



REPORT FROM COUNSEL

SUMMER 2009

NEW IDENTITY THEFT RULES AFFECT BUSINESSES

Faced with the reality that identity theft continues to cause billions of dollars in losses for individuals and businesses each year, the Federal Trade Commission (FTC) has issued “Red Flag Rules” that are intended to fight the problem by requiring businesses to implement procedures designed to detect and respond to identity theft.

Covered Accounts

The rules apply to financial institutions and creditors with “covered accounts.” The category of financial institutions includes entities such as banks, savings and loans, and credit unions holding “transactional accounts,” meaning a deposit or other account from which the owner makes payments or transfers.

The creditor category has raised some eyebrows because it embraces some businesses that in everyday parlance may not have been considered to be creditors. Basically, a “creditor” is broadly defined as any entity that regularly extends, renews, or continues credit. For example, this means finance companies, automobile dealers, mortgage brokers, and utilities, but it also means nonprofits and governmental entities that defer payment for goods or services.

An account is a “covered account” for purposes of coverage of the

new rules if it is used mostly for personal, family, or household purposes, or if it is an account for which there is a foreseeable risk of identity theft, such as small business and sole proprietorship accounts.

Entities subject to the rules must develop a written policy to identify and detect the warning signs . . . the “red flags” of identity theft. Detection should involve the regular review of accounts, at a minimum. The plan must describe appropriate responses to prevent or mitigate the effects of the crime. There also must be training for staff members, oversight for any service providers, and overarching management of the plan by the board of directors or senior employees of the financial institution or creditor. How extensive a plan must be will vary depending on the size of the entity and the kind of credit accounts it maintains. The new rules also mandate an annual update of the plan.

Red Flags

So just what are those red flags for possible identity theft? An exhaustive list may not be possible, but a supplement to the Red Flag Rules identifies and describes 26 separate red flags. They fall into five broader categories: (1) alerts, notifications, or warnings from a consumer reporting agency; (2) suspicious

documents, including any that have signs of having been altered or forged; (3) suspicious personal identifying information, such as personal information that does not match information from external sources; (4) unusual use of, or suspicious activity relating to, a covered account, such as the use of an account that has been inactive for a long time or, more generally, any sudden and unexplained change in the patterns of activity for an account; and (5) notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts.

The consequences for not complying with the Red Flag Rules are significant. The FTC itself has provided for the potential imposition of monetary sanctions and an FTC enforcement proceeding. An even more far reaching incentive for compliance is not to be found in the fine print of the rules but is no less real: The Red Flag Rules are likely to become the prevailing standard of care for what preventive measures companies are expected to take if they hope to be able to defend themselves successfully in civil lawsuits arising out of identity theft.

COLD FEET COST GROOM \$150,000

Sometimes even the best laid marital plans go astray. Usually when that happens, litigation does not ensue, but there are precedents for a cause of action for breach of a contract to marry. In one such recent case, a jilted “bride to be” recovered a substantial jury verdict from her fiancé after he called off the planned wedding. It was the second time that the same man had balked at marrying the same woman. This time, he had asked her to pull up stakes in Florida, where she then lived and worked, and move to live with him in Georgia. He also offered her a diamond ring and agreed to pay off about \$40,000 in debt that she had accumulated. Only two weeks into the new arrangement, the man called off the wedding, citing his poor health and

apologizing for making promises he would not be keeping.

Despite the canceled wedding, the couple stayed together for a few more months. Then the last straw came for the former “bride to be” when she found her boyfriend with another woman. He claimed that he had started his romance with the second woman only after the wedding was canceled, but this claim was belied by evidence that he had given that woman \$500 just before his ill fated marriage proposal to the plaintiff.

The plaintiff sued for breach of contract, seeking damages for financial and emotional harm. While it may seem that the most obvious injury in such cases is emotional in nature, in this case all but a small amount of the jury verdict was

attributable to the value of the employment package that the plaintiff had given up to be with her fiancé. After coming to Georgia, she had struggled to find work and ultimately settled for a much less attractive job after the breakup.

