

Impact

An Overview of Current Legal Events of Concern and Interest

Summer 2003

Basic Steps in the Fight Against Identity Theft (Part II)

By: Charles C. Ashdown



“Identity theft” is a relatively new term used to describe the unauthorized taking and use of someone else’s personal information to commit fraud or theft. The most common example of identity theft is a thief’s use of someone else’s name to open and use a credit card.

On July 1, 2003, California passed a law requiring California businesses to advise customers when personal databases may have been compromised. At the national level, the “Notification of Risk to Personal Data Act,” which likewise would require such notification, is currently pending. While such measures may be helpful in alerting customers about potential problems, they only underscore the need for all consumers to take basic measures to keep personal financial information secure, thereby minimizing the risk of identity theft.

“How can personal financial information be compromised?”

Thieves can obtain sensitive financial information about you in a variety of ways. An obvious and common method is by stealing a wallet or purse. Thieves also commonly steal mail containing bank and credit card statements, pre-approved credit offers, telephone calling cards, and tax information. It is not unusual for thieves to rummage through trash to find credit card receipts.

Personal financial information can be used in a variety of ways — to the benefit of the thief and to the detriment of you, the victim. An identity thief may change the billing address on your credit cards so fraudulent charges are sent to a new address without your knowledge (thus preventing you from reporting unauthorized use of the cards). Using your personal information, thieves may open a new credit card account, make purchases, and not pay the bills. Other schemes involve establishing telephone or wireless service in your name. Unfortunately,

when the bills become due, the delinquent account may become your liability. More sophisticated criminals may use your private information to create counterfeit checks or debit cards and then drain your account.

Three simple ways to prevent identity theft

First and foremost, do not disclose personal information to any third party over the telephone, by mail, or on the internet, unless you initiate the contact. The Federal Trade Commission reports many scams where thieves posing as investigators, bank examiners, or credit agencies contact unsuspecting victims and ask for personal information such as date of birth, social security number, and account numbers. Be suspicious of any telephone inquiry, especially if it is unsolicited. If you have questions about the validity of the call, hang up and call back at the number listed on your billing statement. There are reports of internet scams involving unsolicited e-mails requesting personal and financial information, allegedly from one of your internet accounts. Again, if you need to contact an internet merchant or service provider, go to their web site and contact them directly about the inquiry. Do not respond to an unsolicited e-mail seeking personal financial information.

Second, shred or tear up pre-approved credit offers unless you plan to accept them. If you simply discard the offer without tearing it up, a thief can use it to create a fraudulent account in your name. You can opt out of most pre-screened credit offers (and thereby avoid having them sent to you) by calling 1-888-5-OPTOUT (1-888-567-8688).

Third, remove your Social Security number from your driver’s license, checks, and other materials that you carry with you. It is important to know your Social Security number, but you should not carry it with you. Keep your Social Security card in a safe location—not in your purse or wallet—and use your social security card only when necessary to open a new bank account, renew your driver’s license, or apply for a loan.

continued on page 2

In This Issue

Basic Steps in the Fight Against Identity Theft



Ohio Employer Intentional Tort Liability: Are You Covered?



Employer Responsibilities for Employees Returning from Military Service



News of the Firm



Make A Difference (“MAD”) Team



Client Spotlight: Forest Laboratories, Inc.

Other ways to reduce the chance of identity theft include:

- avoid carrying extra checks in your purse or wallet
- put outgoing mail in a collection box rather than in your home mailbox
- promptly retrieve mail from your mailbox
- tear up or shred discarded credit applications, insurance forms, physician statements, checks and bank statements, and expired charge cards
- use updated virus protection, including a firewall program on your personal computer
- if you use your computer for financial purposes such as on-line banking, disable any automated log-in feature that may allow others unauthorized access to your accounts

What if you are a victim of identity theft?

First, contact the fraud department at the three major credit bureaus and request that a fraud alert be placed on your file: Equifax - 800-525-6285; Experian - 800-301-7195; and Trans Union - 800-680-7289. Additionally, request that all creditors contact you by telephone before opening a new account or changing information on any existing account.

