

COMMENT

Financial Institutions' Duty of Confidentiality to Keep Customer's Personal Information Secure from the Threat of Identity Theft

TABLE OF CONTENTS

INTRODUCTION	1078
I. STATE OF THE LAW	1081
A. <i>Identity Theft</i>	1082
B. <i>Federal and State Statutory Law</i>	1088
C. <i>Causes of Action Available to Customers for Financial Institutions' Failure to Protect Customer Information</i>	1095
1. <i>Invasion of Privacy</i>	1097
2. <i>Breach of an Implied Contractual Duty of Confidentiality</i>	1100
3. <i>Breach of the Tort Duty of Confidentiality</i>	1102
II. ANALYSIS	1110
A. <i>Identity Theft and Federal and State Statutory Law</i>	1111
B. <i>Invasion of Privacy Applied to Identity Theft</i>	1113
C. <i>Implied Contractual Duty Applied to Identity Theft</i>	1115
D. <i>Tort Duty of Confidentiality Applied to Identity Theft</i>	1119
III. PROPOSAL	1124
CONCLUSION	1126

INTRODUCTION

In the process of securing a loan or opening a checking or savings account, applicants have an obligation to disclose personal assets, credit history, and other intimate personal information to their financial institution.¹ Stanley Stevens and his wife followed this familiar process and ended up \$50,000 in debt for credit cards and high interest loans.² Unfortunately, neither Stevens nor his wife incurred any of this debt themselves.³ An employee of the couple's bank surreptitiously obtained confidential data that the Stevenses entrusted to the bank when they opened a checking account.⁴ The employee then used this information to commit identity theft, defrauding third party creditors to attain numerous charge cards and loans in the Stevens' name.⁵

Thousands of individuals, like the Stevens, have become victims of identity theft.⁶ Identity theft is occurring with increasing regularity and

¹ *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982); see *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000) (explaining how individuals are required to make personal information available to obtain credit); Edward L. Raymond, Jr., *Bank's Liability, Under State Law, For Disclosing Financial Information Concerning Depositor or Customer*, 81 A.L.R. 4TH 377 § 30a (1999); see also 18 U.S.C. § 1014 (1994) (establishing that customer may face imprisonment for falsifying credit application). See, e.g., *Stevens v. First Interstate Bank*, 999 P.2d 551, 552 (Or. Ct. App. 2000) (describing how bank required husband and wife to disclose confidential information to open checking account).

² *Stevens*, 999 P.2d at 552; Rob Eure, *Bank Is Sued Over Theft of Private Data*, WALL ST. J. (Cal.), Sept. 8, 1999, at CA1.

³ See *Stevens*, 999 P.2d at 552; Eure, *supra* note 2 at CA1.

⁴ See *Stevens*, 999 P.2d at 552; Eure, *supra* note 2 at CA1.

⁵ *Stevens*, 999 P.2d at 552; Eure, *supra* note 2, at CA1, CA3.

⁶ See Nicole M. Buba, Note, *Waging War Against Identity Theft: Should the United States Borrow from the European Union's Battalion?*, 23 SUFFOLK TRANSNAT'L L. Rev. 633, 635 n.13 (2000). In 1996, identity theft cost consumers \$450 million, and in 1997 the cost was \$745 million. *Id.*; Kathy Kristof, *Clinton Signs Bill to Curtail Growing Problem of Identity Fraud*, DETROIT NEWS, Nov. 15, 1998, at D1. However, the director of the Privacy Rights Clearinghouse, Beth Givens, estimates losses from identity theft at over three billion dollars per year. Buba, *supra*, at 635 n.12; John Caniglia, *Police Say ID Thefts on Rise on Internet, Easy Credit Create an 'Epidemic,'* PLAIN DEALER, Dec. 28, 1998, at 1B. In 1997, there were approximately 12,000 credit fraud cases, but this number jumped to more than 500,000 in 1999. Buba, *supra*, at 635 n.13; Kristof, *supra*, at D1. Similarly, consumer inquiries to the TransUnion credit bureau's Fraud Victim Assistance Department increased from over 35,000 in 1992 to over 522,000 in 1997. *Selected Regulatory Developments*, 5 No. 1 Electronic Banking L. & Com. Rep. 21 (May 2000) (quoting statements made by FTC Consumer Protection Bureau Chief Jodie Bernstein); see also Statement by President William J. Clinton upon Signing H.R. 4151, reprinted in 1998 U.S.C.C.A.N. 709, 711 (stating that "tens of thousands of Americans have been victims of identity theft."); Sylvia Pagan Westphal, *Friday Report: An In-Depth Look at People and Policies Shaping Southern California Fighting the Fakes*, L.A. TIMES, Feb. 11, 2000, at B2 (describing identity theft as increasingly common and extremely profitable).

almost always involves a financial institution.⁷ Surveys indicate that four out of ten adults have been the victims of some type of identity theft.⁸ Although identity theft is not an uncommon event, the Stevens' response to it was unusual.⁹ The couple sued their bank, arguing that the bank breached its duty of confidentiality by failing to protect their personal account information.¹⁰

In *Stevens v. First Interstate Bank*, the Oregon Court of Appeals was one of the first courts in the country to decide whether the theft of a bank customer's personal information gives rise to a cause of action for breach of confidentiality.¹¹ The court found that a duty of confidentiality does not exist where the bank has not "affirmatively" disclosed the confidential information.¹² Other state courts, however, have not yet ruled on the issue.¹³

Financial institutions, legislatures, attorneys, and courts should anticipate a rise in litigation as Americans become more cognizant of the use and potential misuse of their personal data.¹⁴ One survey reports

⁷ See *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (describing identity theft as rampant); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993) (explaining increasing problem of fraudulent use of social security numbers); *In re Riccardo*, 248 B.R. 717, 721 (Bankr. S.D.N.Y. 2000) (calling identity fraud epidemic); Prepared Statement of the FTC on Financial Identity Theft before the Subcommittee on Telecommunications, Trade, and Consumer Protection (Apr. 22, 1999) (statement of Jodie Bernstein, Director of Bureau of Consumer Protection) [hereinafter FTC Statement] reprinted in 1172 PRACTICING LAW. INST. CORP. L. & PRAC. HANDBOOK SERIES 383, 389 (stating that identity theft almost always involves financial service institution in some way); Kristen S. Provenza, *Identity Theft: Prevention and Liability*, 3 N.C. BANKING INST. 319, 319-21 (1999); Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?*, 29 MCGEORGE L. REV. 483, 483-88 (1998); Buba, *supra* note 6, at 665 n.13; Kristof, *supra* note 6, at D1.

