



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 32
Number 4 *Symposia—Bankruptcy Reform and
Election Law as Its Own Field of Study*

Article 5

6-1-1999

What Do You Mean, I Filed Bankruptcy—Or How the Law Allows a Perfect Stranger to Purchase an Automatic Stay in Your Name

Maureen A. Tighe

Emily Rosenblum

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Maureen A. Tighe & Emily Rosenblum, *What Do You Mean, I Filed Bankruptcy—Or How the Law Allows a Perfect Stranger to Purchase an Automatic Stay in Your Name*, 32 Loy. L.A. L. Rev. 1009 (1999).
Available at: <https://digitalcommons.lmu.edu/llr/vol32/iss4/5>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**“WHAT DO YOU MEAN, I FILED
BANKRUPTCY?” - OR HOW THE LAW
ALLOWS A PERFECT STRANGER TO
PURCHASE AN AUTOMATIC STAY IN YOUR
NAME**

Maureen A. Tighe and Emily Rosenblum***

In early 1995, Pearl Simpson¹ discovered offenses she did not commit listed on her driving record in California, where she no longer lived.² She spent over two months trying to clear her driving record.³ At the time she thought the problem was merely a clerical error by the authorities back in California.⁴ In June of 1995, however, Pearl Simpson learned it was not just her driving record that had been injured. When she attempted to use her credit card to make a purchase, to her surprise, the store turned her down. Puzzled, she called a representative from the credit card company who told her that the account was blocked because a bankruptcy petition had been filed in her name.⁵

* United States Trustee for Region 16, the Central District of California. Ms. Tighe was previously the Deputy Chief of the Major Frauds Section in the Office of the United States Attorney and Coordinator of the Bankruptcy Fraud Task Force for ten years. The views expressed herein are those of the author and may not be considered the official policy or views of the Department of Justice.

** Loyola Law School, Los Angeles, J.D. candidate May 1999.

1. All descriptions of fraud scenarios are from actual incidents reported to the United States Trustee. Victim names have been changed to protect their identity from any further abuse. Real perpetrator names have been used where a case is in the public record and a conviction has been obtained.

2. See Statement of Victim, Federal Bureau of Investigation (FBI) File at 2 (June 30, 1995) (on file with *Loyola of Los Angeles Law Review*).

3. See *id.*

4. See *id.*

5. See *id.*

Soon Pearl Simpson learned that Carolyn Lynn Robinson had obtained her driver's license and social security number when Robinson worked for a college that Simpson attended years before in California.⁶ Robinson had been using Simpson's personal identification information since 1992 when Robinson rented an apartment in Van Nuys, California.⁷ She also used Simpson's information to open an account with MCI, accumulating an unpaid bill of nearly \$1,000.⁸ When Robinson defaulted on her rent along with all other obligations and finally faced eviction, she simply filed bankruptcy in Pearl Simpson's name in order to postpone the eviction process and live another few months rent free.

Fortunately, the Federal Bureau of Investigation was able to track down the person posing as Pearl Simpson, and Robinson was convicted of bankruptcy fraud and use of a false social security number.⁹ Robinson found continued free rent at a federal prison and Simpson is continuing to try and clear her name.

Unfortunately, Pearl Simpson's nightmare is representative of many identity frauds carried out in the bankruptcy courts. It is easier to file bankruptcy than it is to obtain a library card - and the "loan" of an automatic stay can be much more valuable than the latest best-seller. Currently, when a person files bankruptcy, there is nothing to check that the person identified as the debtor on the bankruptcy petition is actually the individual authorizing the filing. There are no rules allowing a court clerk to ask for photo identification from the person filing or to verify that the name on the petition matches the social security number given. In fact, even if the filing clerk knows that the filer is not the person he or she claims to be, and that the social security number on the petition belongs to someone else, it is not clear that the clerk has the authority to reject the filing. So the filing will effectively act as a temporary injunction against any lawsuit pending against the bankruptcy filer and the bankruptcy will be recorded for all time in the name of the person listed on the petition.

6. See Federal Bureau of Investigation Report, FBI File at 52 (Oct. 21, 1996) (on file with *Loyola of Los Angeles Law Review*).

7. See *id.*

8. See Schedule F, Creditors holding unsecured nonpriority claims, FBI File at 35 (June 16, 1995) (on file with *Loyola of Los Angeles Law Review*).

9. See Indictment, United States v. Robinson, No. CR 96-153 (C.D. Cal. 1995) (on file with *Loyola of Los Angeles Law Review*).