Next, order a copy of your credit report and review it for accuracy. Close all accounts that have been tampered with or that were opened fraudulently. Finally, file a report with the local police or the police department in the location where the theft took place. Get a copy of that report and keep it as proof of the crime in case you need it later to prove your loss.

If an account has been opened without your authorization, many merchants will accept an "ID Theft Affidavit" as proof that you are not responsible for the charges. The affidavit, developed by the Federal Trade Commission in conjunction with financial institutions and credit agencies, is in a form that can be used to report information to many organizations and simplifies the process of disputing charges. The form is available online at www.consumer.gov/idtheft. In addition, the FTC maintains an identity theft hotline — 877-IDTHEFT (1-877-438-4338) — to report suspected identity theft and obtain advice about what to do.

While it is impossible to eliminate all risk of identity theft, you can significantly reduce your risk by following these basic rules to safeguard sensitive financial information.

Charles Ashdown is a partner in the firm's Corporate and Business Department. He regularly practices in the area of consumer rights. If you would like more information about identity theft, you may contact Mr. Ashdown at 621-2120.

Employer Intentional Tort Liability: Are You Covered?

By: Thomas P. Glass



Historically, Ohio employers enjoyed limited liability for injuries to employees injured in the course of their employment. The workers' compensation statutes struck a balance between employers and employees. Such laws allowed employees injured in the scope of employment to recover compensatory damages without showing negligence on the part of their employer. The trade-off was that employees were precluded from filing suit against their employers, and the employers' liability was limited to actual compensatory damages.

In 1982, the Ohio Supreme Court created an exception to the liability enjoyed by employers, greatly expanding their potential liability for employee tort claims. In *Blankenship v. Cincinnati Milacron, Inc.*, the Court held that an employee could file suit against his or her employer for intentional torts (and that the employer was not immune from liability if the employee could prove such an intentional tort). The Court reasoned that, in affording limited liability to Ohio employers, the legislature did not envision that employers would be protected from their own intentional acts. The claims recognized by the Court in *Blankenship* became known as intentional torts.

After the *Blankenship* decision, Ohio courts have greatly expanded the class of claims for which an employee may recover against his or her employer. Although the original exception related to an intentional act by the employer, the intentional tort exception to workers' compensation immunity is now expressed in terms of whether the employer has exposed the employee to a dangerous work condition in which injury is substantially certain to occur. Because most cases in this area are fact-dependent, a number of courts have declined to dismiss employee claims and instead have allowed the cases to go to trial by jury. Such cases are very expensive to defend, and verdicts are difficult to predict, making the cases quite risky to Ohio employers. The balance contemplated by the workers' compensation statutes is no longer in place.

In the aftermath of the *Blankenship* case, insurance companies began promoting insurance coverage for intentional tort claims. Such coverage is commonly referred to as "stop-gap coverage." As the law regarding intentional torts evolved, however, insurance companies began inserting exclusions into their stop-gap endorsement forms, eliminating coverage for intentional tort liability. The changes by insurance companies rendered stop-gap coverage meaningless for many employers.

Some insurance companies even issued two different stop-gap coverage endorsements, one providing coverage for intentional torts and the other excluding such coverage. The combination of exclusions and conflicting endorsements proved confusing. Often, employers were unaware of the existence of the exclusions and their consequences until an employee filed suit, the insurance company was notified, and the insurer denied coverage.

continued on page 5

An employer defending an intentional tort lawsuit without insurance coverage faces potentially severe financial consequences. Not only is the employer exposed to the risk of an adverse judgment, but it also must pay its own legal fees in defending the suit.

Because of the potentially serious consequences of facing an intentional tort claim without insurance coverage, it is recommended that Ohio employers conduct a basic review of their insurance policies to determine whether the company is protected. The first step is simply to check with the company's agent or broker to determine if the company has stop-gap coverage. Stop-gap coverage is typically provided by an endorsement to the Commercial General Liability ("CGL") policy. If the company does not have stop-gap coverage, it needs to assess whether the nature of its business exposes it to the risk of suit by an employee injured in the course of employment. The absence of past claims may not be a good measure of the likelihood of future claims since the law has greatly expanded the claims that can be filed.

