

Identity Theft and the Fair Credit Reporting Act: A Primer for Attorneys¹

by Kellam T. Parks

It is estimated that more than nine million Americans had their identities stolen in 2008.² This occurs by companies “losing” clients’ confidential data; “phishing,” (seemingly authentic e-mails requesting verification information for accounts, but instead coming from scammers seeking personal information); computer hacking; and lost or stolen wallets, purses, or mail.

More people know of the problem due to the increased frequency of identity theft and public awareness campaigns, but few know how to rectify the problem. Victims are often overwhelmed and do not know their rights or what to do. Many attorneys have clients or potential clients calling them seeking assistance.

This article is a primer for the steps to follow in the event of identity theft and a brief overview of the Fair Credit Reporting Act (FCRA). I recommend that a victim of identity theft take these steps in order, if not simultaneously:

Contact a credit reporting agency.

The victim should contact any of the three major credit reporting agencies (CRAs): Equifax, TransUnion, and Experian, and ask that a fraud alert be placed on his or her file.³ This can be done by phone. Any CRA contacted must alert the other two once a request has been made. The alert prohibits creditors from extending credit to the victim without verifying his or her identity. This alert will remain active for not less than ninety days. This alert also entitles the victim to one free report⁴ from each agency (every consumer in America has access to one free credit report every twelve months⁵). Be aware that a fraud alert will slow down approval of any authentic credit checks, as the creditor will need

to verify the victim’s identity. However, a telephone number may be provided in the fraud alert that the creditor may use to contact the victim for verification purposes.

The victim can also request that an extended fraud alert, active for seven years, be placed on his or her file. This requires the victim to fill out an identify theft report with the CRA, which can vary in substance, but usually requires the agency form such as affidavits, proof of identity, relevant documents, and a filing with a law enforcement agency. The extended alert entitles the victim to two free credit reports within twelve months and the CRA will automatically remove the victim from the marketing prescreened list for five years, unless he or she asks to be placed back on the list before that time.

In addition to the fraud alerts with the CRAs, a Virginia law went into effect on July 1, 2008, that also allows its citizens to place a security freeze on their credit by contacting each of the CRAs.⁶ This security freeze prevents the victim’s credit file from being shared with potential creditors. After July 1, 2009, the CRAs have to comply within one business day.⁷ The law is detailed and it is important that the victim follow the procedures carefully.⁸

Beyond the initial ninety-day fraud alert call, all steps should be documented in writing and anything sent to a third party during the process of addressing the identity theft should be sent by certified mail, with return receipt requested and copies kept for the victim’s records. In addition, all documents given to third parties should be copies. Originals should be stored safely for future use.

Close accounts.

The victim should close any accounts that were created or were abused, due to the identity theft. He or she should obtain the contact information for the creditor’s fraud department and then send all relevant information with an explanatory letter to that department. The victim should also ask if

the creditor accepts the Federal Trade Commission's ID Theft Affidavit, which can be downloaded at the FTC's website.⁹ If not, the victim should request each creditor's specific fraud dispute form to fill out and return. Once the accounts have been closed and any fraudulent charges reversed, the victim should request a letter confirming the actions and status for his or her records. Unfortunately, often the old information reappears on the victim's credit, and the letters will speed up the process of correcting the information in the future.

When new accounts are opened to replace those that have been closed, the victim should be sure to place passwords on them. The passwords should not be easy to guess or readily available from personal information that has already been compromised.

Cancel government-issued documents and licenses.

The victim should contact any government agency that has issued a license or document, and follow its procedures for canceling and requesting a re-issuance. The victim should also request that his or her file or account be flagged to prevent further access to the account from anyone other than the victim and any authorized agent.

File a report with the police.¹⁰

The victim should file a report with the police and obtain a copy of the report. Sometimes the local police will be reluctant to take an identity theft report, so the victim may need to try a different jurisdiction such as the jurisdiction where the identity theft took place or where the card or information was used.¹¹ An in-person meeting should be attempted to make the report rather than any automated process that may be offered. This will allow the victim to present all of the evidence at the outset. It also will allow for better verification by third parties, should the need arise.

File a complaint with the FTC.

The victim should file a complaint with the FTC.¹² This will be useful personally to corroborate to third parties that the theft occurred and also for the government to keep track of such crimes and assist in combating them.

Clean up the victim's credit.

Once the steps in reporting the identity theft and setting up measures to prevent any future damage have been taken, it is important to address the victim's credit itself. The first step is understand-

ing the law protecting consumers' credit. The FCRA, 15 U.S.C. § 1681 *et seq.*, as amended by the Fair and Accurate Credit Transactions Act of 2003, governs credit reporting and provides for redress for correcting identify theft. The FCRA allows the recovery of both statutory and actual damages suffered by the victim, as well as attorney's fees and costs against the offending party. This fee-shifting scheme aids those victims who normally could not afford counsel to assist them in their efforts to clear their credit. As to identity theft, the FCRA usually applies by addressing unauthorized access to a victim's consumer report and by inaccurate information not being removed from the victim's report.