The ability to buy an automatic stay in anyone's name for the price of a filing fee¹⁰ allows a credit card thief to exhaust the victim's credit and file bankruptcy in the victim's name in order to further elude creditors. It also allows unscrupulous "foreclosure consultants" to concoct elaborate schemes to scam either homeowners facing foreclosure or lenders attempting to foreclose with no way of knowing who is orchestrating the bankruptcy filings.

Although most of these fraudulent bankruptcies are eventually dismissed because no one attends the required hearings, these filings still have a tremendous impact on their victims. The consequences of a false bankruptcy filing have a devastating effect on a person's life. Time and money are needed to clear a credit report of the filing and, even where the credit reporting agency clears the record, the problem continues to resurface regularly. The victim also must convince the bankruptcy court that the filing is indeed fraudulent. This may entail hiring an attorney and, often, traveling across the country to the place where the bogus bankruptcy was filed. Some people may not have the resources to clear their record or the process may be too slow to allow them to purchase the car or home they need.

Take for example the case of Joe.¹¹ Joe was a nineteen-year-old college student attending State University studying math, with ambitions of becoming a professor. He went to the financial aid office one spring to check on his student loan for the fall. He was shocked to find out the University had turned down his request because of a bankruptcy on his credit report. Joe had never filed bankruptcy. He asked the Financial Aid clerk to re-check. She pulled out his file and showed him his credit report. Sure enough, there was a bankruptcy filing.

After getting over his disbelief, Joe contacted the credit agency. Joe's wallet had been stolen earlier that year. He had always kept his social security card in his wallet. The representative at the credit reporting agency said he would note Joe's complaint in the file, but the agency could not remove the bankruptcy because Joe could not

10. The current filing fee for Chapter 7 is \$135. See 28 U.S.C. § 1930(a)(1) (1994).

11. This fact scenario is based on information supplied to the Office of the United States Trustee's Fraud Section in Los Angeles by the victim (on file with *Loyola of Los Angeles Law Review*).

prove someone else had filed in his name. During this period, he was also turned down for a credit card and the apartment he was planning to share with a friend. Without a student loan, Joe could not attend the university. Now two years later, Joe is working at a 7-Eleven.

While the problem of identity theft has received some long-overdue attention in recent years, its impact in bankruptcy has gone virtually unnoticed apart from a small circle of law enforcement personnel, bankruptcy judges, trustees, and United States Trustees. This Article examines the problem of identity theft in the context of bankruptcy. Part I discusses the types of identity theft schemes which result in fraudulent bankruptcy filings. Part II examines current federal and state laws that protect victims of identity theft and how the laws do not offer much assistance in the context of bankruptcy. Part III proposes possible deterrents to the problem.

I. IDENTITY THEFT AND BANKRUPTCY

Although no formal study exists on the prevalence of identity theft, there is little doubt that it is on the rise.¹² In 1992, the credit reporting agency, Trans Union, reported 35,000 complaints regarding identity theft.¹³ In 1997 that number rose to 523,000!¹⁴

Like most societal problems, this rapidly growing crime rears its head in bankruptcy proceedings.¹⁵ Not only do identity thieves use their victims' credit, they may also file bankruptcy in their victims' names. A review of bankruptcy identity theft complaints filed with the U.S. Trustee in Los Angeles indicates that the problem is severe and getting worse. The Fraud Section of the United States Trustee's Office received sixty-eight identity theft complaints in 1995, ninety-nine in 1997, and eighty-eight such complaints in 1998.¹⁶ While

12. See Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?*, 29 MCGEORGE L. REV. 483, 483 (1998).

13. See Michael Higgins, *Identity Thieves*, A.B.A. J., Oct. 1998, at 42, 43.

14. See *id.*

15. There were 1.44 million bankruptcy filings in 1998. See *Bankruptcy Statistics: Another Record Year for Bankruptcy Filings, But Increase Slowed From Previous Year*, BNA BANKR. LAW DAILY, Mar. 10, 1999, at D3.

16. See Memorandum from the Fraud Section, Office of the United States Trustee, Los Angeles, (Feb. 6, 1998) (on file with *Loyola of Los Angeles Law Review*). These complaints generally comprise about 22% of all bankruptcy

these numbers may not seem high, it should be kept in mind that most victims of identity theft would have no idea how to file a complaint or where to file it.¹⁷ Local police departments usually will not take a complaint involving bankruptcy because it is considered an exclusively federal problem. United States Trustees around the country as well as federal prosecutors report that filing bankruptcies in false names and social security numbers is a growing problem in many areas such as Illinois, Texas, New Jersey, and Florida.

