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Freeze! That law may be unconstitutional

Credit freeze laws expand, but will they last?

By Correy E. Stephenson
Staff writer

As identity theft continues to grow, states are beginning to take action to protect their consumers.

A recent trend is the passage of "credit freeze laws," enabling consumers to prevent credit reporting agencies from releasing a credit report or any information in the report – meaning that an identity thief cannot open new accounts using the stolen information.

"Consumers were tired of waiting for a solution to identity theft," said Gall Hillebrand, a senior attorney with Consumers Union in San Francisco. While a freeze statute doesn't stop identity theft, "it cuts off the most pernicious form, the opening of new accounts."

Consumers Union has actively participated in the passage of credit freeze laws across the country, in a total of 25 states since 2003, and *Hillebrand predicts that more states will follow.*

But critics note that the process – which varies from state to state – can be confusing and complicated for consumers.

And a recent case, holding California's security freeze statute unconstitutional as applied to a credit reporting agency that provided public records as part of its service, may not bode well for the future of these laws. (*U.D. Registry, Inc. v. California*, No. B179653.)

Michael J. Saltz, a partner at Jacobson, Russell, Saltz & Fingerman in Los Angeles who represented the credit agency, predicted that other agencies will file similar suits in California and in other states with credit freeze laws.

Despite the variations from state to state, "I anticipate that the other statutes throughout the country are likewise unconstitutional," he said.

"Credit reporting agencies are not pro-identity theft," Saltz added. "They will do whatever they can to help stop it, but we shouldn't throw the baby out with the bathwater by intruding on constitutional rights."

State laws

Chris Hoofnagle, a senior fellow at the Berkeley Center for Law & Technology at Boalt Hall Law School, described freezes as "more in-

tense" than a prior safeguard, fraud alerts.

"Freezing a credit report creates an impenetrable shield," against identity theft, he said, noting that he doesn't know of a single instance where a consumer with a freeze in place subsequently became a victim of identity theft.

On the other hand, Hoofnagle noted that because of limited knowledge about the laws, only a few thousand freezes have taken place.

Twenty-five states currently have freeze laws. Seventeen of those states passed legislation in 2006, and another 17 have considered similar measures or have bills pending.

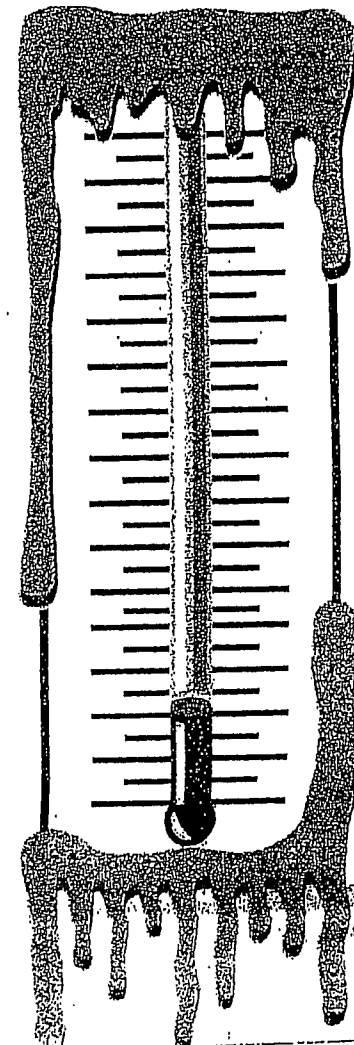
California was the first to pass a law, back in 2003, but it was quickly followed by Colorado, Connecticut, Delaware, Florida, Illinois, Kentucky, Louisiana, Maine, Minnesota, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Rhode Island, Utah, Vermont and Wisconsin.

Most recently, New York's credit freeze law went into effect Nov. 1.

Five states – Hawaii, Kansas, South Dakota,

Freeze: Other consumer protection laws may be at risk.

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Credit freeze laws spreading across the country

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Texas and Washington – require that the consumer be a victim of identity theft in order to freeze his or her credit.

Other variations also exist from state to state.

