁵ The newer online methods to steal an individual's identity can be accomplished through: 1) computer spyware; 2) accessing information as part of an online transaction; 3) creating computer viruses and hacking; and 4) sending "spoof" emails posing as legitimate businesses, or "phishing". *Id.*

⁶ See Privacy Right Clearinghouse, *A Chronology of Data Breaches Reported Since the ChoicePoint Incident*, www.privacyrights.org/ar/ChronDataBreaches.htm

⁷ See, e.g., Sherman Burdette, *VA Identity Theft Alert*, 16 *The News Station* (May 23, 2006) at <http://www.wnep.com/Global/story.asp?S=4934808&nav=5ka4> and *Local veterans wonder if they're affected by identity theft scare*, WROC-TV (May 23, 2006) at <http://www.wroctv.com/news/story.asp?id=23098&r=1>.

⁸ See generally, Gary M. Victor, *Identity Theft, Its Environment and Proposals for Change*, 18:3 *Loyola Consumer Law Review* 274 (2006).

institutions—information that can be bought, sold or stolen. Other factors include the ability of lenders to pass the cost of ID theft on to the public, the behavior of lenders and CRAs, the use of Social Security Numbers (SSNs) as the universal personal identifier, and, perhaps most importantly, the refusal of the federal government to attack the problem in any meaningful way.¹⁰

The result of this governmental "inaction" is an ever increasing number of ID theft victims. At the same time this expanding population of ID theft victims is measured in the tens of millions, the number of attorneys willing and capable of representing them is perhaps no more than a thousand nationally, if that. Clearly, a cadre of attorneys willing and able to represent ID theft victims is required where none currently exists. Without competent assistance, ID theft victims can incur years of hardship, lost business or employment opportunities, credit denials

⁹Credit bureaus are regulated by the Fair Credit Reporting Act, 15 U.S.C. § 1681a(f) as "consumer reporting agencies".

¹⁰To date, there has been little federal action addressing the environmental forces that contribute to ID theft. With much fanfare, the President signed a law passed by Congress increasing the penalties on ID theft. *See, e.g.,* David McGuire, *Bush Signs New Identity Theft Bill*, Washington Post, (July 15, 2004) at www.washingtonpost.com/wp-dyn/articles/A51595-2004Jul15.html; and, The White House, *President Bush Signs Identity Theft Penalty Enhancement Act* (July 15, 2004) at www.whitehouse.gov/news/releases/2004/07/20040715-3.html. However, when an identity thief knows his chances of getting caught are about 700 to 1, this "get tough" approach is at best cosmetic. *See* Nadine, Wimmer, *Identity Theft Prevention*, White Canyon Software, (February 2, 2004) "Police make arrests in violent crime more than 50 in 100 cases. They make arrests in identity theft in about 1 in 700 cases." www.whitecanyon.com/identity-theft-prevention-ksl-02-2004.php and BCS Alliance, *Identity Theft*, at www.bcsalliance.com/identitytheft.html: ". . .if you commit identity theft, your odds of ever being caught and prosecuted are about 1 in 750".

As to the environment factors of ID theft, thus far, business interests have been able to thwart attempts to effectively address these causes. In fact, the federal government has more often than not enacted weak laws which preempt stronger state action and created new "rights" without corresponding remedies. *See* Victor, *supra* n 8, at 292-297. For example, the Fair and Accurate Credit Transactions Act of 2003, Pub L No 108-159 117 Stat. 1952 (2003) (FACTA), which amended the Fair Credit Reporting Act (FCRA) made permanent preemptions in the FCRA, 15 USC. § 1681a(q)(3) (2005), which were about to expire and added additional ones. At the same time, Congress refused to enact any new enforceable consumer rights to have only accurate credit information on the consumer's report, and instead left virtually all the protections enforceable only by administrative and regulatory bodies. *See*, National Consumer Law Center (NCLC), *Analysis of the Fair and Accurate Credit Transactions Act of 2003*, Pub L No 108-159 (2003), at http://www.nclc.org/initiatives/facta/nclc_analysis.shtml.

The Michigan Legislature's attempts to address the ID theft problem have also been essentially cosmetic. In 2004, it passed the Identity Theft Prevention Act, MCL 445.61 *et seq.* which requires credit issuers to take reasonable care in verifying the identity of a consumer to whom credit or credit devices are issued, and prohibits identity thieves from obtaining credit in the consumers name without consent. However, the act does not expressly create a private right of action that can be utilized by ID theft victims, and even in the unlikely event that the statute were interpreted to contain such a right, there is no provision for attorneys' fees.

and increased insurance rates with no viable remedy. In those instances where ID theft victims do not find specialized counsel to assist, they may end up in no better position. In order to encourage attorneys to develop the skills necessary to represent ID theft victims, this article will outline the basic strategies for such cases.