An identity thief may have various motives for filing bankruptcy in another's name. A person who has stolen another's identity and then exhausted that person's credit may file bankruptcy under the victim's name in order to elude creditors who may be able to trace the thief.¹⁸

For example, Jerome Joseph Griesmer was recently charged in Abilene, Texas with filing bankruptcy in his victim's name a second time.¹⁹ His victim, the real Richard Pike, endured Griesmer's use of his identity since 1964 when Pike's wallet was stolen at a state fair.²⁰ Griesmer used Pike's identity for years, held himself out as Pike and even bought a car in Pike's name. Griesmer ruined Pike's credit to such an extent that he filed bankruptcy in his assumed name first in 1996 and again in 1998.²¹

Another popular scam involves the thief convincing homeowners who are facing foreclosure to use the thief's "service" to "refinance" their mortgage.²² The thief then files bankruptcy listing the property, using either the name or social security number of the

fraud complaints received. *See id.*

17. Most members of the public appear to be unaware of the office of the United States Trustee, especially if they have no significant contact with the bankruptcy system, so they do not know where to complain when they are victimized by this crime.

18. *See* Patrice Apodaca, *Bankruptcy Filers Have Photos Taken*, L.A. TIMES, Apr. 27, 1997, at A3.

19. *See* Criminal Complaint, United States v. Greismer, Case No. 1:99.M013 (N.D. Tex. 1999) (on file with *Loyola of Los Angeles Law Review*).

20. *See id.* at 3 (affidavit of FBI Special Agent Michael Morris, accompanying complaint).

21. *See id.* at 1.

22. *See* Jane Limprecht, *For \$800 and the Deed to Your Home: Bankruptcy Foreclosure Scams Target Distressed Homeowners*, 17 AM. BANKR. INST. J. 14, 14 (Oct. 1998).

victim.²³ When the bankruptcy is filed, an automatic stay is invoked, preventing the mortgage holder from foreclosing.²⁴ By this point, the victim may have paid the thief between \$250 and \$850 up front or made payments over several months.²⁵ Because of the automatic stay, the victim no longer receives collection calls and, therefore, may believe the service has worked.²⁶ However, when no one shows up at the hearing scheduled after the bankruptcy filing, the bankruptcy is dismissed and the foreclosure process continues.²⁷

A variation of this scam involves a perpetrator filing bankruptcy in another's name or using a false social security number in order to stay an impending eviction. For example, in 1992, an indictment was brought against Norman and Ivanna Flores for conspiracy and perjury for concocting a scheme that bilked innocent renters out of money.²⁸ Mr. and Mrs. Flores set up a business that claimed to help renters on the verge of eviction. They solicited tenants who were behind on their rent by leaving flyers at apartment buildings.²⁹ They even convinced tenants who were current on their rent to go on a "rent strike" and then would offer their service when the tenant faced eviction.³⁰ Ivanna and Norman Flores would then file bankruptcy in the name of the tenant.³¹

In some cases they had the tenants sign blank bankruptcy petitions.³² Mr. and Mrs. Flores did not explain to the non-English speaking tenants the nature of the documents the tenants were signing.³³ Instead, they told the tenants only that the paper work would

23. *See id.*

24. *See* 11 U.S.C. § 362 (1994).

25. *See* Limprecht, *supra* note 22.

26. *See id.*

27. *See id.*

28. *See* Indictment, United States v. Flores (C.D. Cal. 1992) (on file with *Loyola of Los Angeles Law Review*).

29. The husband and wife team left flyers written in both Spanish and English that stated, "We can help you!!! . . . We can prolong your stay in your home from 20 to 45 days, we do all the leg work!!! . . . We take care of everything . . . It just takes you 10 minutes!" *See id.* at 7-8.

30. *See id.* at 8.

31. *See id.*

32. *See id.*

33. *See id.*

hold off the eviction.³⁴ Additionally, they used false social security numbers in the petitions, even when the tenants provided their real ones.³⁵ Mr. and Mrs. Flores charged their victims between \$120 and \$300 for the “service.”³⁶

While identity theft is a significant problem in this country, the fraudulent use of a person’s identity in a bankruptcy takes on an added element of outrage for its victims because it is the nature and structure of the federal bankruptcy laws and rules that make the crime possible. The identity thief, by using the automatic stay and the official court record of the filing, enlists the federal bankruptcy court as an unwitting aider and abettor of the crime. Without the automatic stay, there would be no advantage to most identity thieves in filing a bankruptcy. Although there are many advantages to the current legal framework based on the automatic stay provisions, this is one result which appears not to have been contemplated.

