

**IDENTITY THEFT**  
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**WINNING STRATEGIES**  
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**I. Overview**

Identity theft, broadly defined, is the use of another person's identifying information ("means of identification") in a way that involves fraud. One way to think about identity theft is to consider it an element of wrongdoing (wrongfully using someone else's identifying information) added to some underlying crime.

Congress has passed two statutes that criminalize identity theft. In 1998, Congress enacted the Identity Theft and Assumption Deterrence Act, which set forth the substantive offense of identity theft at 18 U.S.C. § 1028(a)(7). That provision prohibits the use of another person's identifying information in connection with any federal crime or any state or local felony. The maximum penalty for violating § 1028(a)(7) is 15 years imprisonment if the value obtained exceeded \$1,000 over a one-year period.

When Congress enacted 18 U.S.C. § 1028(a)(7), it also directed the United States Sentencing Commission to incorporate the crime of identity theft into the Sentencing Guidelines. The Commission's primary response to this directive was to add a two-level enhancement in the fraud and theft guideline (at U.S.S.G. § 2B1.1(b)(10)(C)(i) and (ii)) for cases that involve identity theft in certain circumstances. Thus, fraud and theft offenses involving identity theft may receive an increased punishment by operation of the Sentencing Guidelines, regardless of whether the defendant is charged with a substantive count under 18 U.S.C. § 1028(a)(7).

In 2004, Congress enacted a second identity theft statute: 18 U.S.C. § 1028A, entitled "Aggravated Identity Theft." Section 1028A(a)(1) prohibits identity theft in connection with certain enumerated federal crimes. Section 1028A(a)(2) prohibits identity theft in connection with terrorism offenses.

Although Congress entitled § 1028A "Aggravated Identity Theft," the elements of § 1028A(a)(1) are identical to those of § 1028(a)(7), except that § 1028A(a)(1) is triggered by a nominally narrower range of underlying predicate offenses. However, that range of underlying offenses (enumerated at § 1028A(c)) is actually quite broad, including many different types of fraud and immigration crimes. Therefore § 1028A(a)(1) arguably does not apply to "aggravated" forms of identity theft in any meaningful sense. Rather, the only "aggravated" aspect of § 1028A(a)(1) is the prescribed penalty: a **two-year mandatory sentence**, which must be served **consecutively** to the sentence for the underlying offense.

Congress has then provided prosecutors with a powerful weapon that may now be used, at the government's discretion, in identity theft cases. Legal challenges in the context of § 1028A prosecutions have proven difficult, with a couple of notable recent exceptions discussed below. The most effective defense advocacy in § 1028A cases may well be to persuade the prosecutor to dismiss any § 1028A count(s) in return for a plea to the underlying offense, and the more modest sentence enhancement that may apply under the Sentencing Guidelines.

## **II. 18 U.S.C. § 1028A – “Aggravated Identity Theft”**

### **A. Elements of the offense**

18 U.S.C. § 1028A(a)(1) provides:

Whoever, during and in relation to any felony enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

#### **1. “Means of identification of another person” defined**

Identity theft is the use of another person's identifying information in a way that involves fraud or deception. In the language of the statutes (and the Sentencing Guidelines), a person's identifying information is called a “means of identification.” For purposes of both § 1028A and § 1028(a)(7), “means of identification” is defined at 18 U.S.C. § 1028(d)(7) as follows:

the term “means of identification” means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any –

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code;  
or

(D) telecommunication identifying information or access device (as defined in section 1029(e)).

The lists in subsections (A) - (D) are illustrative, not exhaustive. The most important part of the statutory definition appears in the first paragraph. Simply put, a “means of identification” is

“any name or number that may be used to identify a specific individual.” Kurt M. Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act*, 8 Cornell J.L. & Pub. Pol’y 661 (Spring 1999).

