

Spring 2004

A FACT You Should Know

By Con Chapman

Identify theft – the unauthorized use of your personal information and credit – is the fastest-growing crime in America.

In 2001 over 500,000 people were identity theft victims, and that number jumped to 9.9 million in 2003 – a twenty-fold increase in two years.

The reason? It is much easier for a thief to use your identity to steal from merchants than it is to break into your house.

In the simplest form of identify theft, someone obtains enough of your personal information to acquire a credit card, uses it for a month or two and then throws it away once you get the bill.

However, credit card charges represent only a small portion of total identity theft losses, since liability for unauthorized charges is capped at \$50 per card. Sophisticated identity thieves now use purloined information to obtain car loans and mortgages, and even earn wages that are taxed to your social security number.

Losses from identity theft also include the time and money spent in cleaning up your credit record. By one estimate, the average victim spends \$1,374 and 175 hours to get his or her good name back once an identity thief strikes.

Perhaps the most serious harm caused by identity theft is the damage that it does to your credit record. When unauthorized credit cards and loans are added to the consumer debt that an individual carries in order to enjoy his or her current lifestyle, the resulting picture is one of an overextended borrower to whom no one would lend money. Unless you regularly check your credit report, you may not know that your identity has been stolen until you try to buy a car or refinance your mortgage and are turned down.

However, there is some good news to report on the subject of identity theft.

*Con Chapman
is a Partner
in the Firm's
Finance,
Corporate and
Bankruptcy
Groups.*



On January 1st of this year, the federal Fair and Accurate Transactions Act (FACT Act) went into effect. The FACT Act contains the following tools you can use to protect yourself from identity theft.

“One-Call” Notice of ID Theft

The FACT Act enables you to notify all three major credit bureaus (Equifax, Experian and TransUnion) of ID theft with a single call to one of them. This means that your credit won't be impaired just because you didn't know that there were three credit bureaus to call, or how to reach them.

Ban on Reporting Negative Credit Data

Until the passage of the FACT Act, credit bureaus were not prohibited from re-inserting false or negative information stemming from ID theft in a consumer's credit report. Thus, an ID theft victim could spend hours on the phone removing negative information from one credit bureau's records, only to have it re-appear if another credit bureau reported the same information later.

Stronger “fraud alerts”

While consumers have previously been able to give credit bureaus “fraud alerts” when they suspected that someone had stolen their personal information, banks routinely ignored such notices and continued to issue new credit cards in their hunger for new accounts. Now, once a consumer

reports a suspected ID theft, lenders must give the individual notice before opening a new account in his or her name.

The FACT Act is not perfect. For example, some commentators think the law should have immediately barred merchants from printing credit card numbers on charge slips. This would protect people from “dumpster divers” and unscrupulous employees who take shoppers' credit card numbers from merchant copies of credit card paperwork. Instead, Congress gave merchants until 2007 to adopt this practice.

The FACT Act may also overrule state laws that permit individuals to “freeze” their credit if they suspect someone has stolen their identification. The consumer lending industry, which must swallow much of the bad debt that is run up through identity theft, prefers uniform national rules rather than conflicting state laws.

If you think identity theft is something that happens to someone else, you may be right – at least for now. Our experience, however, is that individuals victimized by identity thieves are often those who feel most secure in their daily lives because of the protections that wealth provides. We have already assisted a number of clients in responding rapidly to identity theft and are prepared to help you as well. ■

In this issue

A FACT
You Should Know

After 40 years – A New
Massachusetts Corporate Law

The ROI
from Employee Training

2004 Estate Planning Update

After 40 years – A New Massachusetts Corporate Law

By Deanna M. Silva
and William C. Donovan

Businesses incorporating in Massachusetts have been relying on a business corporations statute that was adopted 40 years ago. This statute has been seen as somewhat antiquated given the changing face of the economy and business organizations in general. Opting for an extreme makeover of the statute, rather than merely a facelift, a task force affiliated with the Boston Bar Association wrote an entirely new statute which was enacted by the Massachusetts legislature and approved by Governor Romney in November 2003. Effective July 1, 2004, the new statute, entitled the “Massachusetts Business Corporations Act”, Massachusetts General Laws Chapter 156D (MBCA), replaces the existing statute, the Business Corporation Law, Massachusetts General Laws Chapter 156B. The MBCA will apply not only to newly formed Massachusetts corporations, but also to all existing Massachusetts corporations.

