<u>Identity Theft Victims' Rights</u>

Micah S. Adkins | Attorney

MicahAdkins@ItsYourCreditReport.com

2 Perimeter Park South

Suite 405 E

Birmingham, Alabama 35243

(P) 205-206-6718 | **(F)** 205-208-9632

www.ItsYourCreditReport.com

Course Description: This is an introductory course on identity theft victims' rights.

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Micah S. Adkins
The Adkins Firm, P.C.
Birmingham – Dallas – Houston – Nashville

Micah Adkins is a consumer advocate. He is the founding member of The Adkins Firm, PC., which maintains offices in Birmingham, Alabama, Dallas, Texas, Houston, Texas and Nashville, Tennessee. Mr. Adkins earned his Bachelors of Science degree from the University of Texas, at Dallas, with honors (*cum laude*), in 2000. He earned his juris doctorate from the Cumberland School of Law, at Samford University, in 2005.

Mr. Adkins is admitted to the Alabama and Texas Bar. He is also admitted to the United States Court of Appeals for the Fifth, Ninth and Eleventh Circuits and to all federal district courts in Alabama, Colorado and Texas. He is also a member of the Eastern District of Michigan and the Western District of Tennessee. Mr. Adkins has been admitted by motion in various district courts, including California, Florida, Georgia, Illinois, Indiana, Kentucky, Mississippi, New Jersey, Oregon, Pennsylvania and the District of Columbia.

Mr. Adkins' practice focuses on the representation of identity theft victims and consumers who have credit or background report errors. His practice is 100% civil litigation in federal court, primarily under the Fair Credit Reporting Act (FCRA), individually and on class wide bases.

Mr. Adkins represented the named class representatives in numerous certified class actions, and he currently represents the named class representatives in statewide and nationwide putative consumer class actions.

Mr. Adkins' consumer advocacy has been recognized by the members of the Bar, including the Birmingham Bar Association where he was named as a Top Consumer Lawyer in 2012, 2013, 2014 and 2016. Super Lawyers also recognized him as a Rising Star in 2014 and 2015 and as a Mid-South Rising Star in 2016 and 2017.

He is regularly invited to lecture on federal consumer protection issues by professional organizations, including the: Alabama Bar; Birmingham Bar; Dallas Bar; Florida Bar; Houston Bar; Huntsville/Madison County Bar; Montgomery Bar; and National Association of Consumer Advocates.

Mr. Adkins is a member of the Alabama Association for Justice; Birmingham Bar Association, Collin County Bar Association, Dallas Bar Association, Houston Bar Association and the National Association of Consumer Advocates.

1. Overview of the Identity Theft Problem

Identity theft is a big problem – for our clients and each of us. In fact, identity theft surpassed drug trafficking as the number one crime in America more than a decade ago. About one in 700 identity theft complaints to law enforcement results in an arrest.

Large scale data breaches have become the norm. Michaels, Home Depot, Target and Uber are just a few of the recent breaches which made news. Likewise, Equifax recently announced 145 million consumers in its database became the latest victims of identity theft.

Identity thieves obtain consumer's personal identifying information ("PII") in low-tech and high-schemes. For example, thieves may obtain PII by stealing victims' mail or trash. Mail may include promotional credit offers, checks, credit/bank statements or other financial information. Likewise, trash may include PII, such as discarded explanation of benefits or financial statements.

Victims often do not discover the theft until after the fact. Some identity theft victims discover the theft when they are denied credit. Others learn of identity theft from dunning phone calls for debts that they did not incur or when they do not get jobs because background reports include crimes they did not commit.

Identity theft is not a victimless crime. Consumers credit scores plummet and victims' often spend hundreds of hours trying to clear their names. Others are unable to move forward, whether that means obtaining a job, housing or employment, due to fraudulent information on their consumer reports.

2. Common Fact Patterns

Identity theft victims come in many different flavors. Victims may have their PII used to open new accounts or takeover existing accounts, such as debit or credit cards. While others may have their PII used to gain employment or housing. Identity thieves may also use PII to file fraudulent tax returns or obtain housing.

So how does someone know whether they are a victim of identity theft?

1. Account, PII or inquiries on credit reports that do not belong to the victim
2. Criminal history that does not belong to the victim
3. Employment wages earnings reported by employers' other than the victims' employers
4. Tax returns intercepted
5. Unauthorized credit card/debt card charges
6. Stolen mail
7. Forged checks
8. Medical procedures or claims that do not belong to the victim

9. Fraudulent school loans
10. The list goes on and on

Overview of the FCRA

The Fair Credit Reporting Act, 15 U.S.C. §§1681, *et seq*. ("FCRA"), provides identity theft victims with rights and remedies under federal law. First enacted in 1970, the FCRA was enacted to increase the accuracy of consumer reports – commonly referred to as credit reports. Specifically, Congress found that:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. §1681.