Both 18 U.S.C. §§ 1028A(a)(1) and § 1028(a)(7) only reach the fraudulent use of a means of identification that belongs to a real person. See, e.g., United States v. Jimenez, 507 F.3d 13, 20 (1st Cir. 2007). Some courts have held that a “real person” includes a deceased person. See United States v. Kowal, 527 F.3d 741 (8th Cir. 2008); United States v. Jimenez, 507 F.3d at 22 (1st Cir. 2007).

While the definition at 18 U.S.C. § 1028(d)(7) is broad, it does have limits. In United States v. Mitchell, 518 F.3d 230 (4th Cir. 2008), the court held that the statutory definition “allows for an identifier, taken alone or together with other information, to qualify as a means of identification so long as the sum total of information identifies a specific individual.” Mitchell involved a counterfeit check scheme, wherein the defendant bought merchandise with counterfeit checks, then later returned the merchandise for cash. When paying by check, the defendant presented a false Georgia driver’s license he created in the name of “Marcus Jackson.” The driver’s license also contained an address and a date of birth. In fact the Georgia department of motor vehicles had issued licenses to two Marcus Jacksons, one of whom – Marcus Deyone Jackson – lived in the same town (East Point, GA) and had the same year of birth as appeared on the false license. The government claimed that this information was sufficient to identify a specific individual (Marcus Deyone Jackson from East Point, GA).

The Fourth Circuit disagreed. The court emphasized a distinction between “unique identifiers,” such as a government-issued driver’s license number (or social security number, A-number, and the like) and “non-unique” identifiers, such as first and last name, city of residence, and year of birth. A unique identifier “identifies a ‘specific individual for purposes of § 1028A(a)(1).” (The number on the false driver’s license in this case was wholly fictional). See also United States v. Melendrez, 389 F.3d 829, 830 (9th Cir. 2004) (real Social Security numbers used alone or in conjunction with other information constitute a means of identification because they can be used to uniquely identify specific persons). Non-unique identifiers, on the other hand, may be too general to identify a specific person. Such was the case in Mitchell: (1) “Marcus Jackson” was not an exact match with “Marcus Deyone Jackson,” the individual from East Point; (2) though Marcus Deyone Jackson lived in East Point, he did not live at the address given on the false license; (3) and though Marcus Deyone Jackson had the same year of birth as that on the false license, he had a different month and date of birth.

In United States v. Blixt, 548 F.3d 882, 887-88 (9th Cir. 2008), the Ninth Circuit held that a forged signature constituted a “means of identification.” The defendant in Blixt forged her supervisor’s name on company checks in the midst of a fraudulent scheme. The court held that the signature was a “name” within the meaning 18 U.S.C. § 1028(d)(7)(A). When considering Blixt it is important to keep in mind that, in context, the signature there identified a specific individual: the supervisor who was otherwise authorized to sign the checks. If, in context, the forged signature did

not identify a specific (and real) individual, the signature would not be a “name” within the meaning of 18 U.S.C. § 1028(d)(7)(A).

**2. The *knowing* transfer, possession, or use of a means of identification of another person**

Although the law requires that the means of identification belong to a real person, a significant issue developed regarding whether a defendant had to *know* that it belonged to a real person. This issue may arise, for example, in immigration-related offenses, where the defendant may have obtained a social security card, or a green card, without knowledge that the social security number, or A-number, had been assigned to a real individual. In Flores-Figueroa v. United States, 129 S.Ct. 1886 (2009), the Supreme Court held that the government must prove that the defendant knew that the “means of identification” he or she unlawfully transferred, possessed, or used did, in fact, belong to another person. In so holding, the Court resolved a circuit split on the issue. Compare United States v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir. 2008); United States v. Hurtado, 508 F.3d 603 (11th Cir. 2007); United States v. Montejo, 442 F.3d 213 (4th Cir. 2006) (“knowingly” modifies only “transfers, possesses, or uses”; consequently, the defendant had only to know that he or she was using the identifying information, not that the information belonged to a real person) with United States v. Miranda-Lopez, 532 F.3d 1034 (9th Cir. 2008); United States v. Godin, 534 F.3d 51, (1st Cir. 2008); United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C.Cir. 2008) (“knowingly” means that the government is required to prove that defendant actually knew that the identification belonged to real person). See also United States v. Sanchez, 2008 WL 1926701 (E.D.N.Y. 2008).