II. CURRENT IDENTITY THEFT LAW

Current law adequately provides for the punishment of those who use false names and social security numbers to file bankruptcy. New state and federal laws address other aspects of identity fraud and attempt to provide better remedies for victims. However, neither the established laws nor recent legislation address the need to prevent people from filing under false names and social security numbers in the first place.

A. Federal Law

On October 30, 1998, President William J. Clinton signed the Identity Theft and Assumption Deterrence Act.³⁷ The Act is intended to address the growing problem of identity theft and the effects the crime has on the victim. Prior to the Act, federal law criminalized the “fraudulent use of identification documents” but not the “unlawful . . . use of personal identity information” such as a social

34. *See id.*

35. *See id.* at 9.

36. *See id.* at 8.

37. *See* Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998); Kathy M. Kristof, *New Law to Assist Victims in Fight Against Identity Fraud*, L.A. TIMES, Oct. 31, 1998, at C1.

security number.³⁸ Prior federal law viewed the victim of identity theft as the creditor.³⁹ Consequently, the creditor—not the person whose identity was stolen—was offered recourse under the law. Creditors found it more economical to deal with losses by either writing them off or increasing interest rates rather than bringing an action against the criminal.⁴⁰ Therefore, the federal laws were more or less ineffective in curtailing the perpetrators of identity theft.

Before the Act became effective, identity thieves assumed their victims' identity and used their victims' credit with reckless abandon.⁴¹ The activities of identity thieves went unchecked because creditors chose not to enforce their legal rights, and victims of identity fraud had no recourse under the law. According to the United States Secret Service, the dollar value of identity theft cases almost doubled from \$450 million in 1996 to \$745 million in 1997.⁴² This increase in the crime resulted in more and more victims bearing the cost of restoring their own credit.⁴³

With the actual victims of the crime in mind, Congress, through the Identity Theft and Assumption Deterrence Act, sought to address the losses that these victims suffered. The Act makes it a crime to "knowingly transfer or use [], without lawful authority, a means of identification of another person with the intent to commit, or to aid

38. *Identity Fraud: Hearings on S. 512 Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 105th Cong., available in WESTLAW 1998 WL 2577481998 [hereinafter *Identity Fraud Hearings*] (statement of Chairman Jon Kyle).

39. See *Identity Fraud Hearings*, *supra* note 38, available in WESTLAW 1998 WL 11518411 (statement of David Medine of the Federal Trade Commission).

40. See *Are You a Target for Identity Theft?*, CONSUMER REPORTS, Sept. 1997, at 10.

41. See Kristof, *supra* note 37, at C3 (discussing identity theft victim Bob Hartle, whose imposter informed Hartle that he would use Hartle's identity until he no longer wanted to, and that there was no law enforcement agency that would prosecute him).

42. See *id.*

43. See *Identity Fraud Hearings*, *supra* note 39 (statement of David Medine of the Federal Trade Commission). Mari Frank, a victim of identity theft paid about \$10,000 and spent nearly 500 hours in order to restore her credit. Her imposter charged \$50,000 using Frank's name. Bob Hartle's imposter charged \$100,000 using Hartle's name and filed bankruptcy. Hartle and his wife moved from Iowa to Arizona in order to get the imposter arrested. See Kristof, *supra* note 37, at C3.

or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.”⁴⁴ Whereas, prior to the Act it was only considered a crime to produce false identification,⁴⁵ transfer false or stolen identification,⁴⁶ or possess—with the intent to use—five or more illegal or false identification documents,⁴⁷ the Act makes it a crime to use the identification of another in an illegal activity.⁴⁸

The Act attempts to offer restitution to the victims of the crime by amending the federal sentencing guidelines. A court will be allowed to consider whether the loss suffered by the victim of the crime would be an appropriate measure of the penalty the perpetrator is required to pay.⁴⁹ Thus, victims can be compensated for losses they incurred in restoring their credit.