If the company does have stop-gap coverage, the exclusions in the policy should be carefully reviewed. Insurers typically attempt to exclude coverage for intentional torts by language along the following lines:

This insurance does not apply to:

- i) any injury sustained because of an act committed intentionally or at the direction of any insured; or
- ii) bodily injury sustained due to an action by an insured where injury to the employee was substantially certain; or
- iii) bodily injury sustained due to an Ohio Intentional Tort;

If the company's stop-gap policy contains such language, it is highly likely that the insurer will deny coverage for intentional tort claims against the company.

Any questions about stop-gap coverage and endorsements should be discussed with both the insurance agent for the company and with legal counsel familiar with intentional tort claims and stop-gap insurance.

Tom Glass is a partner in Strauss & Troy's Litigation Department. If you have any questions about Ohio Employer Intentional Tort Liability, please call Mr. Glass at 621-2120.

Employer Responsibilities for Employees Returning from Military Service

By: Paul B. Calico



In recent months, thousands of men and women have been called to serve our country. Fortunately, it appears that large numbers of service personnel will be returning to their civilian jobs in the relatively near future. For others, however, there may be much longer periods of service. Due to the relative infrequency of military action, employers of persons called to service may face new and uncertain employment law issues when their employees return.

The Uniformed Services Employment and Re-Employment Rights Act (USERRA, pronounced "U-Sara") was enacted to provide for the smooth transition of military personnel back into the workforce. The statute provides protection for such employees, prohibiting discrimination based on their military service. Specifically, the Act provides that no person shall be denied employment, re-employment, promotion, or any benefit because of his or her service to our nation. USERRA does not require re-employment, however, if the employee was discharged under other-than-honorable conditions. The statute has a very broad reach, applying to all members of the uniformed services and to every employer in the United States.

Reporting Back to Work

Congress recognized that it is important for businesses to know whether an employee called to military service intends to return to work or not. Thus, USERRA includes specified times within which a returning soldier must report back. Otherwise, the employer need not hold the position open:

Length of Service	Deadline for Reporting Back to Work*
Less than 31 days	Beginning of the next regularly scheduled work period on the first full day following completion of service (taking into account safe travel home plus an eight-hour rest period)
More than 30 days but less than 181 days	Within 14 days after completion of service
Longer than 180 days	Within 90 days after completion of service

* Employees in military service for less than 31 days must physically report. Employees serving longer need only submit an application for re-employment within the specified time.

USERRA allows the employer to request information on the employee's eligibility for re-employment, including details about the date and terms of discharge.

continued on page 6

Terms of Re-employment

Assuming that a service person reports back to work within the required time, USERRA also governs the position that must be offered to the returning employee. The Act embodies the "escalator principle," under which the returning employee is treated the same, for seniority purposes, as if he or she had been continuously employed. The position for which the person is re-employed, however, depends on the length of military service. A returning employee whose length of service was less than 91 days must be promptly placed in the same job he or she would have had if continuously employed. A returning employee whose length of service exceeded 90 days is entitled to the same placement or a position of like seniority status and pay. If the returning employee is not qualified for such a position, USERRA requires the employer to use reasonable efforts to qualify that person for the position (refresher or training courses to update or provide job skills) unless such efforts present an undue hardship to the employer. If the employee cannot become qualified for such a position, the employer must place the employee in a position he or she is qualified to perform, with full seniority.

Employee Rights and Benefits

Under USERRA, returning employees are entitled to all employer-provided benefits, whether based on seniority or not, just as if they had remained continuously employed. For example, the Act contains detailed provisions regarding the rights of returning employees with respect to health coverage and pension plans. Returning service members are to be treated as if they were on a leave of absence during their tour of duty and therefore are entitled to participate fully in all such benefits, subject to certain requirements.

