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California's Identity Theft Act

A TOOL TO PROTECT CONSUMERS AFTER THE EQUIFAX BREACH OF 2017

Every two seconds, a consumer falls victim to identity theft. In fact, the White House recently acknowledged that identity theft is the fastest-growing crime in America, resulting in the loss of \$16 billion from 12.7 million U.S. consumers in 2014 alone. The trend continues, given the September 2017 Equifax hack that exposed an estimated 143 million American consumers to further identity theft. The question becomes, what can we do as attorneys to protect our clients from debt collectors that insist upon collecting these fraudulent accounts from victims of identity theft?

As merely one example to set the stage, "FC" hired a live-in caregiver after FC's mother was diagnosed with a mental disability. Thereafter, one of the caregivers met a man online who then moved into the home. While living there, the man stole the mentally incompetent woman's identity and utilized it to purchase multiple vehicles, open numerous credit cards and to obtain student loans despite not even being a student.

When FC discovered these issues, FC spent many hours attempting to close these accounts. Despite FC's pleas and compliance with all demands from the creditors, the creditors repeatedly said

the mentally incompetent woman was liable for the debts. After years of no success, FC was forced to retain the services of the Kazerouni Law Group, APC. Through contentious litigation, FC finally won in court and successfully closed each of the fraudulent accounts.

FC's victory was made possible in part by California's Identity Theft Act, (Cal. Civ. Code, § 1798.92, et seq. ("CITA").) This powerful statute forces creditors and debt collectors to investigate claims of fraudulent accounts upon receipt of written notice. Pursuant to CITA, "a person may bring an action against a claimant to establish that the person is a victim of identity theft in connection with claimant's claims against a person." (See Cal. Civ. Code, § 1798.93(a); and *Peters v. Discover Bank* (9th Cir. 2016) 649 Fed.Appx. 405.)

Before bringing this action, however, the consumer must send a copy of a police report to the entity that is attempting to collect the fraudulent debt. (*Satey v. JPMorgan Chase & Co.* (9th Cir. 2008) 521 F.3d 1087, 1092, citing Cal. Civ. Code, § 1798.93(a)(6)(A).) If, and only if, collection activity continues after the thirty-day period, the consumer may then bring a lawsuit.

Intake

The initial intake is crucial in developing a strong case that will be ready for trial, or even one that can survive motion practice. Once you have all the information listed below, at minimum, assist your client in organizing the documents and preparing an explicit dispute for all entities that have attempted to collect the debt, including the credit bureaus. The more information and supporting documents, the better. Vague and/or flippant disputes provide these entities with sturdy defenses during litigation. An important caveat to keep in mind during the intake process is that many consumers have learned that claims of identity theft will allow them to avoid legitimate debts. Discovery of such lies rightfully makes businesses skeptical of any identify theft claims, to the detriment of the actual victims. A thorough intake process in conjunction with an objective analysis will help you avoid filing meritless lawsuits on behalf of fraudsters.

Before seeking the documents listed below, have a thorough conversation with the consumer about the situation. What debt(s) are at issue? How did they find

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out about the identity theft? Was it an account that they initially opened but was later compromised? Have they disputed the account(s)? The answers to these questions will help you shape your investigation as well as evaluate the consumer's credibility. If believable, move forward with the document-gathering stage.

Police report

As stated above, providing a police report to the claimant (i.e., creditor and/or debt collector) at least thirty days before filing the action is required pursuant to CITA. Ideally, the consumer has already obtained the police report and has begun the dispute process. If not, it is important to tell your client that the police report is the first document they need to obtain for you. The inconvenience of obtaining this document will be very telling for you. Individuals who are simply hoping to get out of the debt easily will just fade away. On the other hand, individuals who have legitimate identity theft claims will do anything that you ask them to do in order to move past this situation. This willingness is also a good sign that the individual will participate in written discovery, depositions, mediation, trial, etc.

FTC Identity Theft Affidavit

While not required pursuant to CITA, many businesses do require a copy of an FTC Identity Theft Affidavit to substantiate identity theft claims. A copy of this document is available at <https://www.identitytheft.gov/>. The information will be similar to what appears in the police report, but taking this affirmative step will further substantiate the consumer's identity theft claims.