CONSEQUENCES OF ID THEFT: CREDIT REPORTING AND DEBT COLLECTION

Creditors such as banks, credit unions, finance companies, mortgage companies, and other financial institutions report information regarding their accounts to CRAs on a monthly basis. For purposes of federal law, when information is provided to a CRA by a creditor, that creditor is designated a "furnisher"¹¹ and becomes responsible for the accuracy of the information provided.¹² In turn, the CRA's make this information available to their subscribers, who use the information to render credit decisions, underwrite insurance, or make employment decisions. Thus, when a creditor incorporates an ID theft account into its accounts receivable database, the information washes into the credit reporting system, and the consumer faces potential adverse action on credit, insurance or employment matters. Moreover, if a fraudulent account goes unpaid for more than 180 days; it will be charged off and will likely be turned over to third party collectors, debt buyers or collection attorneys.

The ID theft victim's problems begin when one or more merchants who have unknowingly been defrauded by an ID thief attempt to collect the fraudulent debts and/or report the debts to CRAs. The victim's first notice of a problem may be the loss of a job opportunity, a denied security clearance, or a blown real estate transaction.¹³

While some consumers may have specific needs which dictate contrary action, the basic approach representing ID theft victims is fivefold:¹⁴ First, triage the immediate, intermediate,

¹¹See generally 15 U.S.C. § 1681s-2(b).

¹²15 U.S.C. § 1681s-2(a).

¹³This situation becomes compounded when the merchant or bank continues to attempt enforcement of the debt after notice of the identity theft, thereby converting its loss into harm to the consumer's credit reputation or privacy.

¹⁴Not listed, but one of the most important things for a novice ID theft attorney to do is find an experienced ID theft attorney willing to assist as a mentor or co-counsel. Experienced ID theft attorneys are usually quite willing to assist attorneys new to the area. Clearly, there are sufficient potential clients available

and long term needs of the client for their credit use. Second, deal immediately with any creditors or collectors that are engaged in direct contact or litigation. Third, provide notice using the appropriate procedures to those creditors and collectors who are engaged only in credit reporting or regular billing. Fourth, file suit for appropriated relief against those entities that have failed to cease their non-judicial enforcement after notice of the ID theft. Finally, continue to monitor the results of prior dispute notices as well as litigation results.

1. Triage

Not all identity theft victims share the same legal needs. While many victims may present themselves freshly upon learning of an ID theft, others may present after having disputed their credit problems for years. A number of victims may even have engaged the services of an attorney or a credit repair organization to no avail. Some clients have immediate needs for access to credit while others may have adequate credit available and simply need to clear their credit as a hedge against future uncertainty.

Given the wide variety of victims' possible needs, the attorney must begin by assessing the scope and seriousness of the problem. ID theft victims rarely know the full extent of the theft, and often present their situation more narrowly than is actually the case. Thus, a consumer who presents a dunning letter from a single debt collector on an ID theft account may erroneously conclude the collector is that the full extent of the problem while the actual situation is probably much more complex.

The actual circumstances may include all of the following: 1) the collector works on behalf of a debt buyer who has itself posted the account to the four CRAs; 2) the collector has also reported the information to four CRAs; 3) the original creditor's initial report of the debt remains on each of the four CRAs;¹⁵ 4) there are other fraudulent accounts unknown to the

for many attorneys to enter the field, and by assisting novice attorneys an experienced counsel can make sure the law created is more likely to benefit the area. Attorneys considering ID theft work and seeking to contact experienced ID theft attorneys in their area can contact the National Association of Consumer Advocates or Lyngklip and Taub Consumer Law Group.

¹⁵ Such postings create duplicate debt information, effectively doubling the effect of derogatory reporting.

consumer; 5) an attorney has been retained to collect on one or more of the fraudulent debts, and 6) the identity thief has submitted applications for new accounts which have yet to result in credit information being posted to the report. Such situations are routine and require far more attention than the consumer may expect.¹⁶

These situations generally require 6 months to a year to remedy through ordinary dispute mechanisms and an additional one to two years if litigation becomes necessary. If the victim requires immediate access to credit or needs to be free of collection efforts, the attorney must first determine the entire scope of the problem and adjust the client's expectations accordingly.¹⁷

2. Keeping the Wolves At Bay

For most consumers, there are three situations which might require immediate attention in order to preserve the consumer's rights or property: 1) a lawsuit, 2) harassing collection efforts, or 3) an important pending credit transaction which is being held up by inaccuracies on the consumer's credit report. In those instances where the consumer faces litigation by a creditor to enforce the debt, the attorney is in the best possible position to render immediate assistance.