**3. The *knowing* transfer, possession, or use of a means of identification of another person *without lawful authority***

What if the defendant claims that he or she had permission to use the other individual’s means of identification? This issue has not been fleshed out in the case law. As a general matter, the Eleventh Circuit has held that the government does not have to prove that the means of identification was actually stolen in order to establish that it was used “without lawful authority.” See United States v. Hurtado, 508 F.3d 603, 607-08 (11th Cir. 2007). In Hurtado, the defendant used another person’s birth certificate and driver’s license in applying for a U.S. passport. Relying upon the legislative history and title § 1028A (“Aggravated identity *theft*”), the defendant argued that the statute was aimed at individuals who stole identities, not to those who commit simple passport fraud, and that in order to establish that the identification was used without lawful authority, the government had to prove that the identification was stolen by the defendant. Without defining the full scope of the term “without lawful authority,” the court said:

For sure, stealing and then using another person's identification would fall within the meaning of “without lawful authority.” However, there are other ways someone could possess or use another person's identification, yet not have “lawful authority” to do so. There is no dispute here that Hurtado did not have any authority, much less lawful authority, to use

Colon's identification. We need not attempt to define every situation where transfer, possession, or use of a means of identification would be “without lawful authority.” It is clear that the plain language of this phrase indicates Congress's intent to prohibit more than just the defendant's transfer, possession, or use of identification that was obtained by theft by that defendant.

Id. at 607.

In United States v. Hines, 472 F.3d 1038, 1039-40 (8th Cir. 2007), the defendant was convicted of identity theft on the basis of providing a false name and social security number during an arrest. The defendant testified that he had used the identifying information with permission (and thus, presumably, with lawful authority), because he had given money and drugs to an individual in exchange for permission to use his name. The court in Hines said that whether the defendant used the name with or without permission, he acted without lawful authority when he provided false information to the police.

Together Hurtado and Hines may simply stand for the proposition that an individual cannot give permission to another to use his or her identification fraudulently.

#### **4. *During and in relation to any felony enumerated in subsection (c)***

There is also little case law interpreting the phrase “in relation to” in the context of 18 U.S.C. § 1028A(a)(1). One district court has interpreted the phrase broadly. In United States v. Guillen-Perez, 2007 WL 1455823 (N.D. Fla. May 16, 2007), an alien defendant was arrested by local police for a battery offense. During his arrest, the defendant gave a false name that corresponded to a fraudulent social security card he was carrying. In a subsequent federal prosecution for illegal re-entry and aggravated identity theft, the defendant challenged § 1028A(a)(1) on the grounds that the phrase “in relation to” is too vague. The court rejected the challenge, and in doing so said that the defendant’s possession of the fraudulent social security card was “in relation to” the crime of re-entry, since the defendant gave the name on the social security card at his arrest to avoid being correctly identified. (Despite the court’s view, the defendant was acquitted by a jury of the aggravated identity theft charge).

### **B. Penalties**

#### **1. Statutory provisions**

The statutory penalty for violating 18 U.S.C. § 1028A(a)(1) is a two-year mandatory sentence that must be served **consecutively** to the sentence for the underlying offense. Moreover, the statute expressly prohibits a reduction in the sentence for the underlying offense “to compensate for, or otherwise take into account” the harsh effect of the mandatory penalty. 18 U.S.C. § 1028A(b)(3). See, e.g., United States v. Omole, 523 F.3d 691, 699 (7th Cir. 2008). Note, however, that a court is not precluded from taking § 1028A's mandatory sentence into account in sentencing a defendant

on other counts of conviction charged in the same indictment that are not predicate felonies underlying the § 1028A conviction. United States v. Vidal-Reyes, 562 F.3d 43 (1st Cir. 2009).