⁸ *The Identity Theft Assumption Deterrence Act: Hearings on S. 512 Before the Subcomm. on Technology, Terrorism and Government Information of the Senate Comm. on the Judiciary*, 105th Cong. 3 (1998) (statement of Robert Hartle) [hereinafter *Identity Theft Hearings*]; *Executive Summary: 1998 Privacy Concerns and Consumer Choice Survey*, at <http://www.privacyexchange.org/iss/surveys/1298execsum.html> (last visited May 5, 2001) [hereinafter *Executive Summary Survey*].

⁹ Eure, *supra* note 2, at CA1.

¹⁰ *Stevens v. First Interstate Bank*, 999 P.2d 551, 552 (Or. Ct. App. 2000); Eure, *supra* note 2, at CA3.

¹¹ See *Stevens*, 999 P.2d at 552; Eure, *supra* note 2, at CA3 (noting that Oregon Court of Appeal would be one of first courts in country to determine liability of banks for identity theft).

¹² *Stevens*, 999 P.2d at 554.

¹³ See generally THOMAS P. VARTANIAN ET AL., 21ST CENTURY MONEY, *Banking and Commerce* 297-99 (1998) (discussing novelty of banks liability for identity theft); Eure, *supra* note 2, at CA1 (explaining that Oregon court was first court in country to determine banks liability for identity theft).

¹⁴ See PETER P. SWIRE & ROBERT E. LITAN, *NONE OF YOUR BUSINESS: WORLD DATA*

that eighty-two percent of Americans feel they have lost control over the collection and use of their personal information.¹⁵ Moreover, sixty-one percent of Americans feel the existing laws and business practices do not adequately protect their privacy rights.¹⁶ The rise of identity theft and customer awareness will inevitably give rise to litigation, self-regulation, or legislation.¹⁷ Legislatures and courts must ultimately determine whether financial institutions have a duty to secure customers confidential information from identity theft.¹⁸

This Comment addresses whether and under what theory financial institutions are liable to their customers for identity theft. Part I describes identity theft, explains its impact on victims, and examines

Flows, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 42-48 (1998) (concerning data privacy laws associated with collecting and using personal information); Pamela Samuelson, *A New King of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CAL. L. REV. 751, 751-52 (1999) (reviewing PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION* (1996)). One of the reasons why American lawyers need to become familiar with informational privacy law is that the American people are becoming aware and concerned about the acquisition and use of its personal information. *See id.* For example, public concern over the use of personal data motivated Congress to pass the "Bork law," which prohibits revealing information about videotape rentals. *See id.* Congress enacted the Video Privacy Protection Act, known as the "Bork Bill," in response to the public uproar that occurred when a magazine published a Supreme Court nominee's past video rentals. *See* 18 U.S.C. §§ 2710-2711 (1998); Samuelson, *supra* at 752. *See generally* Michael Higgins, *Identity Thieves*, A.B.A.J., Oct. 1998, 42, 47 (explaining that identity theft is so new that lawyers have been known to misadvise clients by telling them to change their social security number or declare bankruptcy when their identity is stolen).

¹⁵ *Executive Summary Survey*, *supra* note 7. The number of Americans concerned about the use of their personal information has increased slowly but steadily. Alan F. Westin, "Whatever Works": *The American Public's Attitudes Toward Regulation and Self-Regulation on Consumer Privacy Issues*, in *Privacy and Self-Regulation in the Information Age*, at <http://www.ntia.doc.gov/reports/privacy/selfreg1.htm> (last visited Apr. 3, 2001) [hereinafter *Whatever Works*]. For example, in 1994, 84% of those surveyed stated that they were concerned, which was up from 79% in 1990. *Equifax Executive Summary 1994*, at <http://www.privacyexchange.org/iss/surveys/eqfx.execsum.1994.html> (last visited May 5, 2001); *Equifax Executive Summary 1990*, at <http://www.privacyexchange.org/iss/surveys/eqfx.execsum.1994.html> (last visited May 5, 2001). Similarly, one 1998 survey found that 88% of computer users were concerned about online privacy. *Executive Summary Survey*, *supra* note 7.

¹⁶ *Executive Summary Survey*, *supra* note 7.

¹⁷ *See generally* SWIRE & LITAN, *supra* note 14, at 7-12 (outlining framework of regulations for data privacy which involves legislatures construing rights from federal and state constitutions and courts developing standards through common law); VARTANIAN ET AL., *supra* note 13, at 297-99.

¹⁸ *See generally* VARTANIAN ET AL., *supra* note 13, at 297-99 (discussing questions raised regarding identity theft and banking industry's liability). *But see* *Stevens v. First Interstate Bank*, 999 P.2d 551, 554 (Or. Ct. App. 2000) (deciding issue and holding that banks only have duty to depositor to prevent affirmative disclosures by bank).

federal and state legislative attempts to handle the escalating problem of identity theft. Part I also examines potential causes of action for victims of identity theft against financial institutions, including invasion of privacy, breach of implied contract, and breach of the duty of confidentiality. In search of an appropriate civil remedy for identity theft victims, Part II applies these causes of action to the type of identity theft that occurs when a financial institution fails to protect its customers' confidential information. Finally, Part III proposes that courts find financial institutions have a duty of confidentiality to keep customers' private information secure from the threat of identity theft.