Driver's license and Social Security card

Including a driver's license and Social Security card with the dispute will provide great assistance in resolving the account expeditiously.

First, a driver's license has the consumer's photograph; height; weight; eye color; hair color; address; and, signature sample. Notifying the claimant of

these physical attributes will either resolve the dispute early on or provide great evidence of the validity of the identity theft claims. For example, video or photographic evidence of an individual of a different gender or race should be enough to convince the business that the consumer is the victim of identity theft. If not, ignoring such unequivocal and readily available evidence will make proving that the entity conducted a reasonable investigation into the identity theft claim quite difficult.

Second, the Social Security card can also help convince the business that the consumer is the victim of identity theft. It is not uncommon for slightly incorrect Social Security numbers to be utilized to open accounts fraudulently. If information in the business's files is different than the Social Security number on the government document, this will be strong evidence that the identity claims are legitimate.

Signature samples

It is good practice to have the consumer include signature samples as part of the dispute. In addition to the driver's license, have the consumer sign a piece of paper three to five times. Providing these examples will allow the entity to compare signatures and investigate whether the signature on the application is a forgery.

Once the consumer has provided these documents, assist the consumer in preparing dispute packets.

As stated above, the more information, the better. It is best to give the business everything you have and to do everything you can to prove at this early stage that the account is fraudulent. If the business agrees, you save the consumer months and/or years of contentious litigation. If the business disagrees, you have significant evidence that shows the consumer's good-faith attempts to resolve the dispute without litigation. Such good-faith evidence will make it easier for the jury to award six or seven figures in damages at trial.

Also keep in mind that much of this information is highly sensitive and confidential. Accordingly, do not merely

transmit it via U.S. Mail. This method of mailing could potentially expose your client to further identity theft. It is therefore a better practice to submit the dispute packs via certified mail, facsimile, and/or email.

Drafting the complaint

With the potential for high damages as well as other fraudulent claims of identity theft, some sort of motion to dismiss or demurrer is expected. To ensure your complaint survives, you should take considerable care in drafting the complaint. Not only do you need to make sure that the complaint states a prima facie claim, it is also important to thoroughly explain each dispute. How was it sent? What did it include? What was the response? The answers to these questions will also help substantiate claims for pecuniary loss, emotional distress, and, if applicable, punitive damages.

Discovery

Discovery in identity theft matters is highly involved and may require significant information from non-parties. It is important to request ten to twelve months for discovery alone to make sure that nothing is missed. While the information required to support the consumer's claims will vary, the following documents are often needed in each case.

Applications

Obviously, the initial application and/or contract will provide a plethora of information.

How was it signed? E-signature or wet signature? If wet signature, compare the signature to your client's. At this stage, you should have at least seven examples to look at: one from the driver's license, five signature samples provided with the dispute, and one on your retainer. If e-signed, this will require third-party discovery. What e-signature company was utilized? Where was the document signed? If online, you will need to subpoena various documents such as documents that establish an

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I.P. address. If in person, whether e-signature or wet, you will need to obtain footage and/or photographs from security cameras.

Collection letters

These collection letters will also answer many questions. Most importantly, where were the collection letters sent? If not to your client, then to what address? Investigation regarding the actual owner of the address can provide significant evidence required to convince the jury that your client is the victim.

Video/photographic evidence

Why such evidence is necessary should be obvious and has been discussed herein. Obtaining the evidence, however, may prove to be a fight. While a telephonic meet and confer should convince defense counsel why you are entitled to such evidence, make sure that you are readily familiar with the court's chamber's rules regarding discovery disputes, so no inadvertent waivers occur.

Percipient witnesses

A percipient witness is one who testifies about things the witness actually saw, heard or otherwise experienced. Such witnesses on the consumer's side may include family members, coworkers, and/or friends who saw the effect that the dispute process had upon your client.