The MBCA provides corporations with greater flexibility in both structuring the initial corporate governance and in day-to-day business operations. However, in order to take advantage of these provisions and the greater flexibility allowed under the MBCA, existing Massachusetts corporations will be required to amend their articles of organization and/or by-laws; merely doing nothing will not avail existing corporations of the MBCA’s provisions. Following are certain key highlights of the new statute (although this is by no means an exhaustive list).

Electronic Communication and Records are Now Recognized

Notices of shareholder or director meetings, waivers of notice and proxies that were previously required to be in paper format may now be delivered by electronic means, including e-mail. The e-mail address must be provided to the corporation by the receiving shareholder or director. This change eliminates the delays corporations often faced in the past where prompt shareholder or director action or approval was necessary but was difficult to obtain

*Deanna Silva
is an Associate
in the Firm’s
Corporate
Group.*



*William
Donovan is
an Associate
in the Firm’s
Corporate
Group.*



due to the geographical location of shareholders and directors. This is one example of where a corporation should amend its by-laws to take advantage of the flexibility of the MBCA. Since the soon-to-be-replaced Section 156B does not recognize electronic communications, virtually all current by-laws provide for written notice to be sent by first-class mail or delivered to a residence and do not contemplate notice by e-mail.

The old Act allowed directors to meet via teleconference equipment. The MBCA now allows private (but not public) corporations to hold “virtual” shareholder meetings by means of remote communication, such as telephone conference, video conference, Internet chat rooms or their equivalent.

Further, corporations may now retain certain corporate records in electronic format so long as they are readily accessible within a reasonable time and convertible into hard copy format. The MBCA explicitly permits electronic corporate filings over the Internet with the Secretary of the Commonwealth’s office, an accepted practice since 2001.

Shareholder Votes

Under the old Act, certain fundamental changes to corporate structure required at least two-thirds shareholder vote. Also, if shareholder approval of corporate action was in writing, the approval had to be unanimous. Under the MBCA, shareholder written consent can now be less than unanimous provided that the corporation’s articles of organization so permit. In addition, it is now possible under the MBCA to reduce to a simple majority the requirement of two-thirds shareholder vote for certain fundamental changes to the corporate structure. A corporation must

continued on page 4

Recently Published Articles

Articles

**Giving Inter Partes
Reexamination a Chance to Work,**
by Frederick C. Williams, *American
Intellectual Property Law Association
(AIPLA) Quarterly Journal*, Volume 32,
Number 2, page 1, Spring 2004

**Preferred Stock Positions in
Distressed Companies:
The Secured Debt Alternative,**
by Cornelius J. Chapman,
VC Experts.com, February 10, 2004

**Flexibility, Creativity Dominate
Business Act,** by Deanna M. Silva,
Women’s Business Boston, March 2004

**‘Lawrence’ has little effect on taxes,
for now,** by Howard D. Medwed, *The
National Law Journal*, March 1, 2004

Recent Client Advisories and Updates

**Offer Letters, B&L Employment
Solutions Update,** April 2004

Previous Issues of Focus

WINTER 2004

**Same-Sex Marriage: *Goodridge
v. DPH*,** by Lisa Madeleine Cukier

**Stock Options –Under Attack!
Again,** by Andrew J. Merken

**Who Owns Employee Inventions?
The Employer or the Employee?,**
by Mark Schonfeld

**Health Care Proxies – Preparing for
the Unexpected,** by Norman C.
Spector and Dianne L. Frade

continued on page 3

Please visit the publications pages of our web site (www.burnslev.com) to view more articles, advisories and alerts. If you would like a copy of any of these publications, please contact Angeline Mistretta at amistretta@burnslev.com. ■

The ROI from Employee Training

By Renee Inomata

To train or not to train. Because most companies are driven by return on investment (ROI), training employees on proper workplace behavior is often not a priority, since it means dedicating financial resources to the training and having employees spend work hours in training and not producing a product or service. Many companies, however, have learned the need for and value of such training the hard way.

