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# RECENT LEGISLATIVE ACTIVITY

by Martha A. Sabol

## The Identity Theft and Assumption Deterrence Act of 1998 Do Individual Victims Finally Get Their Day in Court?

*"Tens of thousands of Americans have been victims of identity theft. Imposters often run up huge debts, file for bankruptcy, and commit serious crimes. It can take years for victims of identity theft to restore their credit ratings and their reputations. This legislation will enable the United States Secret Service, the Federal Bureau of Investigation, and other law enforcement agencies to combat this type of crime, which can financially devastate its victims."*<sup>1</sup> President William J. Clinton.

A man in California was convinced his wife had just bought him a brand new Mercedes-Benz when the dealership called to inform him he could come pick up his new car.<sup>2</sup> He was elated until he discovered the car was not purchased by his wife.<sup>3</sup> He learned instead it was purchased by an imposter who stole the man's social security number and good credit to buy this car and others, as well as expensive sports equipment and merchandise.<sup>4</sup> In the end, the imposter

put the man in debt for hundreds of thousands of dollars.<sup>5</sup> What this man learned, as many other identity theft victims have learned, was that the law was of little help to him. The law at that time recognized banks and other credit granting entities as the victims of the identity theft because the fraud involved their money.<sup>6</sup> The law ignored other real victims, the people whose identities were stolen, who as a result, were left with ruined reputations, devastated credit ratings and destroyed lives.<sup>7</sup>

The Identity Theft and Assumption Deterrence Act, however, makes identity theft a federal offense and gives victims rights and means to be compensated for their losses.<sup>8</sup> Under the new federal law individuals who suffer identity theft are recognized as victims, can obtain police reports, and have the right to be compensated by their perpetrators.<sup>9</sup> Additionally, the new law mandates stricter punishments for the imposters who steal the identities of innocent consumers.<sup>10</sup>

This article discusses the crime of

identity theft, how the increasing number and complexity of identity theft crimes led individual states to enact laws, how this activity ultimately lead to the passing of The Identity Theft and Assumption Deterrence Act of 1998, and just how far the new federal law goes to protect individual identity theft victims.

### **Identity Theft Is A Rising Individual and National Concern**

Identity theft occurs when a person steals another person's name, address, social security number, or other identifying information in order to commit fraud.<sup>11</sup> The criminal then uses this information to open a new credit card account for his own use, take out loans in the victim's name, steal money from the victim's bank accounts, illegally secure professional licenses, drivers licenses, and birth certificates.<sup>12</sup> Some criminals even use a victim's identity to submit false medical bills to private insurers.<sup>13</sup> "There are few clearer violations of personal privacy than having your identity stolen and used in the commission of a crime," stated Jon Kyl, Chairman of the Senate Judiciary Subcommittee on Technology, Terrorism and Government Information.<sup>14</sup>

The criminal process is quite simple, but the results can be devastating. Identity thieves first seek out creditworthy consumers with high incomes.<sup>15</sup> Once a consumer is identified, the identity thief seeks

important identifying information about the individual. The consumer's social security number is the most important form of information for a thief because it opens up an individual's financial life by providing easy access to bank accounts, brokerage accounts, and other important and private information.<sup>16</sup>

The means by which identity thieves gather this important information has evolved. In the past, most identity thieves carried out this crime by pickpocketing purses and wallets, stealing pre-approved credit applications from mailboxes or looking for discarded receipts and files in the victim's trash can.<sup>17</sup> Today, however, the crime has become much more sophisticated. One new technique used by identity thieves is to gain entry level employment at a financial institution which provides access to consumer credit reports and other personal information which the thieves steal.<sup>18</sup> Additionally, according to the Secret Service, thieves now use the Internet as a means to gain access to Internet databases to select their victims.<sup>19</sup>

