SPECIAL FEATURE: IDENTITY THEFT: WHO CARES ABOUT STICKS AND STONES?

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Text

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As this article was written, the 2004 holiday season was in full swing, and many of us were frantically finishing our holiday shopping. Come January 2005, those visions of sugar plums dancing in our heads may, in many cases, have been replaced with horrible images of huge credit card bills. But before paying those bills, you should examine them closely to make sure that you have not unwittingly been duped by someone on Santa's ″naughty″ list.

Case in point: In the last few months, my wife went on an extravagant shopping spree, purchasing literally thousands of dollars in items from Spencer's (a novelty gift store), Best Buy, Mervyn's, and Pier One. But my wife never goes to Spencer's. (She has no need for lava lamps or fiber optic centerpieces.) As for Best Buy, my wife still thinks of RAM as the name of a truck or animal. So who went on this spending spree? Unfortunately, it was my wife's impostor, an identity thief, who still remains at large. Needless to say, rectifying this situation has caused our family (in particular, my wife) countless hours of aggravation. And we are not alone: A Federal Trade Commission report estimates that in 2003, approximately 39,452 Californians were victims of identify theft. *Identity Theft Victim Complaint Data, Figures and Trends in California, January 1-December 31, 2003,* at http://www.consumer.gov/idtheft/IDT_CY03/Cal ifornia%20CY2003.pdf (Federal Trade Commission 2004). Who knows? The statistics for 2004 and 2005 might be even worse.

The following provides some tips for dealing with identity theft and a brief analysis of the state of the law in the criminal and civil context.

If my identity has been stolen, what should I do first? First, you should scream out your favorite expletive at the top of your lungs, unless, of course, you are at a place like work or church. Although swearing does not actually fix the problem, it will make you feel a little better.

Second, before even calling the police, you should call the three major credit bureaus: Equifax (1.800.525.6285), Experian (1.888.397.3742), and Trans Union (1.800.680.7289). Why? As long as your impostor has your identifying information, he or she can continually apply for credit and rack up bills in your name. Closing out each of those new accounts will require work on your part later, so it is best to halt that impostor as soon as possible. Each credit bureau has a system in place that allows you to flag your file with a fraud alert and, essentially, stop thieves from opening new accounts in your name. After your file has been flagged, the credit bureaus will contact you when attempts are made to obtain credit in your name. Furthermore, by contacting the credit bureaus, you will obtain a free copy of your credit report, which will allow you to ascertain the amount of credit activity going on in your name (some of which may have been without your knowledge).

Third, you should report the crime to the police. Obviously, this may help to catch your impostor. It also serves the purpose of generating a police report, which is something that affected creditors and credit bureaus will request copies of. Also, if you are lucky enough to have the police come to your home to take the report (which they did in our case), you will receive the extra added benefit of your neighbors gossiping about the multitude of possible crimes you committed in order to warrant that police visit.

Fourth, you should contact the affected creditors that you know about. In our experience, most of those creditors are relatively cooperative and, if you act quickly, will take appropriate steps to ensure that you are not billed or held liable for the impostor's purchases. You can expect that most of those creditors will ask you to file an identity theft affidavit, which is typically a form provided through the Federal Trade Commission. It can be found online at http://www.ftc.gov//bcp/conline/pubs/credit/affi davit.pdf. In the weeks following the identity theft, it is also a good idea to keep a close eye on **[*42]** your mail because you may continue to receive bills from new creditors that you do not already know about.

In addition to the foregoing steps, the California Department of Consumer Affairs devotes a portion of its website specifically to identity theft. That website provides several detailed and useful links on how to prevent and/or respond to identity theft at http://www.privacy.ca.gov/cover/identitytheft.htm.

What are the criminal ramifications of identity theft? Not surprisingly, given the rampant nature of the identity theft problem, several federal and state criminal laws are already in place to address the issue. For example, the Federal Identity Theft Assumption and Deterrence Act of 1998 makes it a federal crime to knowingly use another's identity to violate federal law or commit a felony under state or local law. *See*_18 U.S.C.A. § 1028_*et seq.* In California, the Penal Code also addresses the crime of identity theft. By way of a few examples: a) *Penal Code § 530.5* imposes jail terms and/or fines on persons who willfully obtain personal identifying information and use that information for any unlawful purpose; b) *Penal Code § 530.7* creates a database of identity theft victims; and c) *Penal Code § 530.8* allows an identity theft victim to receive certain information related to attempts to obtain credit in his or her name. Additionally, the California Department of Consumer Affairs website provides a thorough listing of existing and pending laws relevant to identity theft at its links for "Privacy Laws" and "California Privacy Legislation." *See*http://www.privacy.ca.gov/cover/identitytheft.htm.