Similarly, although the employer is obviously not required to pay employees while they are in military service, the employees must be permitted, at their request, to receive any available vacation pay for a corresponding portion of their time away. Employers, however, cannot force the employee to use vacation time for military service, so a returning employee who chooses

not to receive vacation pay for military time off may be entitled to a paid vacation soon after returning (subject to the employer's normal rules governing vacations).

One major aspect of USERRA is the job security affording to service personnel who are re-employed following their military service. In a sharp departure from the normal rules under which the employment relationship is "at-will," meaning that either party may terminate the relationship at any time for any reason not contrary to law, the Act precludes employers from discharging such employees except for cause for a period of up to one year, depending on the person's length of service.

Remedies and Enforcement

An employee who suspects a violation of USERRA may file a complaint with the Veterans' Employment and Training Service (VETS) of the Department of Labor, which investigates and attempts to resolve complaints. If such efforts are unsuccessful, the employee can proceed with a private enforcement action. Available remedies include reinstatement, back pay, lost benefits, corrected personnel files, retroactive seniority, pension adjustments, and restored vacation time.

Conclusion

USERRA addresses many aspects of the employer/employee relationship and imposes strict requirements. Ultimately, compliance with the requirements of USERRA will allow businesses to facilitate their employees' smooth transition from serving our nation to being productive members of the corporate world.

Paul Calico is a partner in the Strauss & Troy Litigation Department. If you would like more information about employer responsibilities when employees return from the Military Service, please call Mr. Calico at (513) 621-2120.

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News of the Firm

Attorneys on the Move



William V. Strauss

William V. Strauss, President of Strauss & Troy, has been invited to join the Cincinnati Association, one of Cincinnati's oldest civic groups. Active membership is limited to one hundred community leaders whose common goals are to explore issues of importance to the region and to improve the quality of life in Greater Cincinnati. Historically, the Association has focused on local government, public education, and economic development.



Charles H. Melville

Charles H. Melville was elected President of the Forest of Coldstream Condominium Owners' Association. Mr. Melville has served on the Board for the last three years and was active in updating the Association's Articles and By-Laws, developing an Owner's Handbook, and implementing a long-term financial plan for the Association.



Claudia Allen

After a 15-year hiatus from teaching in the college classroom, **Claudia Allen**, along with attorney Cynthia A. Fazio, will teach a course on Corporate Taxation at the University of Cincinnati College of Law this fall.

The Children's Hospital Medical Center has invited **Thomas L. Stachler** to become a member of the Children's Dental Care Foundation Board of Trustees.



Thomas L. Stachler

Jeremy A. Hayden made a recent presentation entitled "Tax Shelter Regulations: A Practitioner's Perspective" at the Tax Section of the Cincinnati Bar Association. Additionally, Mr. Hayden was named to the Board of Directors of the Cincinnati Real Estate Club, an association of professionals who meet to share experiences, ideology, and trends associated with the commercial real estate industry.



Jeremy A. Hayden

The May/June 2003 issue of Ohio Lawyer featured a letter from **Anthony M. Barlow**, responding to an article using derogatory terms to describe difficult clients. Mr. Barlow urged the Ohio Bar to show professionalism in print and otherwise.



Anthony M. Barlow

ALAN ROSSER CHARACTER AWARD

In 2001, Strauss & Troy established the Rosser Character Award, a scholarship honoring Alan "Chip" Rosser, our partner who died suddenly at age 54. The scholarship is presented annually to the student-athlete graduating from Anderson High School who has demonstrated the strength of character exemplified by Chip Rosser.

This year's Rosser Award was presented to Jamie Roth. Jamie was named co-captain of the Anderson basketball team despite the fact that he was not the star player on the team. In fact, although Jamie's playing time decreased, his teammates were inspired by his steadfast enthusiasm, support, and encouragement for his team.

Jamie's positive attitude pervaded his high school career despite circumstances that might have defeated others. Jamie's mother suffered a brain aneurysm, putting her into a coma followed by many months of rehabilitation. His classmates told us of Jamie's devotion to doing "whatever was needed" for his parents and his two younger sisters, without any concern for what he might have been missing.