The Act offers support to victims by establishing a complaint and referral service through the Federal Trade Commission (“FTC”).⁵⁰ The Act specifically directs the FTC to establish procedures to “log and acknowledge the receipt of complaints by individuals”⁵¹ who have been the victims of identity theft. The FTC will also “refer complaints . . . to appropriate entities . . . including the [three] major national consumer reporting agencies; and . . . appropriate law enforcement agencies for potential law enforcement action.”⁵² Thus, the FTC will help victims of identity fraud to restore their credit and stop the perpetrators who have assumed their identities.

Criminal bankruptcy fraud provisions have long provided for prosecution of a false statement under penalty of perjury in a bankruptcy proceeding.⁵³ Numerous prosecutions have been brought under § 152 for use of a false name or social security number in a

44. Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 § 3(a)(4) (1998).

45. *See* 18 U.S.C. § 1028(a)(1) (1995).

46. *See id.* § 1028(a)(2).

47. *See id.* § 1028(a)(3).

48. *See* Identity Theft and Assumption Deterrence Act of 1998, § 3(a)(4).

49. *See id.* § 4(a),(b)(3).

50. *See id.* § 5(a); *Identity Fraud Hearings*, *supra* note 38.

51. Identity Theft and Assumption Deterrence Act of 1998, § 5(a)(1).

52. *See id.* § 5(a)(3).

53. *See* 18 U.S.C. § 152(3) (1995); *United States v. Lindholm*, 24 F.3d 1078, 1083-85 (9th Cir. 1994).

bankruptcy filing.⁵⁴ Prosecutors can also charge an identity thief who knowingly, with the intent to deceive, uses a social security number that is not issued to him or her under a more specific provision governing the fraudulent use of false social security numbers.⁵⁵ The combination of existing federal law and the new identity theft provisions now provide prosecutors with the ability to charge identity thieves and catch them after the fact. As explained below, however, they do nothing to prevent the crime from occurring in the first place.

B. State Law

In 1998, thirty-seven state legislatures considered identity theft legislation.⁵⁶ However, due to privacy concerns only seven states actually enacted laws.⁵⁷ The different states define the offense differently. Georgia defines financial identity fraud as an unauthorized person obtaining identifying information to access financial resources of another.⁵⁸ Kansas makes it a misdemeanor to obtain, possess, transfer or use an identification document not belonging to the user.⁵⁹ West Virginia makes it a felony to take the name, birth date or social security number of another with the intent of fraudulently representing oneself as that person to make financial transactions.⁶⁰ Wisconsin makes it a crime to use without consent personal identifying information of another to obtain anything of value.⁶¹

54. See Indictment, United States v. Jolly, No. CR 93-991 (C.D. Cal. 1993) (on file with *Loyola of Los Angeles Law Review*), Indictment, United States v. Weiss, No. SA CR 89-32 (C.D. Cal. 1989) (on file with *Loyola of Los Angeles Law Review*), Indictment, United States v. Dennis, No. CR 89-832 (C.D. Cal. 1989) (on file with *Loyola of Los Angeles Law Review*); Martin Berg, *U.S. Attorney Targets Fraud In Bankruptcy*, DAILY J., Dec. 19, 1997, at 2 (discussing prosecutions of five people charged with filing bankruptcies under false names or social security numbers).

55. See 42 U.S.C. § 408(a)(7)(B) (1994) (making it a crime to knowingly use a social security number that is not issued to the user).

56. See *Trends in Privacy Law: Identity Fraud in the 50 States*, METRO. CORP. COUNS., Aug. 1998, available in WESTLAW 8/98 METCC 37.

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.*

C. California Law

In January 1999, California passed a law making it a felony to assume someone's name, social security number or any other form of identification to obtain credit, goods, or services.⁶² Identity thieves can face up to three years in jail and fines up to \$10,000.⁶³ Previously, California classified the crime as a misdemeanor which was not often prosecuted by district attorneys.⁶⁴

California did take an early role in the prevention of identity theft in 1975, when it passed the Consumer Credit Reporting Agencies Act.⁶⁵ The Act imposed limitations as to when a person can obtain another's credit information. Such information may be obtained only for credit transactions, court cases, insurance claims, and housing and other legitimate business needs.⁶⁶ The Act requires the user of credit information "[to] certify the purposes for which the information is sought and [to verify] that the information will be used for no other purposes."⁶⁷ However, these precautions were not adequate in preventing identity theft, as thieves could pose as potential landlords or employers in order to steal someone else's credit information.⁶⁸