Once the consumer disclosure has been obtained from the CRA, or a copy of the consumer report given by the CRA to a third party, the victim should review them carefully and note any incorrect information. Each CRA disclosure or report will contain different information, as each creditor or "furnisher," as they are defined under the FCRA, may report to a different CRA. A dispute should be sent to each CRA detailing the inaccurate information. It is especially important that this dispute be in writing (even though the victim may be able to report same online or over the phone) and sent certified return receipt requested. Should litigation be necessary to resolve the situation, the timing of the disputes and the information provided in them become necessary and important evidence.¹³

Once a CRA receives the dispute, it must forward it, including "all relevant information provided by the consumer," to the furnishers against whom the dispute pertains. The CRA must update its information, correct any inaccuracies generally within thirty days of receiving the consumer's dispute, and notify the consumer of the outcome. The CRA can be liable for failing to comply with the various duties and accuracy requirement in the FCRA. The furnishers must

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conduct an investigation, review the information provided by the agencies, and report the results back to the CRA. If the furnishers fail to perform any of these steps, they too can be liable under the FCRA. These procedures protect the victim of

identify theft, as many furnishers fail to adequately investigate disputes.¹⁴ Without the protections of the FCRA, creditors could routinely ignore consumers, and victims would never get out from under the false claims for monies owed and their credit would remain damaged.

Identity theft can be the financial ruin of an individual and often causes tremendous stress and emotional turmoil. It is important for victims to know their rights and the steps that can be taken to enforce them. An excellent source for information for both attorneys and victims of identity theft is the FTC's official ID theft website.¹⁵ Either as a victim or an attorney contacted by a victim, the steps detailed here and the resources provided in this article will help in taking back the life stolen by identity theft. ♪

Endnotes:

- 1 Adapted and updated from the author's 2006 article, "How to Take Back Your Life After Identity Theft." *The Journal Vol 18, #4 (VTLA, 2006)*
- 2 Federal Trade Commission estimate (www.ftc.com); see also the Federal Trade Commission's 2006 ID Theft Survey, which estimated 8.3 million victims in 2005 (www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf); Javelin Strategy & Research 2009 Identity Fraud Survey Report, which estimated almost 10 million victims in 2008 (www.javelinstrategy.com)
- 3 Equifax: (800) 525-6285; P.O. Box 740241-0241, Atlanta, GA 30374
Experian: (888) 397-3742; P.O. Box 9532, Allen, TX 75013
TransUnion: (800) 680-7289; Fraud Victim Assistance Division, P.O. Box 6790, Fullerton, CA 92834-6790
- 4 Technically, the information you receive from a CRA is a "consumer disclosure," not a "credit report." In fact, a "credit report" does not exist under the Fair Credit Reporting Act. A third party receives a "consumer report," which is the document that triggers many of the act's protections. For purposes of this article, however, I use the popular term "credit report" until the section dealing with the FCRA for simplicity.
- 5 www.annualcreditreport.com; (877) 322-8228. I would recommend getting a copy of the Annual Credit Report Request Form and mailing it rather than obtaining the online information for better record-keeping and a cleaner result. You can obtain the form at the website and it should then be mailed to: Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348-5281.
- 6 Va. Code § 59.1-444.2.
- 7 *Id.*
- 8 The Federal Trade Commission provides a link to a summary sheet with instructions,

- www.consumersunion.org/pdf/security/securityVA.pdf.
- 9 www.ftc.gov/bcp/edu/resources/forms/affidavit.pdf
- 10 Identity theft is both a federal crime (18 U.S.C. § 1028) and a Virginia crime (Va. Code § 18.2-186.3).
- 11 With the increased frequency of this crime and the growing importance of credit and digital data, more attention is being paid to these crimes and greater resources are being allocated to pursuing such criminals. As an example, President George W. Bush formed a task force in May 2006 to combat identity theft, with recommendations from that task force being issued in April 2007 (www.idtheft.gov/reports/StrategicPlan.pdf), and a report on the steps taken to implement the recommendations being issued in October 2008 (www.idtheft.gov/reports/IDTReport2008.pdf).
- 12 (877) ID-THEFT (438-4338); Identity Theft Clearinghouse, Federal Trade Commission, 600 Pennsylvania Ave. NW, Washington, DC 20580; www.ftccomplaintassistant.gov.
- 13 If at all possible, copies of any consumer reports provided to third parties by a CRA should be obtained. Usually they exist because there has been a denial of credit or contact from a creditor that alerts an individual that he or she has been the victim of identity theft. The purpose of using the consumer reports as a basis for disputing inaccurate information rather than consumer disclosures is twofold. First, the information on a consumer report is often different than the consumer disclosure, as the CRA uses a more stringent set of controls for the disclosures than the reports. Second, the CRA's liability under the FCRA is only triggered when referring to a consumer report, not a consumer disclosure.
- 14 On July 1, 2009, the federal banking agencies, the National Credit Union Administration, and the FTC issued joint rules to implement FACT Act requirements for furnishers to, in part, investigate disputes reported directly to them (as opposed through the CRA verification process). 16 CFR Part 660.4; 74 Fed. Reg. 31484 (7/1/09). The joint rules become effective July 1, 2010. *Id.* Unfortunately, the FCRA does not allow private enforcement against furnishers for failing to keep adequate records, accurate reporting to the CRAs, or handling a direct dispute, unless a dispute has been made with the CRAs and the furnisher then fails to properly verify the information. 15 U.S.C. §§ 1681s-2(c)&(d).
- 15 www.ftc.gov/bcp/edu/microsites/idtheft