I. STATE OF THE LAW

Identity theft is a growing crime that has severe consequences for its victims.¹⁹ Although identity theft almost always involves financial institutions, statutory law does not address whether these institutions have an obligation to protect their customers' information from identity theft.²⁰ Similarly, courts are without clear standards for determining whether a financial institution should be liable for identity theft.²¹ However, the common law provides several germane causes of action for customers against financial institutions when financial institutions disclose customer information to third parties without authorization.²²

¹⁹ See *supra* note 7; Higgins, *supra* note 14, at 42-44; Martha A. Sabol, *The Identity Theft and Assumption Deterrence Act of 1998 Do Individual Victims Finally Get Their Day in Court?*, 11 LOY. CONSUMER L. REV. 165, 166 (1999); 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, 662, 675 n.7.

²⁰ See FTC Statement, *supra* note 7, at 389; Provenza, *supra* note 7, at 327.

²¹ See *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 900 (Tex. Ct. App. 2000) (stating that cases brought by identity theft victims involve new issues because identity theft is new crime); VARTANIAN ET AL., *supra* note 13, at 297-99 (indicating that courts have yet to decide issues regarding bank's liability for identity theft); Provenza, *supra* note 7, at 330 (discussing how current law does not directly address identity theft, but cases involving bank's disclosure of customer information may provide indication of how courts will react to identity theft). See generally Roy Elbert Huhs, Jr., *To Disclose or Not to Disclose Customer Records*, 108 BANKING L.J. 30, 31-32 (1991) (examining bank's duty of confidentiality and countervailing duty of disclosure in certain circumstances); Cheryl B. Preston, *Honor Among Bankers: Ethics in the Exchange of Commercial Credit Information and the Protection of Consumer Interests*, 40 KAN. L. REV. 943, 945-47 (1992) (identifying effect on customers associated with exchange of commercial credit information); Thomas C. Russler & Steven H. Epstein, *Disclosure of Customer Information to Third Parties: When is the Bank Liable?*, 111 BANKING L.J. 258, 259-64 (1994) (discussing case law interpreting legal duties of financial institutions). But see *Stevens*, 999 P.2d at 554 (holding that bank does not have duty of confidentiality for identity theft where customer is depositor and bank has not made affirmative disclosure).

²² See *infra* note 107.

In such situations, customers have brought actions against financial institutions alleging invasion of privacy, breach of an implied contract, or breach of a tort duty of confidentiality.²³

A. Identity Theft

In determining the boundaries of financial institutions' liability for identity theft, it is necessary to understand the nature of the crime and its relationship to those institutions.²⁴ Identity theft occurs when someone uses another individual's personal information for fraudulent purposes.²⁵ A financial institutions' collection and use of personal information directly connects them with the growing problem of identity theft.²⁶ Identity thieves can perpetrate identity theft against a financial institution in a variety of ways, all of which have severe consequences for victims.²⁷

An identity thief can obtain personal information by finding, stealing, or purchasing personal information, such as an individual's date of birth, social security number, and account numbers or codes.²⁸ One common

²³ See *infra* note 108.

²⁴ See generally FTC Statement, *supra* note 7, at 389 (explaining that identity theft usually involves financial institution); VARTANIAN ET AL., *supra* note 13, at 297-99 (summarizing existing standards for bank's liability when bank discloses customer account information and hypothesizing application of these standards to identity theft); Provenza, *supra* note 7, at 321-22 (explaining how identity thieves perpetrate identity theft against banks).

²⁵ *Identity Fraud Protection: Hearings on H.R. 1821 Before the Subcomm. on Technology, Terrorism and Government Information, 105th Cong. 25 (1998)* (statement of David Medine, Assoc. Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Comm.) [hereinafter *Identity Fraud Hearings*]; Sabol, *supra* note 19, at 166; Buba, *supra* note 6, at 637 (defining identity theft). More specifically identity theft is "the unauthorized use of a person's name, address, birth date, Social Security number [or] mother's maiden name to fraudulently obtain credit cards, loans, and open bank accounts." *Identity Theft: Federal Crime*, Pittsburgh Post-Gazette, Oct. 15, 1998, at A5.

²⁶ *Financial Information Privacy Act: Hearing on H.R. 4321 Before House Comm. on Banking and Financial Services, 105th Cong. 148-49 (1998)* (statement of Boris Melnikoff, Senior Vice President, Wachovia Corp.) [hereinafter *Privacy Act Hearings*]; Higgins, *supra* note 14, at 46; see also FTC Statement, *supra* note 7, at 389 (noting that identity theft involves financial institutions because banks have money which criminals want); Provenza, *supra* note 7, at 321-24 (explaining that banks have access to and utilize information that identity thieves use to commit identity theft).

²⁷ See Provenza, *supra* note 7, at 320-21; Sabol, *supra* note 19, at 166; see also Higgins, *supra* note 14, at 42-46 (giving variety of examples of how identity theft is perpetrated).