In those instances where the consumer is facing harassing or abusive collection efforts, the consumer has several remedies available, both judicial and non-judicial. If the collection has been undertaken by the original creditor, the attorney can intervene on the consumer's behalf and thereby effectively prevent direct contact with the victim shielding the consumer from unwanted collection efforts.¹⁸ If, instead, the contact is from a third party debt collector or debt buyer, those entities are subject to the restrictions of the Fair Debt Collection Practices Act (FDCPA).¹⁹ Under the FDCPA and the attorney can draft a letter on behalf of the consumer requesting that

¹⁶Clear signs of each of these consequential problems can be found in the ID theft victim's credit reports if properly read. A more detailed discussion of how to read a credit report can be found at National Consumer Law Center's *Fair Credit Reporting Manual*, 5th Edition § 4.8.

¹⁷Forms for conducting triage and tracking disputes are available at the Lyngklip & Taub Consumer Law Group, LLC web site, WWW.LTCLG.COM along with sample dispute letters and complaints.

¹⁸M.C.L. 445.252(h).

¹⁹ 15 U.S.C. § 1692c(c)

there be no further contact in connection with the collection of the debt²⁰ and/or notifying the collector of the attorney representation.²¹

If ID theft victims have an immediate need for credit which is being effected by inaccurate adverse information their credit reports, the attorney can do little to overcome the effects of the report, but can assist these clients in perfecting their rights to recover damages and to document the harm. In the meantime, the attorney should assist these clients in requesting exiting creditors to consider only accurate information and in notifying potential creditors of the dispute in writing,²² If inaccurate information has already been relied upon, the attorney should help clients seek reconsideration of their applications in light of the disputes.²³

3. Providing notice to the parties.

With regard to notices of the ID theft, the victim has several possible courses of action, but only one truly good option—utilizing the reinvestigation procedures under the Fair Credit Reporting Act (FCRA).²⁴ The FCRA²⁵ provides liability for CRAs and furnishers who negligently²⁶ or wilfully²⁷ report inaccurate information. Attorneys' fees are available in either case and punitive damages can be awarded where the conduct is willful.²⁸

The reinvestigation process under the FCRA provides that consumers may dispute any information in the consumer report which is incomplete or inaccurate.²⁹ The FCRA prevents

²⁰A sample letter can be found at the Lyngklip & Taub Consumer Law Group, LLC web site, WWW.LTCLG.COM.

²¹See, 15 U.S.C. 1692b(6).

²²Michigan and Federal law prohibit creditors from discrimination based on the fact that a consumer is a victim of identity theft (M.C.L. 445.71) or based upon the consumer's assertion of their rights to an accurate credit report and consideration of only accurate information (15 U.S.C. § 1691; 12 C.F.R. 202.6). While the viability of the Michigan prohibition as a remedial act is open to question, the Federal provisions are enforceable under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e.

²³12 C.F.R. 202.6(b)(6).

²⁴ 15 U.S.C. § 1681i. The ID theft victim should also put a fraud alert on their account. See 15 U.S.C. § 1681a(q)(3).

²⁵15 USC § 1681, et seq.

²⁶15 USC § 1681o.

²⁷15 USC § 1681n.

²⁸Id.

²⁹15 U.S.C. § 1681i(a)(1)(A).

consumers from bringing suit against a CRA or furnisher unless notice of inaccurate information and opportunity to reinvestigate is given to the CRA.³⁰ **These dispute letters must be sent to directly to the CRA that is publishing the information.**³¹ Thus, if the ID theft victim needs credit immediately or in the near future, the attorney's principal function is to draft the necessary dispute letters for the victim as quickly as possible and assure that those letters contain everything necessary to provide notice of the validity of the victim's position.

While disputing with the CRAs is a prerequisite to suit under the FCRA, several other statutes require notice directly to the party collecting or reporting the inaccurate information. As such, good practice dictates that along with the disputes to the CRAs, the victim should also dispute directly with creditors who have reported the information and/or are seeking to enforce a fraudulent obligation. This additional step not only insures that the victim has perfected his rights, but operates as an additional piece of evidence which can support a showing of wilfulness under the FCRA, thus opening the door to punitive damages. Therefore, creditors, collectors, and debt buyers should always be copied on disputes.³²

4. Litigation

Unfortunately for the ID theft victim, the dispute process is often ineffective in obtaining removal of fraudulent accounts from the consumers credit report. Where the dispute is unsuccessful, the only clear option is litigation. Assuming that the necessary notices have been provided, the principal remedies for the continued reporting and/or collection will arise largely

³⁰Consumers can, in some circumstances pursue action under 15 U.S.C. § 1681e(b) before directly disputing information with a credit bureau, however, successful actions under this provision are the exception rather than the rule. More importantly, these cases are limited to suit against credit bureaus. Providers of data ("furnishers") are immune from suit under the FCRA until a dispute is forwarded to a credit bureau and passed on to that furnisher. 15 U.S.C. § 1681s-2b(c).