Sentences for *multiple* counts under § 1028A(a)(1) may be imposed to run concurrently with each other. See 18 U.S.C. § 1028A(b)(4). The court is instructed to consult the Sentencing Guidelines when determining whether to impose multiple § 1028A sentences consecutively or concurrently with one another. Id.; see also U.S.S.G. § 5G1.2, comment. (n.2(B)) (enumerating factors court should consider when imposing sentence for multiple counts of conviction under 18 U.S.C. § 1028A).

## **2. Sentencing Guidelines**

The Sentencing Commission created a new guideline – U.S.S.G. § 2B1.6 – for counts brought under the aggravated identity theft statute. Under U.S.S.G. § 2B1.6, the sentence is the two-year mandatory, which is to be applied consecutively to the sentence for the underlying offense.

Application Note 2 to U.S.S.G. § 2B1.6 directs that if a sentence for § 1028A is imposed in conjunction with a sentence for an underlying offense, the guideline identity theft enhancement at U.S.S.G. § 2B1.1(b)(10)(C)(i) and (ii) (see below) is not applied to the underlying offense.

### **III. The Sentencing Guideline Enhancement For Identity Theft in Non- § 1028A Prosecutions: U.S.S.G. § 2B1.1(b)(10)(C)(i) and (ii)**

If a defendant is not charged under the Aggravated Identity Theft section (18 U.S.C. § 1028A), but the underlying facts of the case include conduct that constitutes identity theft, the defendant may be subject to the identity theft enhancement set forth at U.S.S.G. § 2B1.1(b)(10)(C)(i) and (ii).

#### **A. The concept of “affirmative identity theft,” or “breeding” documents**

Identity theft can be committed in very simple form. For example, if a defendant steals a credit card and uses it to pay for goods and services, she has committed “identity theft”: she has used a means of identification (the credit card account number and/or the cardholder’s name) in connection with the crime of credit card fraud.

A more complicated form of identity theft is committed when a defendant takes a means of identification and “breeds” it, i.e., creates another means of identification from the first means of identification. Assume, for example, that the above defendant uses the information from the credit card (for example, the credit card account number) to apply for an additional credit card. The defendant has committed affirmative identity theft; she has “bred” a new means of identification (the new credit card account number) from the old means of identification (the stolen credit card account number). This aggravated form of identity theft arguably causes more harm: new lines of credit may be opened in a victim’s name, affecting her credit report without her knowledge.

When faced with the directive to incorporate the crime of identity theft into the Guidelines, the Sentencing Commission chose to focus on this more aggravated form of identity theft rather than on the simpler form:

Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105- 318. This subsection focuses principally on an aggravated form of identity theft known as “affirmative identity theft” or “breeding,” in which a defendant uses another individual’s name, social security number, or some other form of identification (the “means of identification”) to “breed” (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines “means of identification,” the new or additional forms of identification can include items such as a driver’s license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were “bred” (i.e., produced or obtained) often are within the defendant’s exclusive control, making it difficult for the individual victim to detect that the victim’s identity has been “stolen.” Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual’s reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

U.S.S.G. § 2B1.1, comment.(backg’d).

Thus, the Guidelines provide the following enhancement in the fraud and theft guideline at § 2B1.1(b)(10)(C):

(10) If the offense involved . . . (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, **increase by 2 levels**. If the resulting offense level is less than level 12, **increase to level 12**.

This enhancement applies where the defendant bred the original means of identification to obtain additional means of identification, or possessed 5 or more bred means of identification. The enhancement does not apply to the most basic forms of identity theft (for example, using a stolen credit card or forging a signature on a stolen check).