²⁸ FTC Statement, *supra* note 7, at 390; Provenza, *supra* note 7, at 322-23; see also Sabol, *supra* note 19, at 166 (noting that customer's social security number is most important form of information because it often provides access to bank accounts and other private information); Saunders & Zucker, *supra* note 19, at 663-64 (indicating that traditional methods of obtaining information, such as, pick-pocketing, stealing pre-approved credit

way identity thieves obtain personal information is by changing the address on someone's account to receive that individual's personal information.²⁹ Equipped with another individual's information, the thief can use the information to defraud financial institutions by opening accounts, purchasing items in another's name, financing property, or obtaining loans.³⁰

Another common form of identity theft occurs when an identity thief calls a customer, pretends to be a bank employee, and then solicits personal information.³¹ An identity thief may also sort through the trash or steal a person's mail to obtain personal data.³² Armed with account numbers, social security numbers, or maiden names, the thief may then access information through a financial institution's automated phone system.³³ Eventually, the identity thief may obtain enough information to impersonate the victim and defraud financial institutions.³⁴

A relatively new form of identity theft occurs when an identity thief becomes an employee of a financial institution.³⁵ Once employed, the thief can obtain customers' personal information by accessing the

applications from mailboxes, or raiding trash have given way to more sophisticated methods utilizing internet); Buba, *supra* note 6, at 637. The internet is also a source of personal information that identity thieves can use. See, e.g., *Switchboard: The Internet*, at <http://www.switchboard.com> *Directory* (last visited Feb. 25, 2001) (giving individuals' names, addresses, and telephone numbers); *Welcome to WhoWhere?!*, at <http://www.whowhere.lycos.com> (last visited Feb. 25, 2001) (providing individuals' home addresses and phone numbers).

²⁹ *Privacy Act Hearings*, *supra* note 26, at 149. The defrauded individual usually does not notice this type of identity theft, which commentators call "account take over fraud." See *id.* The individual may not know of the change until the following billing cycle or when the account becomes past due. See *id.* at 149; Provenza, *supra* note 7, at 320-21.

³⁰ Provenza, *supra* note 7, at 321. It is common for identity thieves to steal funds from the defrauded individual's account by impersonating that individual or by making credit card purchases on the internet or via telephone. See *id.*; see also *Privacy Act Hearings*, *supra* note 26, at 150 (statement of Robert Douglas). Identity thieves can also use the stolen identity to obtain employment, obtain insurance policies, receive driver's licenses, or develop criminal records. See *Identity Theft Hearings*, *supra* note 7, at 5 (statement of James Bauer, Deputy Assistant Director, U.S. Secret Service, Office of Investigations).

³¹ Provenza, *supra* note 7, at 323. Commentators refer to this type of identity theft as "pretext calling." *Id.* Identity thieves also use pretext calling to solicit information from banks by pretending to be the victim and requesting information from bank employees. See *Privacy Act Hearings*, *supra* note 26, at 149.

³² See *id.*; see also Higgins, *supra* note 14, at 43. Identity thieves need not even be clever. See *Privacy Act Hearings*, *supra* note 26, at 14. For example, Mari Frank's identity was stolen when a thief got her credit report by pretending to be a private investigator. See *id.* at 44.

³³ See *Privacy Act Hearings*, *supra* note 26, at 149; Provenza, *supra* note 7, at 323-24.

³⁴ See *Identity Theft Hearings*, *supra* note 7, at 5.

³⁵ See *Identity Fraud Hearings*, *supra* note 25, at 25; Sabol, *supra* note 19, at 166.

institution's databases and account information.³⁶ For instance, the Stevenses became victims of identity theft after their financial institution hired an identity thief without completing a proper background check.³⁷ Before the bank uncovered the employee's felonious record, he had already misappropriated the Stevens' information and used it to accumulate \$50,000 of debt.³⁸

Financial institutions are particularly vulnerable to every type of identity theft because they retain and utilize customers' personal information.³⁹ Financial institutions have easily accessible databases, which contain a large repository of customer information.⁴⁰ If banks do not take adequate steps to protect and secure customers' information, this data is an easy target for identity theft.⁴¹

A financial institution's inadequate screening or verification often makes identity theft an easy crime.⁴² For example, an identity thief recently stole one woman's identity and used her information to open nineteen separate accounts.⁴³ The thief obtained credit on some of these accounts even though she did not supply the woman's correct address or

³⁶ See Sabol, *supra* note 19, at 166.

³⁷ See Stevens, 999 P.2d at 552; Eure, *supra* note 2, at CA1.

³⁸ See Stevens, 999 P.2d at 552; Eure, *supra* note 2, at CA1.

³⁹ See generally Provenza, *supra* note 7, at 322 (noting that information that banks use in course of business is same information that identity thieves utilize to perpetrate identity theft).

⁴⁰ Rameriz-Palafox, *supra* note 7, at 486.

⁴¹ See generally Provenza, *supra* note 7, at 322-24 (explaining various ways identity theft perpetrate fraud against financial institutions); Simon Garfinkel, *Internet Identity Crisis User-names and Passwords Help Protect Us, But How on Earth Can We Recall Them All*, BOSTON GLOBE, Feb. 3, 2000, at D4 (explaining how having only one layer of screening such as social security number to access bank accounts is reason for rise in identity theft).

⁴² Rameriz-Palafox, *supra* note 7, at 486. The rise in identity theft is due in part to the ease with which identity thieves commit the crime. *Id.* Financial institutions often have inadequate screening procedures to protect consumers. *Id.*; Frank James, *Security Gaps Dot Internet Landscape Personal Info Often at Risk, Experts Say*, CHI. TRIB., Feb. 13, 1991, at B3 (commenting on threat of identity theft arising from numerous insecure commercial internet sites that allow access to personal information stored in web site databases). One problem is that most financial institutions allow access to their information with an individual's mother's maiden name. Rameriz-Palafox, *supra* note 7, at 486. Another problem is that defrauded individuals may be unaware of a credit transaction, which an identity thief perpetrated, because credit agencies only issue credit reports when required. *Id.* However, the problem is not limited to financial institutions. *Id.* Indeed, inadequate screening can result in identity theft from department stores, car dealerships, and the internet. *Id.*; see also Charles Cressonwood, *Get Data Safety Policies on Paper*, AM. BANKER, Feb. 11, 2000, at 29 (explaining how intruder took control of over 200 systems of large regional bank and began roaming at will, collecting passwords, and pursuing data).