California has also recently enacted a law to help victims of identity theft restore their credit. Recently enacted bills will help victims with the daunting task of erasing fraudulent charges on their credit reports which were run up by imposters. The victim of an identity theft can file a police report pursuant to section 530.5 of the California Penal Code (the unauthorized use of personal identifying information). Then, the victim submits the police report to his or her credit reporting agency.⁶⁹ Under California Civil Code section 1785.16(k), the credit reporting agency must "promptly and permanently block reporting any information that the consumer alleges

62. See CAL. PENAL CODE § 530.5 (West 1999); Peter Hartlaub, *Garcetti Targets Identity Theft: New Law Sharpens Penalty for Crime*, L.A. DAILY NEWS, Dec. 31, 1998, at N3.

63. See Hartlaub, *supra* note 62, at N3.

64. See *id.*

65. See Ramirez-Palafox, *supra* note 12, at 485.

66. See *id.* at 486.

67. CAL. CIV. CODE § 1785.14(a) (West 1998).

68. See Ramirez-Palafox, *supra* note 12, at 486.

69. See CAL. CIV. CODE § 1785.16(k) (West 1998).

appears on his or her credit report as a result of a violation of section 530.5 of the Penal Code so that the information cannot be reported."⁷⁰

D. The Shortcomings of Current Law in the Bankruptcy Context

Federal and California law now offer help to identity theft victims who seek to restore their tarnished credit records and give prosecutors a way to prosecute identity thieves when the crime can be proven. This is one area, however, where an ounce of prevention is worth a pound of cure. Regardless of how stiff the criminal sanctions are made for filing bankruptcy in someone else's name, they will not help the vast majority of bankruptcy identity theft victims.

The problem with these laws is that they do not offer much practical help in combating identity fraud in bankruptcy filings. First, because there is no way to ensure that the person filing is who they claim to be, people who file under another's name or with a false social security number leave no trace of who *actually* filed the false petition and therefore, prosecutors have little evidence on which to build a case.⁷¹ Law enforcement agents have been successful in locating fingerprints on a number of fraudulent filings and tracing them to the identity thief,⁷² but often latent prints cannot be found on the filing or they do not match up to anyone on file in law enforcement data banks. Similarly, where a crook has been living under an alias for years, all investigation leads to a dead end where no one can be found who knows the true name or location of the crook.

Second, even where there is a criminal prosecution, the victim is really never made whole. Where a car or home loan is denied due to a false bankruptcy on one's record, the delay can have serious and

70. Some credit reporting agencies criticize the new law as they feel it will lead to abuse. See *California Takes Aim At Identity Theft*, CREDIT CARD MGMT., June 1, 1998, at 8.

71. See Apodaca, *supra* note 18, at A3.

72. For example, in the George Kingstro prosecution, Kingstro's palm print was found below the signature line of the bankruptcy petition he filed in his victim's name. The prints were in local law enforcement files due to previous convictions. It turned out that the victim's wallet had been stolen a few months before the bankruptcy filing and Kingstro had rented an apartment in his name. See *Indictment, United States v. Kingstro*, No. CR 89-707 (C.D. Cal. 1989) (on file with *Loyola of Los Angeles Law Review*).

irreversible effects on an individual's life. Even where the identity thief is caught and prosecuted to the fullest extent of the law and the bankruptcy court orders the false bankruptcy filing to be expunged, the bankruptcy filing keeps appearing on the victim's credit report.

Aaron Truman,⁷³ an experienced fraud investigator for the California State Department of Insurance, found out about this when he decided to investigate Eugene Hawkins and Sandra Welch, the operators of "HDI Financial & Legal Services." After learning of Truman's investigation, Welch and Hawkins proceeded to call up Truman's credit report and make note of his actual social security number and credit cards. They then filed a bankruptcy in his name, with his true creditors and identifying information. Investigator Truman received his first indication of this event when he tried to use his credit card for a routine purchase and was turned down. His dismay at learning about the fraudulent bankruptcy was similar to many other identity fraud victims in the same situation. He, however, had some suspicions of who might have done it, as he had learned in his investigation that Hawkins and Welch were responsible for hundreds of fraudulent bankruptcy filings. Fortunately, he found telltale fingerprints and other evidence linking Hawkins and Welch to the fraudulent filing.

Although Hawkins and Welch were convicted and sentenced for this crime and given additional jail time for their attempts to obstruct a criminal investigation, the results of their filing plagued Truman for years. Despite the conviction, expungement order, and numerous written requests from both Truman and the United States Attorney to stop, credit reporting agencies kept re-reporting a bankruptcy filing in his name.