"There is every reason to believe that fraudulent identity theft will be the hottest crime trend in the next century," stated King County Prosecutor Norm Maleng of Seattle, "[because] identity thieves capitalize on our system of commerce, which promotes easy and instant credit."<sup>20</sup> Reports offered by the Federal Trade Commission indicate that identity theft is indeed on the rise. In 1995, 93% of

the United States Secret Service Financial Crimes Division arrests made involved identity theft.<sup>21</sup> These crimes resulted in individual and institutional losses of \$442 million.<sup>22</sup> In 1996, 94% of the arrests were identity theft crimes which resulted in losses of \$450 million.<sup>23</sup> In 1997, the percentage of arrests remained constant but the amount of individual and institutional losses nearly doubled to \$745 million.<sup>24</sup>

These statistics have been supported by other studies as well. Trans Union Corporation, a national credit agency, stated that two thirds of the consumer calls to its fraud victim hotline involve identity theft.<sup>25</sup> In 1992, these inquiries averaged about three thousand calls per month, and in 1997, the calls increased to forty three thousand per month.<sup>26</sup> The number of identity theft cases reported increased from seventy eight thousand in 1992 to eighty three thousand in 1998.<sup>27</sup> VISA and MasterCard International, Inc. indicated that losses to their member banks are estimated to be in the hundred of millions of dollars each year.<sup>28</sup>

### **Individual Victims Are Left Alone To Straighten Out Their Credit And Their Lives**

The harm to individual identity theft victims is significant, long lasting, not readily apparent, or easy to measure.<sup>29</sup> After an identity thief goes on an unrestricted shopping spree with the victim's credit, the victim is left alone to clean up the mess, ward off

collection agencies, repair their destroyed credit histories, and rebuild their lives, all without much help from federal, state or local laws.<sup>30</sup>

The clean up process can take years, depending on the extent of the damage to an individual's credit. A victim must go through the time consuming process of: (1) trying to prove to lenders and credit agencies that he did not personally incur the debt nor did he authorize the thief to use his name and credit to incur the charges, and as a result, he must prove that he was in fact the victim of identity theft; (2) having the bad credit information permanently removed from his credit reports; and (3) preventing the thief from taking any further action to damage his records and his life.<sup>31</sup> Until his name and credit is cleared, a victim will have trouble obtaining loans, mortgages, security clearances, promotions and even gaining employment.<sup>32</sup>

The actual harm an individual suffers from identity theft has been difficult to determine because the individual victim does not bear the initial financial burden of identity theft.<sup>33</sup> Federal law limits a consumer's liability for credit card fraud to \$50 per credit card account.<sup>34</sup> Financial institutions are viewed by law as the primary victims of identity fraud and their direct financial loss tended to be viewed as the only loss involved.<sup>35</sup> Federal laws that criminalize the conduct integral to identity theft did not recognize consumers as victims.<sup>36</sup>

Creditors, unlike individuals, can

write off losses they incurred from identity theft, or they pass them off to consumers in the form of higher interest rates, fees and costs.<sup>37</sup> As a result, the creditors rarely pursued prosecution of identity thieves. And, even when they did refer such cases to law enforcement agencies, the cases did not meet the dollar threshold of \$50,000 to warrant prosecution.<sup>38</sup> And, although identity theft victims were seldom held liable for the crime, the creditors were not obligated to clear the consumer's credit record if no criminal charges were brought.<sup>39</sup> To the extent that creditors passed off the cost of identity theft in the form of higher fees and costs to customers, all consumers were harmed, whether they have been victimized directly or not.

### **State Law Offers Individual Victims Some Relief**

A limited number of states have come to the aid of individual victims and have passed identity theft legislation. In July 1996, Arizona became the first state to pass such legislation making identity theft a felony punishable by a one and one half year prison term and not more than a \$150,000 fine.<sup>40</sup> The law also allows the individual victim restitution in that it requires the thief to compensate the victim for the losses he incurred plus the cost of reestablishing his credit.<sup>41</sup> After the legislation was passed, one hundred and forty two identity theft investigations were forwarded to state prosecutors by local