From the defense, you will need to learn the identity of any individuals that handled the account on behalf of the business. From these individuals, you will learn what policies and procedures, if any, are in place to avoid collection upon fraudulent accounts and how the account itself was initially opened. Keep in mind, however, that the debt collection industry has regular turnover of employees. If a former employee handled the account, attempt to obtain their last known address in order to issue subpoenas. Testimony from such former employees can significantly benefit your case.

Expert witnesses

In most identity theft cases, the consumer will need to subpoena at least two expert witnesses.

One expert will be needed to quantify the actual monetary loss your client incurred (i.e., pecuniary loss).

These losses typically are incurred by victims of identity theft in the form of higher interest rates than what they would have obtained without the fraudulent account, lost business opportunities, loss of ability to benefit from creditworthiness, etc.

Another expert will be needed to quantify emotional distress. Ideally, your client visited a doctor regarding the stress before retaining your services. This doctor – a potential percipient witness – can discuss the effect the collection of the fraudulent account had upon your client as your client was experiencing the issues. This doctor can also assist in explaining the continued emotional distress. Some doctors, however, do not wish to be involved in litigation of any kind. If that is the case, you will need to find a doctor who can meet with your client and conduct an independent medical evaluation.

Other experts may be required depending on the facts of your case. If credit reporting is an issue, a Fair Credit Reporting Act expert will be a great benefit to the jury. Another possibility would be a forensic computer consultant. Whether intentional or not, important evidence can be purged from the business's system. While the business may think that it is impossible to recover, such experts may have alternative methods to restore this essential evidence.

While many of these concepts will be easily understood by the attorneys and judge, the average juror will have great difficulty understanding the damages and then affixing a number to said damages.

Motions

While outright summary judgment may be difficult, summary adjudication, at a minimum, is important. As is evident from this discussion, proving identity theft claims at trial involves a significant amount of evidence coming in through a large number of witnesses over a number of days. The more you can narrow the issues for the jury, the less likely they are to lose track of what matters.

Trial

Similarly, trial preparation will take months of planning. Establishing your client's story in the most effective way can be done through any number of methods. To assist in determining what you feel presents your client in the best light, consider a focus group and/or mock trial. The individuals that sit for any of these preparation tools should be average consumers unrelated to you, your law firm or your client in any way. This will ensure honest feedback that can greatly benefit your case.

Another consideration is witness order. Ideally, you will call your witnesses in a chronological or other order that naturally develops your story. In practice though, witness availability rarely lines up exactly with how you need it. To best ensure a logical flow, you should discuss trial dates as early as possible with your anticipated witnesses.

Damages

If successful, the victim of identity theft is able to recover actual damages, attorneys' fees, costs and equitable relief. On top of these damages, a consumer may also recover up to \$30,000 in the form of a civil penalty from the claimant. (See *Cutler ex rel. Jay v. Sallie Mae, Inc.*, 2015 U.S. Dist. LEXIS 58157, at *20 (C.D. Cal. 2015) citing *Toroussian v. Asset Acceptance, LLC*, 2013 U.S. Dist. LEXIS 145007, at *3 (C.D. Cal. 2013).) As a practice tip, any attorney who brings such an action should also be mindful of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA"); the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code, § 1788, et seq. ("RFDCPA"); the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. ("FCRA"); and, the California Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.1, et seq. ("CCCRA"). These statutes, in conjunction with CITA, should address all of the negative repercussions of the thief's actions by ending collection communications and wiping the victim's credit report of any trace of the fraudulent account(s).

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The Equifax Data Breach is a further reminder that our technological age is going to continue to put our personal information and finances at risk. While many banks and lenders are quick to provide money to individuals with minimal effort, these same entities place enormous hurdles on consumers seeking to be relieved of these fraudulent accounts.

Oftentimes, litigation is the only way for a consumer to remedy their financial reputation.

Matthew Loker is a Partner with the Kazerouni Law Group, APC in San Luis Obispo, CA. The Kazerouni Law Group, APC handles consumer-related cases ranging from defending consumers who have been sued by

creditors or debt collectors to large Multi-District Class Actions. Most of Matthew's practice focuses on the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Telephone Consumer Protection Act, California's Identity Theft Act, false advertising claims and environmental actions, such as the Santa Barbara Oil Spill. 