⁴³ Higgins, *supra* note 14, at 43-44.

employer on the application.⁴⁴ Without adequate screening procedures, accessing account information from a bank may be a simple task for the identity thief.⁴⁵

Identity theft has become easier and thus a greater threat to customers with the growth of internet technology and online banking.⁴⁶ As the electronic transfer of information has increased, identity thieves have invented new ways to obtain access to this information.⁴⁷ With the increase of internet banking, thieves are now using the internet to fraudulently gain access to bank databases.⁴⁸

Because thieves can perpetrate identity theft easily and in a variety of ways, it has become a popular crime.⁴⁹ No comprehensive estimates of the prevalence of identity theft are available.⁵⁰ However, one commentator estimated that at least 500,000 people become victims of identity theft each year.⁵¹ In 1997, identity theft arrests from the CIA alone resulted in \$745 million in losses to financial institutions and individuals.⁵²

Identity theft impacts defrauded individuals, banks, and credit grantors.⁵³ Under federal insurance and credit loss provisions,

⁴⁴ *Id.* at 44.

⁴⁵ *See id.* at 43.

⁴⁶ *See* CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, THEFT OF IDENTITY: THE CONSUMER X-FILES 3-5 (1996) [hereinafter CALPIRG REPORT]; VARTNARIAN ET AL., *supra* note 13, at 299.

⁴⁷ *See generally* Sabol, *supra* note 19, at 166-67 (discussing internet's role in identity theft).

⁴⁸ *See Identity Fraud Hearings*, *supra* note 25, at 25.

⁴⁹ *See Higgins*, *supra* note 14, at 43; Ramirez-Palafox, *supra* note 7, at 485.

⁵⁰ U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-100BR, IDENTITY FRAUD: INFORMATION ON PREVALENCE, COST, AND INTERNET IMPACT IS LIMITED 1, 3 (May 1998) [hereinafter GAO REPORT]. Researchers find it hard to make estimates concerning identity theft because identity theft is an element in a variety of financial crimes. *Id.* Moreover, no federal agency has prevailing jurisdiction to investigate identity fraud, and there is no standard definition of the crime. *Id.*

⁵¹ *See* Beth Givens, *Identity Theft: How it Happens, Its Impact on Victims, and Legislative Solutions*, at http://www.privacyrights.org/AR/id_theft.htm (last visited May 1, 2001). *But see* Patrick Leahy, *Congress Clears Kyl-Leahy 'Identity Theft' Bill for President's Signature*, Press Release, Oct. 14, 1998, available at 1998 WL 19793204 (estimating much lower number of 40,000 per year).

⁵² *Identity Theft Hearings*, *supra* note 8, at 1 (opening statement of Chairman Jon Kyl) (calculating losses based on arrests made by CIA).

⁵³ *See* GAO REPORT, *supra* note 50, at 4-5; Eure, *supra* note 2, at CA3; *see also* Lisa Fickenscher, *Credit Industry Strains to Stem Tide of Identity Theft Series*, AM. BANKER, Oct. 24, 1996, at 1 (showing how professionals are susceptible to identity theft); Ken Leiser, *Theft of Identity Growing Rapidly Victims Often Face a Credit Nightmare*, SAN DIEGO UNION TRIB., Jan. 24, 1997, at A3 (noting that anyone is susceptible to identity theft because of technological

defrauded individuals are not liable for fraud losses.⁵⁴ Therefore, financial institutions and insurance companies are responsible for the monetary loss accumulated from the actual fraud.⁵⁵ MasterCard recently reported that identity fraud represented approximately ninety-six percent of its member banks' overall fraud loss.⁵⁶

Although banks are responsible for fraud losses, identity theft also impacts the defrauded individuals.⁵⁷ Current law, financial institutions, and law enforcement do not consider defrauded individuals as victims of identity theft because the individuals are not responsible for the resulting debt.⁵⁸ However, the defrauded individuals are still responsible for handling the multitude of consequences that result from identity theft.⁵⁹ Defrauded individuals must spend countless hours and

era which identifies everyone by number).

⁵⁴ See 15 U.S.C. § 1643 (1996) (discussing liability of credit card holders). See generally Margaret Mannix, *News You Can Use: Personal Finance High-tech Card Fraud Goes on Right Behind Your Back*, U.S. NEWS & WORLD REP., Feb. 15, 2000, at 5 (noting that credit card loss is limited to \$50 dollars but debit card holders could be responsible for up to \$500).

⁵⁵ See 15 U.S.C. § 1643; Sabol, *supra* note 19, at 167.

⁵⁶ See GAO REPORT, *supra* note 50, at 3. The losses from identity theft are significant. See Sabol, *supra* note 19, at 167. In 1995, identity theft was involved in ninety-three percent of the arrest the United States Secret Service Financial Crimes Division made. See *id.* The losses from these crimes totaled \$442 million. See *id.* In 1996 and 1997, the losses totaled \$450 million and \$745 million respectively. See *id.*

⁵⁷ See generally Provenza, *supra* note 7, at 321-22 (discussing impact of identity theft on victims); Sabol, *supra* note 19, at 167 (describing harm to individual identity theft victims as "significant, long lasting, not readily apparent, or easy to measure"); Ramon G. McLeod, *New Thieves Prey on Your Very Name / Identity Bandit Can Wreak Havoc*, S.F. CHRON., Apr. 7, 1997, at A1 (explaining how identity theft can happen to anyone without victim realizing). Identity theft can have severe consequences for the defrauded individual. See generally Higgins, *supra* note 14, at 42 (describing example of identity theft and problems that victim encountered). Clinton Gilbert, while using Robert Hartle's personal information, received a speeding ticket, was involved in an automobile accident, failed to pay taxes, opened bank accounts, and filed a bankruptcy petition. *Id.* Hartle spent \$15,000 and extensive time clearing his name and his credit. *Id.*