law enforcement agencies which resulted in eighty-nine court cases filed.<sup>42</sup> In one county in Phoenix alone, one hundred and five identity thieves pled guilty or had been convicted of identity theft.<sup>43</sup> In January 1998, California was the second state to pass identity theft legislation.<sup>44</sup> Identity theft is now a misdemeanor in California, but legal action is limited to crimes connected to financial losses such as credit card fraud.<sup>45</sup> However, California's law makes it easier for a victim to remove erroneous charges from his credit records, and a thief could be imprisoned for one year and pay a fine of \$1000.<sup>46</sup> In New Jersey, lawmakers elevated identity theft from a misdemeanor to a felony in 1998 and imposed a penalty of up to ten years in prison and a fine of up to \$150,000 for a thief who uses false identification to obtain credit.<sup>47</sup> Georgia and Wisconsin have passed similar identity theft legislation.

### **Congress Addresses The Growing Concern For Individual Victim Recognition**

In response to the growing number of individual and institutional losses resulting from the rise and complexity of identity theft crimes, Congress sought to address the issue. In March 1997, Senator Jon Kyl of Arizona introduced "The Identity Theft and Assumption Deterrence Act" to the House of Representatives.<sup>48</sup> The bill made the theft of identity information a crime, and the bill established

restitution provisions for individual victims.<sup>49</sup> The bill was sent to the Subcommittee on Technology, Terrorism, and Government Information in March of 1998 for review.<sup>50</sup> A legislative hearing was conducted in May of 1998 when the Subcommittee heard testimony from the United States Secret Service, the Federal Trade Commission and two victim advocates.<sup>51</sup> Each presentation reinforced the fact that identity theft crime was a growing concern which was affecting all states. Further, because the crime was crossing state lines, Federal government involvement and action was required.<sup>52</sup> In June of 1998, the bill was amended and in July 1998, the bill received unanimous consent in the House.<sup>53</sup> The Senate approved the bill shortly after, and President Clinton signed the bill into law in October of 1998.

### **Is The New Federal Law Enough To Protect Individual Victims?**

The new federal law has two purposes: (1) to expand the scope of 18 U.S.C. 1028(a), which makes identification document fraud a criminal offense, now making "the unlawful transfer and use of identity information" a criminal offense as well, and (2) to legally recognize the individual as a victim of identity theft, and to establish their rights to restitution. The law, in addition, establishes an educational and complaint service for individual victims at the Federal Trade

Commission.<sup>54</sup> In meeting its intended purpose, the new law makes it a crime to obtain Social Security numbers, birth dates, and birth certificates without authorization and with the intent to commit fraud.<sup>55</sup> In addition, the law makes it a crime to aid or abet any unlawful activity that constitutes a violation of federal law, or that constitutes a felony "under any applicable State or local law."<sup>56</sup>

Critics contend that it will be difficult, if not impossible, for Congress to have constitutional authority to regulate unlawful activity that constitutes a felony under any state or local law.<sup>57</sup> As well, no additional money was allocated to enact the new law. Therefore, federal investigators will primarily focus on identity theft cases involving \$200,000 or more and will have to ignore the small crimes.<sup>58</sup> As result, in order for consumers to be adequately protected, states must adopt their own identity theft laws to give local law enforcement agencies more authority to investigate crimes and prosecute criminals.<sup>59</sup>

### **States Respond To The Need For State Laws To Protect Individual Victims**

Some states are recognizing that the new federal law is not enough to protect individual victims and, as a result, have proposed legislation which provides for strict punishment for identity thieves. Shortly after the new federal law was enacted, New York

began the process of establishing its own identity theft law because, as Senator Nozzolio stated, "the federal law won't deter people because its too hard to catch these types of criminals."<sup>60</sup> In February 1999, an identity theft bill was proposed before the Illinois 91st General Assembly.<sup>61</sup> The Financial Identity Theft and Asset Forfeiture Law, as the bill is termed, proposes a sentence structure for identity theft based on the property value or amount of money stolen.<sup>62</sup>