No doubt it did not make a good impression on the jury that the boyfriend had broken the news that there would be no wedding by leaving his fiancée a note in the bathroom. This fact dovetailed nicely with the woman’s attorney’s closing argument, which could be summed up as “He’s a cad.”

EMAILS CAN MODIFY CONTRACTS

We send emails so casually and with such informality, even in the business environment, that it is easy to forget that they may carry significant legal consequences. It is only prudent to bear in mind that even emails written in the most conversational style may create legal obligations no less binding than a more conventional written agreement laden with legalese and signed with all formalities.

If a business wants to entirely avoid the possibility of having emails treated as binding amendments to existing contracts, the best approach is to be as clear and direct as possible on the subject by including language in contracts to the effect that emails do not count as signed writings for purposes of any contract amendments.

Cautionary Case

A recent cautionary case on point involved an individual who sold his public relations firm to a global communications

company. The deal included an employment contract under which the seller was to continue as chairman and CEO of the new company for three years. Soon, the new company was losing money and the seller was presented with the option of either leaving or taking on new responsibilities.

Email then entered the picture when an employee of the communications company sent yet another option to the seller in an email that spelled out how the seller would allocate his time. The seller replied by email that he enthusiastically accepted that proposal. For his part, the representative of the communications company replied by email that he was thrilled with the seller’s decision to accept the new offer. In both emails the sender had typed his name after the message.

The seller later had a change of heart and sued to enforce the terms of the original employment agreement. An

appellate court ruled against him on the ground that the exchange of emails on the new employment proposal constituted a binding amendment to the employment agreement. This was so even though the original agreement required that any changes had to be in the form of signed writings.

The court reasoned that the emails effectively were signed writings because the parties’ names appeared at the end of the emails, signifying an intent to authenticate the preceding contents of the messages. Likewise, the emails also were signed writings for purposes of the Statute of Frauds, which requires certain contracts to be in writing in order to be enforceable. In short, when the seller and his email correspondent clicked “send” and “reply,” they were sealing a new deal that the seller could not avoid even though it was in an electronic form.

REPORT FROM COUNSEL

SPRING 2009

ROTH 401(K) S

It has become more common for employers to offer not only conventional 401(k) retirement plans, but, since they became available in 2006, also Roth 401(k) plans.

For 2009, an employee can put away a total of up to \$16,500 in a 401(k) plan. If the employee is at least 50 years old or will be before the end of the year, the maximum contribution rises to \$22,000 because of a "catch up" contribution of up to \$5,500. The total contribution may be allocated between 401(k) and Roth 401(k) accounts. In fact, the prevailing view is that it is a good idea to have some money in both types of plans because doing so will yield benefits from a diversified exposure to taxes.

From an income tax standpoint, a

401(k) and a Roth 401(k) are mirror images. Contributions to a traditional 401(k) come from pretax earnings, and tax is deferred on that money and the income earned by the account until money is withdrawn. By contrast, a Roth 401(k) is funded up front with taxable earnings, but then all withdrawals are tax free after the account exists for 5 years and the account holder reaches the age of 59 1/2.

If the tax bracket were to stay constant throughout a taxpayer's working life and into retirement, there would be little or no financial advantage of one plan over the other. In most cases though, either through changes in the Tax Code or due to changing income levels, or both, over the years a taxpayer moves among the various tax brackets. The direction in

which the taxpayer is headed on this scale largely determines whether a conventional 401(k) or a Roth 401(k) makes more sense.

If you anticipate that your tax rate is now higher than it will be in the future, a traditional 401(k) is probably the right choice. A typical example involves the person nearing retirement who is currently in the last few peak earning years, but who soon expects to have lower income during retirement. On the other hand, a young adult worker just getting started may well be in higher tax brackets in later years, making the Roth 401(k) more attractive. For that individual, the future tax free withdrawals from the Roth 401(k) will bring greater benefits.

RELIGIOUS LAND USE LAWSUITS

The land use portion of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) was enacted to prevent discrimination by the government against the use of real property by religious organizations. On its face, the wording of the statute may appear to apply to circumstances that arise infrequently, but many churches and other religious institutions have used the RLUIPA to get their way in zoning standoffs with local governments.