Sure it's a crime, but can I sue in the civil arena? After all, in our litigious society, shouldn't somebody have to pay? A recent California appellate case acknowledged in *dicta* "the current widespread and serious concern for the privacy of an individual's financial data. . . ." *Teamsters Local 856 v. Priceless, LLC, 112 Cal.App.4th 1500, 1512* (Jan. 22, 2004). Yet surprisingly, there is very little (if any) reported case law in California involving civil actions stemming from identity theft.

In a 2002 California appellate case that is *not* officially published, *Jones v. Dept. of Motor Vehicles,* a Mendocino attorney sued the California Department of Motor Vehicles ("DMV") when it improperly provided a duplicate driver's license to an impostor. *Jones v. Dept. of Motor Vehicles, 2002 W.L. 538893* (Cal.App. 1 Dist. 2002); *see* Cal. Rules of Court, rule 977 (non-published opinions cannot be cited as binding authority). The impostor's spending spree forced the Mendocino attorney to spend numerous hours on the phone and writing letters in order to fix his credit. The attorney sued the DMV for, among other things, negligence, negligent hiring, fraud and misrepresentation, negligent and intentional infliction of emotional distress, and invasion of privacy. Ultimately, the appellate court affirmed the trial court's decision to dismiss the suit, based on the conclusion that the DMV: a) lacked a statutory duty to the attorney; and b) had governmental immunity. Thus, in California, the question of what (if any) civil claims one can bring based on identify theft remains open to debate.

Other jurisdictions also grapple with the issue of whether to impose civil liability for identity theft. For example, in a 2003 case, the Supreme Court of North Carolina declined "to recognize a legal duty of care between credit card issuers" and identity theft victims, commenting that even though "it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty." *Huggins v. Citibank, N.A., 355 S.C. 329 (2003).* A recent United States Court of Appeals case from the District of Columbia Circuit certified for appeal questions of whether, under the common law tort of intrusion upon seclusion, a "business may be held liable when it discloses to a third person its customer's credit card information or details about its patron's dining habits." *Schuchart v. La Taberna Del Alabardero, Inc., 365 F.3d 33, 34 (D.C. Cir. 2004).* In certifying those questions, the court noted the tremendous social costs caused by identity theft. *Id. at 37.*

At the federal level, the Fair Credit Reporting Act ("FRCA") provides one possible vehicle for a consumer to initiate civil litigation stemming from identity theft. Enacted in 1970, the FCRA was designed "to promote efficiency in the Nation's banking system to protect consumer privacy." *TRW, Inc. v. Andrews, 534 U.S. 19, 23 (2001);see also15 U.S.C.A. § 1681et seq.* The FCRA requires credit reporting agencies to maintain "reasonable procedures" to assure accuracy in credit reporting. TRW, Inc., 534 U.S. at 23. In that regard, the FCRA gives consumers a private right of action to recover actual damages for negligent violations of the FCRA, and additionally, **[*43]** punitive damages "for willful non-compliance." *Id.; see also15 U.S.C.A. §§ 1681n,* 1681o. The consumer may also be entitled to costs and attorneys' fees if the claim is successful. *See15 U.S.C.A. § 1681o.*

In the 9th Circuit (the federal appellate district that encompasses California), my research uncovered only one identity theft case involving the FCRA, *Andrews v. TRW, Inc., 225 F.3d 1063.* That case ended up in the United States Supreme Court with a published decision, *TRW, Inc. v. Andrews, 534 U.S. 19, 25 (2001).* Specifically, in *TRW, Inc. v. Andrews,* a victim of identity theft (Andrews) sued a credit bureau (TRW, Inc.) under the FCRA, claiming that TRW improperly disclosed her identifying information in connection with credit applications submitted by her imposter. TRW, Inc., 534 U.S. at 25. Ultimately, the Supreme Court did not consider Andrews' improper disclosure claim under the FCRA, based on its determination that the statute of limitations had run. *Id. at 35.*

If anything, the foregoing demonstrates that in the civil context, potential claims stemming from identity theft are relatively uncharted territory.

Although the issue of identity theft is emerging and evolving, one thing that is clear is that prevention can save time, money and aggravation. The various credit bureaus have fraud prevention tips and programs at their websites: www.equifax.com; www.experian.com; and www.transunion.com. Finally, California's Department of Consumer Affairs also offers prevention tips at www.privacy.ca.gov/sheets/ cislenglish.htm.

Graphic

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