In Massachusetts, during the last two years, in virtually every case before the Massachusetts Commission Against Discrimination (MCAD) in which the employer was found to have engaged in unlawful harassment or discrimination, the remedy included back pay and emotional distress damages (usually starting at \$10,000), with interest at a rate of 12% per annum from the date the complaint was filed until the damages were paid, and an attorneys' fees award. Most remedies also included some form of training, often annual training of at least three hours in length for non-supervisory employees and at least six hours in length for supervisory employees, that must be repeated annually for a period of five years.

At the federal level, since the twin cases of *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), federal courts have looked to the employers' efforts in preventing and addressing harassment and discrimination complaints in determining (i) whether or not the employer is liable for the acts of its supervisory employees; and (ii) whether or not the damage awards should be decreased, even where employers were found liable for their supervisor's acts. Although many states have not adopted this defense, a few states have advanced the law at the state level, at least in theory, to permit employers to assert an Ellerth/Faragher-type affirmative defense.

Even the MCAD, which has a reputation for being biased in favor of employees, has not ignored the elements of the affirmative defense in assessing liability and/or damages to an employer for its supervisory employee's conduct. In fact, Massachusetts General Laws, chapter 151B, encourages employers to conduct education and training programs on sexual harassment and discrimination

Renee Inomata is Co-Chair of the Firm's Labor, Employment and Employee Benefits Group.



prevention. Further, the MCAD's Sexual Harassment in the Workplace Guidelines emphasizes that "an employer's commitment to providing anti-harassment training to its workforce may be a factor in determining liability or the appropriate remedy [MCAD, "Sexual Harassment In The Workplace Guidelines," Section VB, issued October 2, 2002]." The footnote accompanying this statement specifically states that "[i]n court cases where punitive damages may be sought, evidence of training may also mitigate damages [Id., at n. 85]."

In Connecticut, training is required for employers with 50 or more employees. It must last for two or more hours for supervisory employees, must be conducted in a "classroom-like" setting that permits participants to interact with the presenters by asking questions and receiving answers, and must be provided for new supervisors within the first six months of their employment. [Regulations of Connecticut State Agencies, Section 46a-54-204.]

In some cases, the employer's failure to train its employees can be deemed to be a "reckless indifference" of the law that warrants an award of punitive damages. However, where proper training is conducted, employers may escape liability for its employee's harassing conduct, or, at the very least, escape a punitive damage award even if it is found to be liable.

In addition to the potential savings in damage awards and prevention of claims being brought, there are other advantages to companies in voluntarily providing training to create a workplace environment free of discrimination and harassment. These advantages include the following: employer productivity is likely to increase; supervisors are likely to spend less time embroiled in harassment and discrimination complaints; and the employer is likely to be susceptible to fewer lawsuits – resulting in a significant return on investment that is often overlooked by employers.

Although an employer cannot control whether or not the employee who was allegedly subject to the sexually harassing behavior takes advantage of the preventive or corrective opportunities that the employer provides, the employer certainly controls the "reasonable care" that it takes to prevent and correct promptly any discriminatory behavior of its supervisory employees. At a minimum, every employer should (1) have a written policy that follows their respective state's model anti-harassment and anti-discrimination policy; (2) distribute it annually to all of its employees; (3) periodically train all employees on its policies and preventing and correcting harassing and/or discriminatory conduct in the workplace; and (4) periodically train its supervisory employees on preventing, identifying, reporting, investigating and correcting harassing and/or discrimination conduct in the workplace. ■

Recently Published Articles

continued from page 2

FALL 2003

Cost-Effective Benefits for Part-Time Workers,
by Evelyn A. Haralampu

Constructive Eviction in Commercial Leases,
by Paul R. Mastrocola

Don't Forget Your E-mail: The Need for Electronic Document Retention Policies,
by Victoria L. Schmidt

Fees Increase in Massachusetts... But for a Client, Some Relief,
by Tracy W. Klay

Burns & Levinson LLP is a leading full-service law firm. For over 40 years we have served a diverse group of individuals and corporations in all industries. The firm operates with an entrepreneurial spirit, like many of our clients, and uses a multi-disciplinary approach to achieve our clients' goals.