⁵⁸ See Higgins, *supra* note 14, at 42; Provenza, *supra* note 7, at 322. See generally Ramirez-Palafox, *supra* note 7, at 483-88 (emphasizing problems with which identity theft victims are faced). Many of the federal laws that criminalize conduct integral to identity theft do not recognize consumers as victims. See Sabol, *supra* note 19, at 167. Currently, federal law prevents federal courts from awarding restitution to individuals who incur expenses resulting from identity theft. See Saunders & Zucker, *supra* note 19, at 671-72. Federal law only recognizes as victims those directly responsible for the underlying debt, such as banks and credit companies. See 18 U.S.C. § 3663(a)(2) (1998); Saunders & Zucker, *supra* note 19, at 672. Thus, victims of identity theft cannot seek restitution under federal law to recover for costs associated with correcting their credit history and restoring their reputation. Saunders & Zucker, *supra* note 19, at 671-72.

⁵⁹ See GAO REPORT, *supra* note 50, at 3 (detailing hardships of identity theft victims); Maria Ramirez-Palafox, *supra* note 7, at 483-88; see also Higgins, *supra* note 14, at 43-46 (listing examples of problems with which identity theft victims deal).

thousands of dollars trying to restore their credit history.⁶⁰

To repair their credit reputation, victims often invest hundreds of hours contacting credit agencies and banks to prove that they were not responsible for the debt.⁶¹ In addition, victims must prevent the continued use of their identity by placing fraud warnings on their credit reports.⁶² For some victims, the exhausting process of rehabilitating their credit can result in lost wages, increased stress, and even health problems.⁶³ Despite all of the victim's efforts, there is no guarantee that they will ever be able to completely restore their credit history.⁶⁴ Even if their credit is partially repaired, the process of securing credit following identity theft may require separate verification, which victims describe as an embarrassing and humiliating process.⁶⁵

While victims are sorting through their credit nightmare, they must live with the consequences of having their identity stolen.⁶⁶ Because of bad credit, a victim may be unable to secure a loan or other credit that the victim desperately needs.⁶⁷ A victim may even lose or fail to obtain a job as a result of identity theft.⁶⁸

One of the worst consequences of identity theft, however, occurs when law enforcement falsely accuses the victim of a crime, which the identity thief committed in the victim's name.⁶⁹ For example, a Los Angeles

⁶⁰ See Ramirez-Palafox, *supra* note 7, at 484; see also Higgins, *supra* note 14, at 47 (explaining that one victim spent \$15,000 to repair his credit and another spent \$10,000 and logged 500 hours while trying to repair credit).

⁶¹ See Higgins, *supra* note 14, at 46-47; Provenza, *supra* note 7, at 322.

⁶² Higgins, *supra* note 14, at 46.

⁶³ Ramirez-Palafox, *supra* note 7, at 484. See generally Eure, *supra* note 2, at CA3 (describing how victim lost time from work and suffered heart problems as result of identity theft); Leiser, *supra* note 53, at A3 (telling story of identity theft victim who suffered heart attack after identity thief stole his personal information).

⁶⁴ See Ramirez-Palafox, *supra* note 7, at 484; McLeod, *supra* note 57, at B2 (demonstrating how consumers work very hard to clear their credit reports, but some are unable to clear all fraudulent transactions).

⁶⁵ See, e.g., Eure, *supra* note 2, at CA3 (explaining that when victim uses credit card, victim must step out of line while teller calls for special verification).

⁶⁶ See Ramirez-Palafox, *supra* note 7, at 484-85; Sabol, *supra* note 19, at 167; Buba, *supra* note 6, at 634-635.

⁶⁷ CALPIRG REPORT, *supra* note 46, at 5.

⁶⁸ *Id.* at 6-7; Buba, *supra* note 6, at 634-35. For example, the United States Army threatened a service woman with a dishonorable discharge when she failed to pass a security check because of bad credit resulting from identity theft. See CALPIRG REPORT, *supra* note 46, at 6-7; Ramirez-Palafox, *supra* note 7, at 484-85.

⁶⁹ See CALPIRG REPORT, *supra* note 46, at 6-7; Bubba, *supra* note 6, at 634-35. An even worse fate that victims may suffer is murder. See Buba, *supra* note 6, at 634 n.9; Duncan Campbell, *Murder Victim's Family Warns of Identity Theft*, GUARDIAN, July 1, 1998 (explaining growing crime of violent identity theft); Stuart Wavell, *Life Swapping is the*

identity theft victim found himself broke and homeless after he was released from his job and unable to obtain employment for over four years.⁷⁰ Unbeknownst to him, employers refused to hire him because of a criminal record that an identity thief generated in his name.⁷¹ Other identity theft victims, with inaccurate criminal records, have even been wrongfully arrested for crimes that the identity thief committed in their name.⁷² As these examples illustrate, identity theft has a significant and enduring impact on its victims.⁷³

B. Federal and State Statutory Law

Despite the serious losses associated with identity theft, federal and state statutory law offers little protection for victims.⁷⁴ The United States Constitution does not contain a provision granting a general right to privacy.⁷⁵ Moreover, the Supreme Court has held that there is no

Crime of the Future as Computers Give Keys to Stealing a Name, SUNDAY TIMES (LONDON), July 5, 1998, at 11 (describing British trial where identity thief was charged with murdering his victim). Although less common, there have been a handful of violent identity thefts where identity thieves killed their victims to obtain their personal information. See Campbell, *supra*, at 8; Wavell, *supra*, at 11.

⁷⁰ See Buba, *supra* note 6, at 634-35; Richard Kelly, *Someone Out There Knows Everything About Your Life*, THE INDEPENDENT (LONDON), Dec. 9, 1997, at N2, N3.