The RLUIPA prohibits the government from imposing or implementing a land use regulation in a manner that imposes a "substantial" burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Thus, a complaining party has the considerable initial burden of showing that the land use regulation substantially burdens the exercise of religion, and is not merely expensive or inconvenient. If that hurdle is crossed, however, the government may well have a difficult time showing both the "compelling" governmental interest and that it has selected the least restrictive means to

advance that interest.

In one RLUIPA case, a village zoning board violated the RLUIPA when it denied an application for a special use permit allowing a private religious day school to construct a classroom building on its campus. The expansion project was a building on, and conversion of, real property for the purpose of a religious exercise, within the meaning of the RLUIPA, given that the rooms that were planned and the facilities to be renovated would all be used, at least in part, for religious education and practices.

Even while ignoring a substantial burden imposed on the school's religious exercise, the zoning board did not act to further any compelling state interest, as was shown by the lack of evidence for its stated reasons for denying the permit. Instead, the board had acted with undue deference to the opposition of a small group of neighbors. Even if some compelling state interest was involved, the board refused to consider approving the application subject to conditions, and thus had not used the least restrictive means available to it.

Of course, religious organizations have not batted a thousand when they have invoked the RLUIPA. Sometimes even similar cases have had opposite outcomes, making any predictions

difficult. In another case of a growing church that had plans to expand the church facilities, including a school on its property, a federal appellate court upheld a township's decision to deny the church's application for a special use permit. The court found that the township's denial of the church's application to build a structure in excess of 25,000 square feet on its property did not impose a substantial burden on the church's religious exercise, so as to violate the RLUIPA.

The denial would require the church to incur increased expense to accomplish its goal of building a significantly larger church and school, and to endure increased inconvenience if it were not able to build a facility of the desired size, but, in the court's view, nothing the township had done required the church to violate, modify, or forgo its religious beliefs or precepts, or to choose between those beliefs and a benefit to which the church was entitled. That the church was still free to carry out all of its missions and ministries, just not on the scale it desired, foreclosed any finding of a "substantial" burden.

ESTATE PLANNING FOR VACATION HOMES

Whether it is a palatial estate where Rockefellers and Vanderbilts would feel at home or a rustic cabin in the woods complete with an outhouse, a family vacation home often carries sentimental value that doesn't show up on financial ledgers. That is all the more reason why owners of such homes should plan for the orderly transfer of the home for future generations. With the help of some professional guidance, owners can choose from a variety of options tailored to particular situations and priorities.

- Outright sale of the property to a third party is simplest, but be prepared for substantial capital gains if the property has been in the family long enough to appreciate in value.
- A simple bequest can be used to keep the home in the family, but, by itself, it may not address issues such as use and maintenance.
- A trust, in particular a Qualified Personal Residence Trust, has some tax benefits. The grantor gifts the property but retains a right to use it for a definite term. The value of the gift is calculated as the value of the property, less the retained interest. However, if the grantor does not outlive the retained term, the property will be included in the grantor's estate.
- A limited liability company (LLC) has the benefit of protecting assets generally. If someone is injured on the property, the owner's liability would be confined to the ownership interest in the property.
- A partnership has the advantage of a formal structure, but each partner would have to contribute.

The issues that arise most often for second and subsequent generations concern how to allocate both the benefits and the burdens of the vacation home, that is, the use of the home and the expenses of the home, including maintenance, insurance, and taxes. The benefits and burdens can be spelled out in writing in as much detail as is desired, but it is not advisable to leave these matters to chance. There is the potential for discord and bruised feelings in even the most congenial families if, for example, one sibling is left out of the prime vacation times while shouldering more than his or her share of costs for maintenance and repair. Parents might head off at least some of these issues by setting up an endowment to cover ongoing expenses for the home.

Looking a bit farther down the road, whatever legal forms are used should provide a means by which one or more of the family members can sell his or her interest in the home to the remaining family members. Considering that there may be honest disagreement as to the property's value, it makes sense to look for consensus by using two separate appraisals, one arranged for by the selling family member and one by the remaining owner or owners.