Under the proposed bill, an identity theft involving less than \$300 is a Class A misdemeanor.<sup>63</sup> However, if the thief has a previous identity theft conviction and is involved in an identity theft crime involving more than \$300, the crime is elevated to a Class 4 felony.<sup>64</sup> Financial identity theft of property exceeding \$100,000, would be a Class 1 felony.<sup>65</sup> In addition, the Illinois proposed law calls for a stricter sentence if the crime is against an elderly or a disabled person.<sup>66</sup> In Missouri, an identity theft bill was proposed in December 1998. In the Missouri proposed bill, identity theft is a Class D felony which is punishable by up to six months in jail for the first offense, up to one year in jail for the second offense, and one to five years in jail for the third or subsequent offense(s).<sup>67</sup> Wyoming has a similar proposed plan that provides for stricter penalties as the amount stolen increases.<sup>68</sup>

Other states have proposed legislation that does not provide as strict of punishment for identity theft

offenders. In Maryland, an identity theft bill was proposed in January 1999 that makes the crime of identity theft a misdemeanor and a conviction is subject to a fine of not more than \$10,000 or imprisonment for not more than one year or both.<sup>69</sup> Tennessee's proposed legislation as well classifies identity theft as a Class A misdemeanor. However, in Tennessee, the proposed legislation makes the offender liable to the victim for three times the amount of actual damages sustained by the victim, as well as, punitive damages and attorney fees.<sup>70</sup>

Some states have addressed the problem in other ways. Colorado, Florida and South Carolina have developed a machine that verifies a consumer's identity by displaying their drivers license photo whenever credit cards are used.<sup>71</sup> Consumers, however, are concerned that the companies buying the driver's license photos, addresses, and names of the drivers for verification purposes are potential abusers of the identity information.<sup>72</sup> In response to this concern, Colorado and Florida have ceased operation of the identifying machines until further protections are in place.<sup>73</sup>

Regardless of state lawmakers efforts to restrict the unauthorized use of identifying information, credit agencies continue to be opposed to any laws that would restrict their ability to use consumer's Social Security numbers. Credit agencies claim that by making their access to such information more limited, the agencies will have a more difficult time

verifying credit applications, and as a result more fraudulent crimes will occur.<sup>74</sup>

### **In The Mean Time, What Can Individuals Do To Protect Themselves**

While individuals wait for state or federal protection, the Better Business Bureau suggests the following to consumers so that they may protect themselves against identity theft:

- 1) Don't carry extra credit cards, a social security card, a birth certificate or a passport in your wallet or purse,
- 2) Take extra precautions when using public phones and automated teller machines to keep all personal identification numbers out of sight,
- 3) Save teller machine and credit card receipts and completely destroy them to avoid information being stolen out of the trash and used by a perpetrator,
- 4) Cancel all unused credit card accounts,
- 5) Do not give a social security number or credit card number over the phone to a stranger or unfamiliar company,
- 6) Contact the Better Business Bureau before giving any personal information to a business,
- 7) Secure or properly destroy all banking information, and
- 8) Shred any pre-approved credit card applications.<sup>75</sup>

Beth Givens, Director of the Privacy Rights Clearinghouse, a non-profit consumer information and advocacy program suggests that in addition to these protections, consumers should not write their account numbers on checks when they pay credit card bills.<sup>76</sup> If a thief steals the monthly statement with the canceled checks enclosed, he will have all the information he needs to commit fraud.<sup>77</sup> In addition, consumers should not use their mother's maiden name or their own birth dates on financial accounts, and consumers should check a credit report at least once a year to ensure no fraud has occurred.<sup>78</sup> "We tell people to take precautions," stated Beth Givens, "but in many cases there is nothing you can do."<sup>79</sup>

### **Endnotes**

<sup>1</sup> See *Statement by President William J. Clinton Upon Signing H.R. 4151*, U.S.C.C.A.N. 709 (Oct. 30, 1998).

<sup>2</sup> See V. Dion Haynes, *With Stolen Identities, Criminal Cashing In*, CHI. TRIB., Feb. 11, 1999, at A [hereinafter Haynes].