⁷¹ Kelly, *supra* note 70, at N2.

⁷² See Saunders & Zucker, *supra* note 19, at 665-67. See, e.g., *Rogan v. City of Los Angeles*, 668 F. Supp. 1384, 1387-89 (C.D. Cal. 1987 (describing how police falsely arrested identity theft victim). In *Rogan*, a prison escapee, McKandes, obtained a copy of Rogan's birth certificate and used it to obtain personal identification information and to impersonate Rogan. *Id.* at 1387. While using Rogan's identity, the Los Angeles Police Department arrested McKandes on suspicion of murder, but later released him. *Id.* at 1387-88. A California court subsequently issued an arrest warrant in Rogan's name for two robbery-murders. *Id.* at 1388. The information was entered into a national crime database. *Id.* Based on the information in the national crime database, the police falsely arrested Rogan and took him into custody four different times. *Id.* at 1388-89. Thereafter, Rogan sued the City of Los Angeles and recovered damages for deprivation of his constitutional rights. *Id.* at 1386, 1398.

⁷³ See *supra* notes 58-72 and accompanying text.

⁷⁴ See generally Provenza, *supra* note 7, at 330-35 (indicating that certain common law causes of action may provide avenue of recovery where federal statutes are inadequate); Sabol, *supra* note 19, at 167 (indicating that federal government offers little help to identity theft victims); Saunders & Zucker, *supra* note 19, at 669-70 (explaining that federal laws are inadequate because they are "scatter-shot" and primarily intended to protect federal financial institutions rather than victims); Eure, *supra* note 2, at CA3 (mentions inadequacies of current identity theft laws).

⁷⁵ Dan L. Nicewander, *Financial Record Privacy—What Are and What Should Be the Right of the Customer of a Depository Institution*, 16 ST. MARY'S L.J. 601, 608-09 (1999). However, various states have placed a constitutional right to privacy in their constitutions. See, e.g., ARIZ. CONST. art II, § 8; CAL. CONST. art I, § 1; ILL. CONST. art. I, § 6. Although states may

constitutional right to privacy in bank records under the Fourth or Fifth Amendments.⁷⁶ Without a constitutional remedy, Congress has filled the gap with several statutes designed to protect the right to financial privacy.⁷⁷

Over the last several decades, Congress attempted to protect financial privacy by enacting laws designed to prevent the unauthorized release or use of financial information.⁷⁸ For example, The Right to Financial Privacy Act of 1978, ("RFPA"), prevents financial institutions from releasing customer financial records to the federal government, unless a court authorizes the release.⁷⁹ Because the RFPA only prohibits the release of financial information to the federal government, it does

recognize such a right, the right does not usually regulate interactions among citizens. See SCHWARTZ & REIDENBERG, *supra* note 14, at 9-10 (discussing constitutional privacy law). Instead, some state constitutions establish limits on the government to protect privacy. *Id.* But see *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 641-42, 26 Cal. Rptr. 2d 834, 837 (1994) (recognizing that California constitutional right of privacy applies equally to government and private sector).

⁷⁶ See *United States v. Miller*, 425 U.S. 435, 435 (1976). In *Miller*, police charged defendant with operating an unregistered still in Georgia after fireman discovered a distillery in a warehouse Miller rented. *Id.* at 436. At trial, Miller sought to suppress bank records that established his relationship with several Georgia Banks. *Id.* at 435. Without authorization from Miller, several Georgia banks permitted Treasury agents to examine Miller's bank records pursuant to a defectively issued subpoena. *Id.* Miller argued he had a Fourth Amendment interest in his bank records to challenge the validity of the subpoena. See *id.* The Court, however, held that Miller had no legitimate expectation of privacy in bank records. See *id.* at 442; see also *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 66-68, 113 (1974) (upholding validity of Bank Secrecy Act under Fourth Amendment challenge).

⁷⁷ See, e.g., Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1998) (imposing fines for unauthorized access to government computers and computers of federally protected financial institutions); Identity Theft Assumption Deterrence Act, 18 U.S.C. § 1028 (1998) (making identity theft federal crime); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (1998) (protecting various types of stored information from access and acquisition); Fair Credit Reporting Act, 15 U.S.C. § 1681 (1998) (requiring consumer reporting agencies to divulge credit information with confidentiality, accuracy, and care); Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (1998) (prohibiting financial institutions from disclosing customer's financial records to federal government authorities); Privacy Act of 1974, 5 U.S.C. § 552(a) (1998) (establishing rules to control federal government's collection, use, and dissemination of information it holds). See generally Nicewander, *supra* note 75, at 609-10 (explaining how Congress enacted statutes in direct response to *Miller* court's negation of right to privacy); Buba, *supra* note 6, at 643-49 (discussing reactionary and sectoral privacy legislation).

⁷⁸ See Saunders & Zucker, *supra* note 19, at 669-70; Mark D. Seltzer, *The New Threats to Financial Privacy: Is There Liability for Institutions and Their New Antagonists, The Information Brokers*, 43 B.B.J. 8, 21 (1998) (explaining that Right to Financial Privacy Act covers only disclosures made to federal authorities not state or private parties); see, e.g., 12 U.S.C. §§ 3401-3422 (prohibiting financial institutions from disclosing customer's financial records to federal government authorities).