Third, creditors who were defrauded by the identity thief rarely obtain restitution. If an eviction was wrongfully delayed, the property owner has simply lost the rent for the time the bankruptcy delayed the eviction. If credit has been extended based on the false identifying information, the debt must be written off. A dismissal of the bankruptcy may give the creditor the legal right to chase the

73. See Indictment, *United States v. Hawkins*, No. CR 94-944(A) (C.D. Cal. 1995) (on file with *Loyola of Los Angeles Law Review*).

debtor, but the dismissal is to no avail where the true identity of the debtor is not known or the individual is judgment-proof.

Lastly, the official record of bankruptcy filings is corrupted regardless of subsequent events. Attempts are being made to automate access to all bankruptcy filings and allow for more accurate information gathering about bankruptcy filings, yet thousands of files in the system are simply a fiction.

Any prevention, or at least deterrence, of these false filings must occur at the point where the bankruptcy petition is filed. Occasionally, an identity thief will proceed all the way through to discharge,⁷⁴ but the vast majority of the cases are filed solely to obtain the automatic stay for as long as local court procedures allow. Because identity thieves do not want to be detected and often move on to use other names, they usually do not show up at the required meeting of creditors normally held a month or two after the case is filed.⁷⁵ The benefit of the automatic stay is already realized by the time this hearing is held, and checking identification at this point is too late to prevent the fraud.

III. THE PROPOSED SOLUTIONS

A. Debtors Must Show Photo Identification upon Filing for Bankruptcy

One very practical deterrent to false bankruptcy filings would be to make it clear that the local clerk's office has the authority to require filers to show photo identification when they first file their petitions for bankruptcy. Although there are no provisions which currently prohibit a court from adopting such provisions, some judges have expressly questioned whether they have such authority. Currently, in order to file bankruptcy, the debtor is required to "file a list of creditors . . . a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs."⁷⁶ The clerk at the bankruptcy court is required to accept the petition and cannot refuse it "solely because it is not

74. See 11 U.S.C. § 727 (1995).

75. See *id.* § 341(a).

76. See 11 U.S.C. § 521(1) (1988).

presented in proper form.”⁷⁷ Although there is no authority one way or the other,⁷⁸ the rules can be interpreted as requiring a clerk to accept a bankruptcy petition from anyone posing as a debtor. For a “debtor” using another person’s name or social security number, there is no reason to fear getting caught filing a false bankruptcy petition.

Because bankruptcy identity fraud appears to be a problem in only certain areas of the country, it is important to simply provide the discretion for the local court to implement an identity checking procedure and not to require the procedure in every court. Courts with a significant level of complaints about false filings can implement identity checking procedures.⁷⁹ Courts where this is not a problem can choose not to be burdened by the procedure.

Section 301 of Title 11, United States Code, could easily be amended to provide such discretion to the local district by reading as follows:

(b) The court may adopt a local rule providing that the clerk refuse to accept a voluntary petition by an individual debtor or joint debtors unless the debtor:

(1) shows documents that establish his/her identity to the clerk at the time of filing the petition, or prior to filing the petition, provides such proof to a designee of the clerk; or

(2) files a declaration under penalty of perjury by the debtor’s attorney that the attorney has reviewed documents sufficient to reasonably establish the identity of the debtor.

77. See Bankr. R. 5005 (a)(1) (1995).

78. Because there is no clear authority prohibiting the implementation of identification procedures, courts facing this problem should institute such rules at this time. Congress should make the law clear that such an exercise of the local court’s authority is allowed in order to provide assurance to those who need it.

79. The document used for purposes of identification should be documented by the clerk, preferably by obtaining a photocopy of the document (for example, a driver’s license or state identification card). The clerk could also note information about the identification, such as the license number, issuing state, and expiration date.

The procedure should be made the least burdensome as possible on legitimate filers. Where the debtor has an attorney, the attorney can look at the appropriate identification and certify such review as part of the filing. Where pro se debtors live a significant distance from the courthouse, provisions can be made for them to have their identity checked by a trustee located nearby. As almost every bankruptcy identity theft ever reported has been a bankruptcy filed without the assistance of an attorney, the incidence of attorneys assisting an identity theft is likely to be extremely low. Furthermore, any fraudulent activity by an attorney can be redressed through the state bar disciplinary process.