³¹While the consumer is now entitled to dispute the information with the furnisher of that information (15 U.S.C. § 1681s-2(a)(8)), the failure of the furnisher to comply and/or continuing to report of the inaccurate information in the absence of a bureau dispute is not actionable by the consumer. 15 U.S.C. § 1681s-2b(c). *Stafford v. Cross Country Bank*, 262 F.Supp 776 (WD KY 2003). Conversely, if the consumer disputes the information with a CRA, the consumer may sue both the agency, as well as the furnisher. *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057 9th Cir. 2002).

³²For more information on the dispute process, see the Lyngklip & Taub Consumer Law Group, LLC web site, WWW.LTCLG.COM

under Federal statute.³³ Specific remedies include:

- The Fair Credit Reporting Act, 15 U.S.C § 1681i imposing liability on credit bureaus for failing to properly investigate a consumer's credit dispute.³⁴
- The Fair Credit Reporting Act, 15 U.S.C § 1681s-2(b) imposing liability on providers of credit data for failing to properly investigate a consumer's credit dispute upon receipt of notice from a credit bureau.
- The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(8), and 1692f(1) imposing liability on third party debt collectors and debt buyers for reporting false credit information and collecting amounts not agreed to by the consumer.
- The Truth In Lending Act, 15 U.S.C. § 1642 prohibiting the issuance of credit cards to a consumer unless the consumer has requested the card.
- The Fair Credit Billing Act, 15 U.S.C. § 1666 permitting consumers to dispute erroneous billings on monthly statements to the consumer, and providing for the cessation of collection and reporting relating to erroneous charges while the dispute is pending.
- The Equal Credit Opportunity Act, 15 U.S.C. § 1691 prohibiting discrimination against persons based on the assertion of their rights under the Federal Consumer Credit Protection Act and requiring creditors to reconsider credit applications at the consumers request where an adverse decision is predicated upon erroneous credit history. 12 C.F.R. 202.6.

5. Post claim monitoring

One of the more difficult aspects of ID theft litigation is the fact that a large portion of victims will continue to experience recurring problems long after the attorney has successfully assisted in removal of the fraudulent accounts from the consumer's credit report or obtained a settlement. With this in mind, clients should be advised of the need to review their credit reports on an annual basis for signs of reappearance. These reappearances and reinsertions arise from a variety of causes³⁵ and many cannot be effectively remedied without new dispute letters being

³³The FCRA does not purport to preempt the entire field of credit reporting, but it does contain broad preemption of state regulations and immunities for businesses from state law liability. See 15 U.S.C. §§ 1681h(e) and 1681t(b)(1)(f).

³⁴The topic of litigation under the FCRA is dealt with extensively in the National Consumer Law Center's Fair Credit Reporting Act Manual, Fifth Edition available at www.NCLC.org. Additional litigation information is available at www.NACA.net.

³⁵It is not uncommon for creditor's whose account information has been blocked from a consumer's credit report to change the account number or subscriber number associated with the account. In spite of this industry-wide practice (which may arise through simple negligence or raw intransigence) the credit reporting agencies are unable to recognize the new accounts as containing the same account information. Thus, the information may appear on a consumer's credit report indefinitely so long as the identifiers associated with the account change.

It is common for both creditors, debt collectors, and debt buyers to forward debts to other parties without notice of a prior dispute. With each subsequent transfer, these debts are re-posted to the consumer's credit file, with no notice given to the consumer. It is not uncommon to see a single debt pass through half a dozen entities. Notwithstanding any applicable statutes of limitations, these debts may be bought and sold ten

written. Therefore, the attorney should keep any ID theft or credit reporting files indefinitely active so that the relevant documents can be retrieved and used for should new disputes arise.

CONCLUSION

While ID theft rages in our society, it creates a continuous supply of ID theft victims with credit and debt collection problems and, as yet, few experienced attorneys to assist them. The remedies available for these victims are essentially statutory in nature. With time, effort and assistance of an experienced ID theft attorney, an attorney new to this area can begin to master it in a relatively short time. Representing ID theft victims can be personally, professionally and financially rewarding. We hope, you will consider adding this area to your practice.

or twenty years past the date on which the debt would be enforceable in any court, resulting in extreme hardships for victims of identity theft.