The three primary purposes of the FCRA pre-FACTA:

1. Accuracy of credit reports
2. Privacy safeguarding consumers' credit and personal identifying information
3. Disclosure - showing consumers the information that is in their file

The FCRA's Title Can Be Misleading:

A consumer report is:

[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

15 U.S.C. §1681a(d). In other words, a consumer report is any communication that is used to determine the eligibility for credit, insurance, employment and any other permissible purpose.

The FCRA covers:

- credit reports to banks, credit card companies, mortgage lenders, and debt collectors;
- reports sold to insurance companies for underwriting;
- background screening checks such as criminal or public records reports sent to employers;
- bad check writing history;
- tenant screening, residential lease history; and
- “no report” returned may be a report, too.

The FCRA applies to consumers and is a consumer protection statute. A consumer is defined as an individual. 15 U.S.C. §1681a(c). The FCRA also applies to:

- Credit reporting agencies (CRAs): e.g. the “Big 3” - Trans Union, Equifax and Experian
- Specialty CRAs, such as background screening companies, including LexisNexis
- Furnishers, such as banks, credit card companies and debt collectors
- Users: typically, the same as the furnishers

§1681e(b) MAXIMUM POSSIBLE ACCURACY

A consumer reporting agency must follow “reasonable procedures to assure maximum possible accuracy of the information” it reports.

- Need a report with inaccurate information to bring a claim.
- Objectively verifiable as inaccurate

§1681i DUTY TO REINVESTIGATE DISPUTED INFORMATION

A consumer reporting agency must reasonably and timely reinvestigate any information disputed by a consumer.

- CRA must notify furnisher of the dispute within 5 days.
- CRA must provide furnisher with all relevant information received from the consumer.
- CRA must review and consider all relevant information provided by consumer.
- CRA must delete or modify information that is found to be inaccurate, incomplete, or cannot be verified.
- CRA must send consumer written results of reinvestigation.

§1681g - INFORMATION PROVIDED TO CONSUMERS

Upon request of a consumer, a CRA shall clearly and accurately disclose:

- all information in the consumer's file at the time of the request
- the sources of the information
- identification of each person who procured a consumer report for employment purposes within the previous 2 years, and for any other purpose within the previous year
- a record of all inquiries received within the previous year that identified the consumer in connection with a transaction that was not initiated by the consumer
- Hide the first five digits of the consumer's Social Security number upon request.

§1681s-2(b) – FURNISHERS' DUTY TO "INVESTIGATE"

- Furnisher must investigate information disputed by a consumer upon receipt of a dispute notice from CRA.
- Investigation must be reasonable and timely.
- Furnisher must review all relevant information sent by CRA.
- Furnisher must report the results to CRA.
- If furnisher finds the information is inaccurate or incomplete, it must:

    -report results to all CRAs to which it furnished the information,

-delete or block the reporting of that information to CRAs.

- Furnisher must inform CRA if consumer disputes the account
- Investigation must be completed within 30 days.
- No private cause of action if consumer makes direct dispute to furnisher.

FACTA

In 2003, the FCRA was amended by the Fair and Accurate Credit Transactions Act, known as FACTA. The industry wanted to amend the FCRA in order to address the expiration of preemption of state laws, which would have taken place on January 1, 2004. 15 U.S.C. §1681t(d). Congress sought to address the identity theft epidemic. H.R. Rep. No. 108-263, at 25 (Sept. 4, 2003).

The FACTA amendment was passed in 2003 with certain provisions becoming effective in 2004. In the statement provided by the president during the signing of the bill, the president declared:

> This bill also confronts the problem of identity theft. A growing number of Americans are victimized by criminals to assume their identity and cause havoc in their financial affairs. With this legislation, the federal government is protecting our citizens by taking the offensive against identity theft.

KEY FACTA AMENDMENTS

§1681j(1)(A) – FREE ANNUAL DISCLOSURE RULE

- Consumers may request a credit report from each CRA
- 12 month time period
- CRA may not charge for report

§1681g(e) - INFORMATION AVAILABLE TO ID THEFT VICTIMS

- Victim may request, in writing, the application and business transaction records
- Victim may be required to provide personal identifying information and police report or fraud affidavit
- Business entity must provide within thirty (30) days of receipt of request to:
  -the victim
  -Federal, State or local law enforcement specified by the victim

-any law enforcement agency investigating the identity theft and authorized by the victim to receive the records