Certainly, this procedure will not stop all identity theft in bankruptcy court. The more clever thieves will obtain false identification. If false identification is provided, however, it should at least provide a true photograph and possibly other clues to provide some chance of catching the identity thief. Showing identification will deter many of these people and make it more difficult to file a false bankruptcy.

It is shocking to identity theft victims that a filing in their name is even possible without them knowing about it and that the federal court system does nothing to prevent such victimization through bankruptcy. This minimal identification procedure sends victims the message that the court does care and is taking some steps to prevent this crime.

B. Expungement of False Bankruptcy Filing from Victim's Record

A second problem not adequately addressed under the current Bankruptcy Code is that there is no clear provision allowing for expungement of a fraudulently filed bankruptcy. This leaves bankruptcy judges unsure of how they can or should handle these victims even where a victim has spent the time and expense to prove he or she was not the one who filed the bankruptcy.

An amendment to 11 U.S.C. § 107(b) to allow for easier expungement of the bankruptcy record of a victim would help address this problem. Section 107(b) currently allows the court, on a party's motion or its own motion, to protect trade secrets or seal scandalous

or defamatory information.⁸⁰ A third provision should be added as follows to allow the court:

(3) to protect a person whose name, social security number, address, or other identifying information is recorded as that of the debtor on a voluntary petition but who has proved that such filing was due to forgery or fraud of another without the authority of the person.

Ideally, courts would have forms and procedures that in pro per individuals could obtain to pursue such a motion without the expense of an attorney. A credit reporting agency that continues to report a fraudulent bankruptcy in the victim's name after such an expungement order would be liable under existing laws,⁸¹ but perhaps courts should then consider use of their contempt powers if the expungement order is not followed.

C. Social Security Numbers Verification with Debtor's Information

Lastly, there should be some amendment to the laws governing access to social security numbers to allow court clerks to do routine checks of the social security number listed on a petition to be sure it matches the name used. This could be done electronically and automatically with the appropriate technology in place. Because access to social security numbers raises many concerns about privacy⁸² and access to social security numbers should be severely limited, a system must be developed where no one can access the system to search for an individual's social security number. Admittedly, this proposal requires both legislative change as well as programming and automation changes at the clerk's office. However, the linking of the social security database and the social security numbers listed on the petitions being filed would provide a significant deterrent to fraud and assist the court in maintaining an accurate case data bank.

The automatic checking procedure should simply spit out a report stating that the number on the petition does not match the name provided on the petition. The system could be designed so that no

80. See 11 U.S.C. § 107(b) (1995).

81. See 15 U.S.C. § 1681n (1988).

82. See Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions To Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529 (1998).

one can put in a number or a name without tying it to a bankruptcy case number. An automatic order to show cause could be issued ordering the debtor to appear and explain the discrepancy between the name and social security number on the petition. In this way, debtors who have made a legitimate mistake in putting their social security number down would have an opportunity to explain and correct the problem. Those who are attempting to defraud will have their petitions dismissed quickly, at least reducing the harm done by the fraudulent filing.

Such a cross-check system would give bankruptcy courts the basic tool to try to prevent the obtaining of an automatic stay or even a discharge using a false social security number—something private companies have now, but which is unavailable to the bankruptcy court. Private companies and resourceful crooks have access to the social security number of anyone who has a credit record maintained by any of the commercial credit reporting agencies. Thus, an individual's name, social security number, and credit information can easily be obtained for commercial and nefarious purposes, but cannot be accessed to prevent the victimization of those same people. In order to fight government intrusion into our personal lives, we have prevented government systems from providing basic deterrent measures for fraud, yet we allow anyone with access to commercial credit reporting services to utilize our personal identifying information in all sorts of ways.

This result does not make much sense to victims of identity fraud who feel the results of that fraud in their lives for many years. This is especially shocking given that the bankruptcy identity fraud victim would not have been victimized in that manner were it not for the nature of a federal court system and laws that provide for an automatic stay with no questions asked and no court review until after the crime is complete.

IV. CONCLUSION

In the new information age, we all need to realize that more intangible crimes such as a false bankruptcy filing in someone's name can have just as serious an effect on the victim's life as the theft of funds from a wallet or bank account. Where a federal court is utilized by the thief in perpetrating this crime, the least we can do is

design rules to try and prevent the crime. It is time for some much needed attention to this aspect of identity fraud. Legislation designed to deter this crime might not help the current victims in getting their lives back on the right path, but it will prevent many future identity frauds.