Building relationships with and for our clients for more than 40 years.

Boston, MA • Providence, RI • Washington, DC
Hingham, MA • Wellesley, MA

2004 Estate Planning Update

By Clifford R. Cohen

2004 has brought about another set of scheduled gift and estate tax changes which were built into the federal and state tax law revisions enacted in 2001 and 2002. Depending upon your individual situation, the new tax rules may necessitate amending your wills and trusts to take maximum advantage of these changes.

On the federal level, for the first time since the estate and gift taxes were "unified" in 1976, the cumulative exemption amount for gifts made during life is different from the estate tax exemption. The lifetime gift tax exemption stays frozen at \$1,000,000. However, the estate tax exemption for 2004 (and 2005) has risen to \$1,500,000. That means a married couple can now shelter a total of \$3,000,000 from the estate tax over both deaths by fully utilizing both of their estate tax exemptions.

The Massachusetts *state estate tax* exemption has also increased, but the smaller amount of the increase has enlarged the "spread" between the federal and state exemptions. For 2004 each individual can pass \$850,000 to the next generation without tax. (Rhode Island still exempts only \$675,000 per individual, and unlike Massachusetts, no scheduled increases

*Cliff Cohen
is Chairman
of the Firm's
Trusts and
Estates
Group.*



are built into the state law.)

The larger spread makes it especially important for married couples to have their documents reviewed, because without the correct provisions in the estate plan, the spread can be taxed on the death of the first spouse. A special tax election authorized by Massachusetts and Rhode Island allows the executor to prevent this if the necessary language is present in the will or trust. For a death in 2004, the inability to make the election may in some cases cause an inadvertent tax of \$64,400 for a widow or widower who thought the deceased spouse's plan was engineered to achieve "zero tax".

Neither Massachusetts nor Rhode Island has a gift tax. Therefore, individuals who can afford to do so should consider gifts to transfer wealth while still living where possible. This includes making annual exclusion gifts (now \$11,000 per donee each year) where appropriate, since these gifts do not exhaust the lifetime exemption amount. ■

Focus

Focus is published three times a year by Burns & Levinson LLP for clients and friends of the firm. This newsletter provides general information and does not constitute legal advice.

Editorial Board

Angeline Mistretta
*Chief Editor;
Marketing Manager*

Clifford R. Cohen
Partner

Andrew J. Merken
Partner

Paul R. Morton
Executive Director

David P. Rosenblatt
Managing Partner

Donald E. Vaughan
Partner

Lauren Butterworth
Editorial Assistant

Please address comments and inquiries to Angeline Mistretta at:

BURNS & LEVINSON LLP

C o u n s e l l o r s a t L a w

125 Summer Street
Boston, MA 02110-1624
Telephone 617-345-3694
or amistretta@burnslev.com

For more articles and advisories, visit the publications pages of our web site at www.burnslev.com.

After 40 years – A New Massachusetts Corporate Law *continued from page 2*

amend its articles of organization and/or by-laws to take advantage of either of these changes.

Directors – Number, Indemnification and Duties

Historically, a corporation with at least three shareholders must have at least three directors under the old Act. Under the MBCA, a corporation now has the flexibility to specify a lesser number of directors, regardless of the number of shareholders. The articles of organization and/or by-laws must both be amended to implement this change.

The MBCA expressly addresses, in much greater length and detail than the old Act, indemnification of directors and officers. In particular, the MBCA requires that directors who are successful in their defense of an action be indemnified for their reasonable attorneys' fees and litigation expenses. The MBCA also addresses directors' conflicts of interest and their duties and standards of conduct. It includes a provision that defines more precisely a "conflict of interest" transaction. An approval procedure for conflict transactions is specifically outlined and, if followed accordingly, will

be a safe harbor for such transactions.

How to Make These Changes

Although no new filings will be required from any business previously incorporated in Massachusetts, the benefits provided by the new MBCA are only available to those corporations which amend their articles of organization and/or by-laws. Existing Massachusetts corporations desiring to implement these changes and discuss other changes that may be appropriate, should contact their Burns & Levinson attorney to discuss these changes and actions that should be taken. ■