For example, in California, consumers must send a written request to freeze their credit report by registered mail, while in Illinois, e-mail may be used if the credit agency provides a secure address.

Typically, the laws require that credit agencies provide the consumer with notice that the report has been frozen and that the account be frozen within five to 10 days of the request.

The majority of the states allow credit agencies to charge consumers to freeze their reports at an average cost of \$10, although the range varies – Delaware permits a \$20 charge, while other states require the reports to be free. But most states don't allow victims of identity theft to be charged, and several waive fees for those over 65.

Some states include enforcement provisions, like Kansas, which provides for civil penalties of up to \$10,000, attorney fees and court costs if a credit agency violates a security freeze.

Public records

As these state laws began proliferating, one California credit agency fought back.

U.D. Registry, Inc. provides consumer credit reports to property managers and landowners who rent or lease apartments. The bulk of the company's consumer information comes from public records, like

tax lien, foreclosure and bankruptcy data.

U.D. Registry filed a declaratory action, seeking to enjoin enforcement of California's security freeze law, arguing that it violated the company's First Amendment right to disseminate public information.

A trial court agreed, issued an injunction barring enforcement of the statute regarding information contained in or obtained from matters of public record, and declared the law unconstitutional as applied to all consumer credit agencies using such information.

The court of appeal generally agreed, but limited the injunction to the plaintiff.

Assuming that the credit reports at issue were commercial speech, and therefore entitled to less First Amendment protection, the court said the law as applied couldn't pass intermediate scrutiny.

"[The security freeze law] includes plaintiff's truthful reporting of lawfully available and obtained public record information. [The law] prevents disclosure of data contained in court records which are constitutionally presumptively available to journalists and the public. ...

"The bulk of the sources of records referred to on plaintiff's website are publicly produced documents. Nor do defendants dispute the public nature of that information; it is available to members of the public without resort to plaintiff's records. Moreover, preventing plaintiff from disseminating all of the public record information does not serve the asserted state interest. The knowledge that an individual has been the subject of an unlawful de-

"I anticipate that the other statutes throughout the country are likewise unconstitutional."

- Michael J. Saltz

tainer action by a lessor, a tax lien imposed by the government, or a foreclosure action by a lender does not facilitate identity theft. Even if that information could be of some use to a potential identity thief, it would be available without resort to plaintiff's credit reports. Nor is it likely the absence of such records, without more, would result in an extension of consumer credit to a would-be thief. We conclude [the law] sweeps more broadly than is necessary to serve the government interest in protecting consumers from identity theft; therefore, "the excessive restriction cannot survive," the court said.

It determined that the statute couldn't be judicially reformed, and enjoined the state from enforcing it against the plaintiff.

However, it reversed the trial court's injunction against other credit reporting agencies, as it found "no merit to plaintiff's facial invalidity contentions."

More freezing to come?

Given that almost all privacy laws have been challenged on First Amendment grounds and upheld – although the "Do Not Call" list

was originally struck down before being upheld – Hoofnagle said he was surprised by the court's decision.

He also expressed concern about the "breadth of the court's reading of commercial speech cases" and the likelihood that other agencies will file similar lawsuits.

"If this type of interaction is thought of as speech, many other common consumer protection laws would also fail," he said, such as mandatory disclosure requirements or truth in advertising laws.

Saltz told Lawyers USA that he has already filed a motion for re-hearing with the appellate court to clarify several issues from the opinion, and further appeals are likely from both sides.

In the meantime, he predicted lawsuits from other credit agencies in California and other states with similar laws.

But Hillebrand noted that the court hesitated to invalidate the statute in its entirety, and limited the scope of the case based on the information at issue.

Because most credit reports are made up of more than just public records, "It would be very difficult for other credit agencies to fit under the reasoning of the case," she said.

California Court of Appeal, 2nd District, U.D. Registry, Inc. v. State, No. B179653, Oct. 30, 2006. Lawyers USA No. 9934601. You can link to the full text of this opinion by going to www.lawyersusaonline.com and searching the Lawyers USA Archives.

Questions or comments can be directed to the writer at correy.stephenson@lawyersusaonline.com