As with the substantive offense of identity theft itself, the means of identification must belong to a real person (see U.S.S.G. § 2B1.1, comment. (n.9(A)), and the burden is on the government to establish proof of that fact. See, e.g., United States v. Hines, 449 F.3d 808 (7th Cir. 2006) (district court’s application of enhancement reversed where prosecution failed to offer evidence that Social Security number had been issued to a real person).

Note, however, that the means of identification subsequently obtained need not be in the victim’s name. See United States v. Melendrez, 389 F.3d 829, 830 (9th Cir. 2004) (enhancement properly applied where the defendant created false social security cards and army forms using stolen social security numbers but fake names: “Those nine digits tied the victims to the identification documents, regardless of the names with which the Social Security numbers were paired.”).

#### **IV. Miscellaneous Sentencing Guideline Issues**

Practitioners should be aware of the following additional sentencing guideline issues. These issues may arise in non- § 1028A cases, or in the guideline calculation for an underlying offense charged in conjunction with § 1028A.

##### **A. Upward departure encouraged in egregious cases: U.S.S.G. § 2B1.1, Application Note 19(A)(vi)**

At Application Note 19 to U.S.S.G. § 2B1.1, the Commission notes that an upward departure may be warranted in an identity theft case where:

- substantial harm was done to the victim’s reputation or credit record, or the victim suffered substantial inconvenience related to repairing reputation or credit record;
- the victim was erroneously arrested, or denied a job based on an erroneous arrest record; or
- the defendant obtained numerous means of identification with respect to one individual, and essentially assumed that individual’s identity.

This departure language was added prior to the enactment of 18 U.S.C. § 1028A. One should argue that if the government proceeds under § 1028A, the consecutive mandatory provides sufficient punishment, and an upward departure with respect to any underlying offense is unwarranted.

## **B. Enhancement for abuse of position of trust**

If the defendant obtained access to the means of identification by exceeding or abusing the authority of his or her employment position, the “abuse of position of trust” enhancement may apply to guideline calculation of the underlying offense. See U.S.S.G. § 3B1.1, comment. (n.2(B)).

## **C. Enhancement for number of victims**

Under U.S.S.G. § 2B1.1(b)(2), enhancements are prescribed if the offense involved 10 or more victims (2-level enhancement), 50 or more victims (4-level enhancement), or 250 or more victims (6-level enhancement).

Application Note 4(E) to U.S.S.G. § 2B1.1 now explicitly provides that in cases involving means of identification, the definition of “victim” includes “any individual whose means of identification was used unlawfully or without authority.” Note 4(E) was added by amendment effective November 1, 2009.

Prior to this amendment, courts were divided on whether an individual whose means of identification was taken and used but who was fully reimbursed by a third party (e.g., a bank or credit card company) was a victim for purposes of the victims table at §2B1.1(b)(2). See United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009) (discussing various cases addressing this issue, including United States v. Armstead, 552 F.3d 769 (9th Cir. 2008); United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008); United States v. Connor, 537 F.3d 480 (5th Cir. 2008); United States v. Icaza, 492 F.3d 967 (8th Cir. 2007); United States v. Lee, 427 F.3d 881 (11th Cir. 2005); and United States v. Yagar, 404 F.3d 967 (6th Cir. 2005)).<sup>1</sup>

## **V. Restitution**

Title 18 U.S.C. § 3663(b)(6) permits restitution for time spent by the victim to remediate the harm resulting from the offense (e.g., to repair damage done to a credit report).

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<sup>1</sup> Prior to the amendment, a “victim” was defined as someone who suffered actual loss. See Application Note 1 (“Definitions”) to U.S.S.G. § 2B1.1. Actual loss is defined as reasonably foreseeable pecuniary harm. U.S.S.G. § 2B1.1, comment. (n.3(A)(i)). Pecuniary harm is defined as monetary harm, and does not include emotional distress, harm to reputation, or other non-economic harm. U.S.S.G. § 2B1.1, comment. (n.3(A)(iii)).