Jamie's selflessness and spirit of "giving back" led to his enlistment in the Marine Corps Reserves. He is in boot camp this summer before enrolling as a freshman at the University of Cincinnati this fall.

MAD TEAM UPDATE

After delighting all of the children at Holly Hill Children's Home with customized Easter Baskets, our Make a Difference Team (the "MAD Team") is now in the midst of its annual Summer project — sending inner-city children to summer camp! In conjunction with Riverfront Kiwanis and Inner City Youth Opportunities, the MAD Team will again send 36 children from the inner city to Camp Ernst in Burlington, Kentucky. The campers spend a week swimming, horseback riding, hiking, and having fun at camp. The MAD Team provides each camper with his or her own sleeping bag and a backpack filled with a beach towel, flashlight, camera, and personal care products. Upon arrival at the camp, each child also receives a camp T-shirt, mascot, and vouchers for purchases at the camp store. Riverfront Kiwanis sponsors a grant to the MAD Team each year to help with the Camp Ernst project, and the MAD Team locates eligible children with the help of Inner City Youth Opportunities. As with all MAD Team projects, funding for the Camp Ernst project is provided by Strauss & Troy employees who pay \$1.50 to "dress down" each Friday.

Client Spotlight



Forest Laboratories is a highly successful developer, manufacturer and marketer of ethical branded and generic pharmaceuticals. In the U.S., Forest's branded products are marketed by Forest Pharmaceuticals, and its generic products are marketed by Inwood Laboratories, both of which are subsidiaries

Employing nearly 4,000 people, Forest Laboratories is headquartered in New York City with operations on Long Island and in Jersey City, NJ. Its Forest Pharmaceuticals subsidiary is headquartered in St. Louis with manufacturing plants in St. Louis and Cincinnati. Nicknamed "Plant 2," the Forest Pharmaceuticals facility in Cincinnati is home to several key manufacturing and packaging operations for both branded and generic products.

Over the past several years, Forest's success with the antidepressant Celexa™, combined with the strong performance of products for hypertension, angina and asthma, has enabled the Company to build a strong, diverse pipeline — the wellspring for future growth. In 2002, two very promising products moved from the pipeline to the product line: Lexapro™ for the treatment of major depressive disorder and Benicar™ for the treatment of hypertension. In the first six months following its launch, Lexapro obtained a 10% share of the antidepressant market, which, combined with Celexa's continuing robust sales, gives Forest the number one share of that market.

Underscoring the Company's recent achievements, Forest has received a host of prestigious awards, including:

- A BusinessWeek Top 50 Performer in the S&P 500 index three years in a row, #1 in 2003!
- One of Fortune's 100 Fastest-Growing Companies in America three years running (2000-2002)

- One of Selling Power's Best Companies to Sell for three years in a row (2000-2002)
- A Company to Watch in Working Mother's annual survey of the 100 best companies for working mothers (2002)
- Fastest-growing pharmaceutical company in 2000 (Pharmaceutical Executive)
- Among BestJobsUSA.com's Employers of Choice 500
- A top 100 "Hot Growth" company in America (BusinessWeek)

Thanks to strong product sales and a sustainable pipeline, Forest has achieved steady sales and personnel growth over the past few years. With the recent launches of Lexapro, a powerful, effective and well-tolerated isomer of Celexa™, and Benicar™ (co-promoted in the U.S. with the drug's developer, Sankyo Pharma), Forest looks forward to an exciting period ahead

Forest currently has New Drug Applications (NDAs) under review for memantine (moderate-to-severe Alzheimer's disease), Aerospan® (asthma), lercanidipine (hypertension) and oxycodone/ibuprofen (pain), as well as a Lexapro supplemental NDA for General Anxiety Disorder (GAD). Forest is seeking additional indications for Lexapro, including panic disorder and social phobia, and is also conducting Phase III studies of memantine for neuropathic pain and dexloxyglumide for the treatment of irritable bowel syndrome (IBS).

To learn more about Forest Laboratories and Forest Pharmaceuticals, visit www.frx.com and www.forestpharm.com.