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See S. Rep. No.105-274, at 5 (1998).

<sup>9</sup> See *id.* at 6.

<sup>10</sup> See *id.*

<sup>11</sup> See *Identity Fraud Protection, Hearings on Identity Theft Before the Subcommittee on Technology, Terrorism and Government Information*, 105th Cong. (May 20, 1998) (statement of David Medine, Assoc. Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Comm.) [hereinafter Medine].

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *Identity Fraud Protection, Hearings on Identity Theft Before the Subcommittee on Technology, Terrorism, and Government Information*, 105th Cong. (May 20, 1998) (statement of Jon Kyl, Chairman of the Senate Judiciary Subcommittee on Technology, Terrorism and Government Information).

<sup>15</sup> See Medine, *supra* n.11.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See Elaine Porterfield, *Identity Theft Can Ruin Victim's Credit*, SEATTLE POST INTELLIGENCER, Jan. 15, 1999, at A1 [hereinafter Porterfield].

<sup>21</sup> See S. Rep. No. 105-274 (1998)[hereinafter S. Rep.]

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See Haynes, *supra* n.2.

<sup>28</sup> See S. Rep., *supra* n.21.

<sup>29</sup> See Medine, *supra* n.11.

<sup>30</sup> See Porterfield, *supra* n.20.

<sup>31</sup> See Medine, *supra* n.11.

<sup>32</sup> See *id.*

<sup>33</sup> See Medine, *supra* n.11.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See John Machacek, *Rep. Clement Joins Foes of "Identity Theft,"* Gannett News Service, July 23, 1998 [hereinafter Machacek].

<sup>40</sup> See S. Rep., *supra* n.21.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See Machacek, *supra* n.39.

<sup>47</sup> See Bill Gannon, *Trying To Stop An Imposter,*

STAR LEDGER, Feb. 3, 1999.

<sup>48</sup> See S. Rep., *supra* n.21.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See Otto G. Obermaier and Ronald R. Rossi, *Evaluating The Crime Legislation By The 105th Congress*, 221 L.Y.L.J. 16 (Jan. 26, 1999) [hereinafter Obermaier].

<sup>58</sup> See Haynes, *supra* n.2.

<sup>59</sup> See *id.*

<sup>60</sup> See Obermaier, *supra* n.57.

<sup>61</sup> See 1999 Ill. S.B. 109, 91st Gen. Assembly (Ill. 1999). 1999 Ill. S.B. 109 provides in part "that it is unlawful to knowingly use personal identifying information or a personal identification document of another person to obtain credit, money, goods, services or other property in the name of the other person, without the written authorization of the other person...."

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* 1999 Ill. S.B. 109 provides in part: "A person commits the offense of aggravated financial identity theft when he or she commits the offense of financial identity theft...against a person 60 years of age or older or a disabled person...."

<sup>67</sup> See 1998 Mo. S.B. 100, 90th Gen. Assembly (Mo. 1998).

<sup>68</sup> See 1999 Wy. H.B. 22, 55th Wy. Leg. (Wy. 1999) which provides in part: " Theft of identity is a misdemeanor punishable by imprisonment for not more than six months, a fine of not more than \$750, or both, if the economic benefit is less than \$500 dollars, or a felony punishable for not more than ten years, a fine of not more than \$10,000 or both, if the economic benefit is \$500 or more.

<sup>69</sup> See 1999 Md. H.B. 90, 1999 Reg. Sess. (Md. 1999).

<sup>70</sup> See Tn. H.B. 501, 1999 101st. Gen. Assembly (Tn. 1999).

<sup>71</sup> See Haynes, *supra* n.2.

<sup>72</sup> See *Id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *Simple Precautions Help Guard Against Identity Theft*, TUCSON CITIZEN, Jan. 4, 1999.

<sup>76</sup> See Douglas Armstrong, *Victim of Identity Thief Learns Tough Lessons About Credit Fraud*, MILWAUKEE J. SENTINEL, Jan. 24, 1999.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See Haynes, *supra* n.2.

