



Consumer Law

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Remedies for Identity Theft Victims

STRATEGIES FOR PROTECTING AND PRESERVING CLIENTS' RIGHTS

Introduction

Identity (ID) theft in the U.S. is now a crisis: 28.3 million people have become victims in the last three years alone. Victims have legal recourse to protect or restore their credit and compensate for some losses, often with attorney fee awards available, but there is a great need for knowledgeable attorneys to represent them.

Consequences of ID Theft: Credit Reporting and Debt Collection

Creditors such as banks and other financial institutions report account information to Credit Reporting Agencies (CRAs) on a monthly basis. Under federal law, when such information is provided, the creditor is designated a “furnisher”¹ and becomes responsible for the accuracy of the information provided.² In turn, the CRAs 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, that 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 been defrauded by an ID thief attempt to collect the debts or report the debts to CRAs. The victim may first suspect a problem at the loss of a job opportunity or real estate financing, a denied security clearance, or a blown real estate transaction.

The basic approach for representing ID theft victims is fivefold: (1) assess the immediate, intermediate, and long-term needs of the client for his or her credit use; (2) deal immediately with any creditors or collectors that are engaged in direct contact or litigation; (3) provide notice using the appropriate procedures to those creditors and collectors who are engaged only in credit reporting or regular billing; (4) file suit for appropriate relief against those entities that have failed to cease their non-judicial enforcement after notice of the ID theft; and (5) continue to monitor the results of prior dispute notices as well as litigation results.

Triage

The attorney must begin by assessing the scope and seriousness of the problem. A consumer who presents a letter from a single debt collector on an ID theft account may erroneously conclude that the collector is the full extent of the problem, while the actual situation is probably much more complex.

The actual circumstances may include all of the following:

- The collector works on behalf of a debt buyer who has posted the account to the four CRAs
- The collector has also reported the information to the four CRAs
- The original creditor's initial report of the debt remains on each of the four CRAs
- There are other fraudulent accounts unknown to the consumer
- An attorney has been retained to collect on one or more of the fraudulent debts
- The identity thief has submitted applications for new accounts that have yet to result in credit information being posted to the report

Keeping the Wolves at Bay

For most consumers, there are three situations that might require immediate attention to preserve the consumer's rights or property: (1) a lawsuit, (2) harassing collection efforts, or (3) an important pending credit transaction that is being delayed because of inaccuracies on the consumer's credit report.

In those instances in which 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 effectively prevent direct contact with the victim, shielding the consumer from unwanted collection efforts.³ 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).⁴

Under the FDCPA, the attorney can draft a letter on behalf of the consumer to request that there be no further contact with the debtor to collect the debt, and to notify the entities of the attorney representation.⁵

If ID theft victims have an immediate need for credit that is being affected by inaccurate adverse information in 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 request that existing creditors consider only accurate information, and notify potential creditors of the dispute in writing.⁶ If inaccurate information has already been relied on, the attorney should help clients seek reconsideration of their applications in light of the disputes.⁷

Providing Notice to the Parties

The ID theft victim has several ways to notify parties, but only one truly good option: using the reinvestigation procedures under the Fair Credit Reporting Act (FCRA).⁸ The FCRA⁹ provides liability for CRAs and furnishers who negligently¹⁰ or willfully¹¹ report inaccurate information. Attorneys' fees are available in either case, and punitive damages can be awarded when the conduct is willful.¹²

The reinvestigation process under the FCRA provides that consumers may dispute any information in the consumer report that is incomplete or inaccurate.¹³ The FCRA generally prevents consumers from bringing suit against a CRA or furnisher unless notice of inaccurate information and opportunity to reinvestigate is given to the CRA. *These dispute letters must be sent directly to the CRA that is publishing the information.* 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.

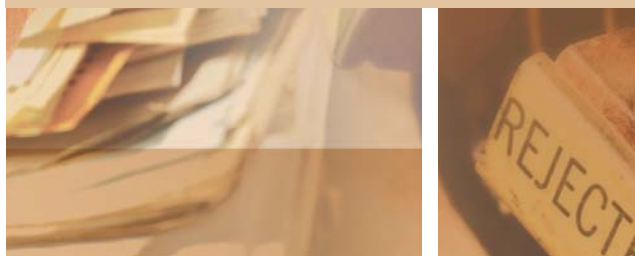
While disputing with the CRAs is a prerequisite to suit under the FCRA, several other statutes require notice directly to the party collecting or reporting the inaccurate information. As such, good practice dictates that, along with the disputes to the CRAs, the victim should also dispute directly with creditors who have reported the information or are seeking to enforce a fraudulent obligation. This additional step not only ensures that the victim has perfected his rights, but operates as an additional piece of evidence that can support a showing of willfulness under the FCRA, thus opening the door to punitive damages. Therefore, creditors, collectors, and debt buyers should always be copied on disputes.¹⁴

FAST FACTS

While ID theft rages in our society, it creates a continuous supply of victims with credit and debt collection problems and, as yet, few experienced attorneys to assist them.

ID theft victims have legal recourse to protect or restore their credit and compensate for some losses.

Many ID theft victims will experience recurring problems long after the attorney has successfully helped remove fraudulent accounts from the consumer's credit report or obtained a settlement, so clients should be advised to review their credit reports on an annual basis.





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Litigation

Unfortunately for the ID theft victim, the dispute process often fails to remove fraudulent accounts from the consumer's credit report and leaves litigation as recourse. Assuming that the necessary notices have been provided, the principal remedies for the continued reporting and collection will arise largely under federal law; specifically:

- The Fair Credit Reporting Act, 15 USC 1681i imposing liability on credit bureaus for failing to properly investigate a consumer's credit dispute.
- The Fair Credit Reporting Act, 15 USC 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 USC 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 USC 1642 prohibiting the issuance of credit cards to a consumer unless the consumer has requested the card.
- The Fair Credit Billing Act, 15 USC 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 USC 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 consumer's request when an adverse decision is predicated on erroneous credit history. 12 CFR 202.6.

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 invariably require that new dispute letters be 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 should new disputes arise.

Conclusion

While ID theft rages in our society, it creates a continuous supply of 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. With time, effort, and the assistance of an experienced ID theft attorney, an attorney new to this area can begin to master it in a relatively short time. ♦



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Footnotes

1. See generally 15 USC 1681s-2(b).
2. 15 USC 1681s-2(a).
3. MCL 445.252(h).
4. 15 USC 1692c(c).
5. See 15 USC 1692b(6).
6. Michigan and federal law prohibit creditors from discrimination based on the fact that a consumer is a victim of identity theft (MCL 445.71) or based on the consumer's assertion of his or her rights to an accurate credit report and consideration of only accurate information (15 USC 1691; 12 CFR 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 USC 1691e.
7. 12 CFR 202.6(b)(6).
8. 15 USC 1681i. The ID theft victim should also put a fraud alert on his or her account. See 15 USC 1681a(q)(3).
9. 15 USC 1681, et seq.
10. 15 USC 1681o.
11. 15 USC 1681n.
12. Id.
13. 165 USC 1681i(a)(1)(A).
14. For more information on the dispute process, see the Lyngklip & Taub Consumer Law Group, PLC website at <http://www.ltclg.com>.