- No private cause of action if business fails to comply with victim's request

§1681c-1 – FRAUD ALERTS & ACTIVE DUTY ALERTS

- **Initial Fraud Alert – 90 Days**

  - Consumer may request CRA to add an Initial Fraud Alert if believes he/she is a victim of fraud or identity theft

  - Nationwide CRA notified of fraud alert must notify other 2 nationwide CRAs

  - CRAs must include the fraud alert on any consumer report

  - Entitles consumer to a free credit report from each CRA
  -CRA must provide to consumer within three (3) business days of receipt of request

- **Extended Fraud Alert (7 Years)**

  - Initial Fraud alert time period will be extended upon CRA's receipt of an identity theft report

  - Nationwide CRA notified of fraud alert must notify other 2 nationwide CRAs

  - Consumer is entitled to 2 free credit reports per year

  - CRA must exclude consumer from promotional lists for 5 years

- **Active Duty Alerts**

  - Consumers who are active duty military may request active duty alert

  - Remains on file for 12 months

  - CRA must exclude consumer from promotional lists for 2 years

- **Reseller's Duties**
  -Include fraud alert or active duty alert in any consumer report

§1681c-2 – BLOCKING INFORMATION FROM IDENTITY THEFT

- CRA must block reporting of information the consumer identifies as resulting from identity theft upon the receipt of:
  - Appropriate proof of identity
  - Copy of an identity theft report
  - The information disputed by the consumer as a result of identity theft
  - A statement by the consumer that the information is not related to any transaction by the consumer.
- The information must be blocked within 4 business days after receipt
- CRA must promptly notify the furnisher of the blocking

§1681s(f) REFERRAL OF FRAUD COMPLAINTS

- Each nationwide CRA must refer to other nationwide CRAs:
  - Any consumer complaint alleging identity theft
  - Any request for a fraud alert
  - Any request for blocking

§1681c(g) – Truncation of Credit & Debit Card Numbers

No person who accepts credit cards may print on the receipt provided to the cardholder at the point of sale:

- more than the last 5 digits of the card number; or
- the expiration date of the card

This provision does not apply to receipts that are:

- handwritten; or an
- imprint of the card

In 2008, Congress enacted the Credit and Debit Card Truncation Clarification Act. The amendment created immunity for willful non-compliance by merchants who printed the expiration dates before June 3, 2008. After June 3, 2008, merchants may be liable for willful non-compliance pursuant to §1681c(g). *See* §1681n(d).

<u>§1681s-2(a) Furnisher Duties Upon Notice of Identity Theft</u>

- Furnishers must have reasonable procedures to respond to fraud blocks from CRAS
- Furnishers must have reasonable procedures to prevent re-furnishing blocked information
- Furnisher may not furnish information to a CRA that the furnisher has received a direct notice from the consumer and an identity theft report
- No private cause of action under this sub-section

<u>§§1681n and 1681o Liability for Non-Compliance</u>

- Any person who is negligent in failing to comply with the FCRA is liable for actual damages, attorney fees and costs.
- Also, punitive damages and statutory damages ($100 to $1,000) for willful violation. § 1681n. "Willful" includes reckless disregard. *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007).
- CRAs may be liable for violations of several FCRA provisions
- Furnishers are liable only for violations of a few provisions, such as §1681b and §1681s-2(b).
- Statute of limitations is the earlier of 2 years after ***discovery of the violation***, or 5 years after the violation. §1681p
- Preemption: state statutory and common law claims may be preempted. §1681h(e) and §1681t.

<u>§1681o Actual Damages</u>

- Denial of credit
- Increased cost of credit
- Decrease in credit score
- Lost opportunity to obtain credit: failure to receive unsolicited offers
- Damage to reputation
- Reputation in profession or among peers
- Loss of financial independence: useful for women and young adults

- Invasion of Privacy
- Emotional distress, embarrassment, frustration
- Physical symptoms: headache, loss of sleep, nausea, crying, irritability
- Interference with normal and usual activities, including work

§1681n Statutory and Punitive Damages

The plaintiff need only prove a reckless disregard of the consumer's rights under the FCRA in order to obtain statutory or punitive damages. *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007).

- Statutory damages $100-$1,000
- Punitive damages. *See Brim v. Midland Credit Management*, 795 F.Supp. 1255 (N.D. Ala. 2011).

3. ID Theft Victims' Rights & Remedies Under Alabama Law

Alabama law also provides right and remedies under law. For example, banks made be held liable for the negligent extension of credit. *See Patrick v. Union State Bank*, 681 So. 2d 1364 (Ala. 1996)

Likewise, pursuant to the Alabama Consumer Identity Protection Act, identity theft victims may be entitled to actual or statutory damages, plus attorneys; fees and costs. Ala. Code. §§ 13A-8-192, *et seq*.

4. Question & Answer

NOTES