⁷⁹ See 12 U.S.C. §§ 3402-3403.

nothing to prevent the unauthorized release of information to private parties, businesses, states, or local governments.⁸⁰ Thus, the RFPA does not prevent identity theft because typically identity theft involves a financial institution's mistaken release of information to a private party.⁸¹ Furthermore, the statute cannot help identity theft victims because it does not provide any civil remedy.⁸²

Another statute that Congress enacted to protect financial privacy is the Fair Credit Reporting Act ("FCRA").⁸³ The FCRA regulates the collection and use of consumer credit information by consumer reporting agencies, such as Trans Union and Equifax.⁸⁴ The FCRA requires that those who furnish information to consumer reporting agencies, such as banks and credit card companies, must provide fair and accurate information.⁸⁵ The FCRA also requires that reporting agencies use reasonable procedures to assure that consumer credit reports reflect fair and accurate information.⁸⁶

Although the FCRA allows a consumer to bring a civil action against any institution that fails to comply with the statute, it does little to prevent identity theft or assist its victims.⁸⁷ The FCRA focuses on

⁸⁰ Saunders & Zucker, *supra* note 19, at 669; Seltzer, *supra* note 78, at 21. See generally Nicewander, *supra* note 75, at 612-15 (detailing limitations of Right to Financial Privacy Act).

⁸¹ See *supra* notes 30-36 and accompanying text (explaining how identity theft involves third party surreptitiously obtaining information from bank). See generally Saunders & Zucker, *supra* note 19, at 670 (noting limitations of RFPA in preventing identity theft).

⁸² See 12 U.S.C. § 3409(e). The RFPA allows an individual to file a motion to quash an application to prevent the release of financial information to the federal government. *Id.* § 3409(a). However, this is the sole judicial remedy for violations of the RFPA. *Id.* § 3409(e).

⁸³ See 15 U.S.C. § 1681a(4); *In re Grand Jury Subpoena to Credit Bureau of Greater Harrisburg*, 594 F. Supp. 229, 233 (M.D. Pa. 1984); Saunders & Zucker, *supra* note 19, at 670; Seltzer, *supra* note 78, at 21.

⁸⁴ See 15 U.S.C. § 1681b; *DiMezza v. First USA Bank, Inc.*, 103 F. Supp. 2d 1296, 1299 (2000); Saunders & Zucker, *supra* note 19, at 670; Seltzer, *supra* note 78, at 2.

⁸⁵ 15 U.S.C. §§ 1681a(p), 1681s2(a); *DiMezza*, 103 F. Supp. 2d at 1299.

⁸⁶ 15 U.S.C. § 1681(e). Additionally, the FCRA prevents the disclosure of consumer credit reports to certain limited, defined purposes. *Id.* § 1681b.

⁸⁷ 15 U.S.C. §§ 1681n(c), 1681o(b), 1681s(2)(b); *Yelder v. Credit Bureau of Montgomery, L.L.C.*, 131 F. Supp. 2d 1275, 1280 (M.D. Ala. 2001); Saunders & Zucker, *supra* note 19, at 670; Buba, *supra* note 6, at 647. Compare *McMillan v. Experian Info. Servs. Inc.*, 119 F. Supp. 2d 84, 86 (D. Conn. 2000) (finding that consumer may bring private action against furnishers of information based on violation of § 1681s-2(b)), *DiMezza*, 103 F. Supp. 2d at 1299 (holding that consumer has private right of action against furnishers of information under § 1681s-2(b)), and *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 927 (D. Ill. 2000) (finding private consumer action under § 1681s-2(b)), with *Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999) (holding that there is no consumer action available against furnishers of information under § 1681s-2(b)). In *DiMezza*, a victim of identity theft attempted to dispute a debt, which an identity thief had incurred in his

dissemination of information to and from specific prescribed entities and in certain narrow circumstances, which are too limited to adequately deal with identity theft.⁸⁸ Furthermore, the act only applies to credit reporting agencies, such as Equifax and Trans Union, and institutions that supply information to those agencies.⁸⁹ Thus, the FCRA does not govern many financial institutions and financial transactions, which may fall prey to an identity thief.⁹⁰

The limited protection of the RFPA and the FCRA has proved insufficient to prevent identity theft.⁹¹ As a result of the rise in identity theft, federal and state legislators have begun to enact reactionary statutes designed to punish the theft of personal information.⁹² For

name. *DiMezza*, 103 F. Supp. 2d at 1298. Despite presenting his case several times to the debt collector, credit card company, and several credit reporting agencies, these organizations refused to correct the information in the victim's credit report. *Id.* *DiMezza* sued the debt collector, credit card company, and the consumer reporting agencies, under the FCRA, for failure to investigate his dispute and correct his credit information. *See id.* The debt collector moved to dismiss, arguing that those who furnish information only owe duties under the FCRA to consumer reporting agencies, not consumers. *Id.* The federal district court rejected the debt collector's argument and found that the FCRA provides a private right of action against furnishers of information that willfully or negligently fail to perform their duties. *Id.* at 1300. This case illustrates that the FCRA may provide some relief to victims of identity theft against consumer reporting agencies and those who furnish information to those agencies. *See id.* However, such relief is under inclusive and will not be available in many instances of identity theft, where consumer reporting agencies or furnishers of information are not involved. *See generally* Saunders & Zucker, *supra* note 19, at 670 (discussing general limitations of FCRA).

⁸⁸ Saunders & Zucker, *supra* note 19, at 670; Buba, *supra* note 6, at 647.

⁸⁹ *See* 15 U.S.C. §§ 1681a(p), 1681s2(a); *DiMezza*, 103 F. Supp. 2d at 1299 (explaining that furnishers of information include those entities, which transmit information regarding debt to consumer reporting agencies); *Carney*, 57 F. Supp. 2d at 501 (defining furnishers of information as entities which transmit information concerning consumer debt to consumer reporting agencies such as Experian, Equifax, MCCA, and Trans Union).

⁹⁰ *See* Saunders & Zucker, *supra* note 19, at 670; Buba, *supra* note 6, at 647. *See generally* 15 U.S.C. § 1681(a)(1) (discussing parties that FCRA governs).

⁹¹ *See* Saunders & Zucker, *supra* note 19, at 670; Buba, *supra* note 6, at 648.

⁹² *See* Provenza, *supra* note 7, at 324-26; 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, 1018-19; Buba, *supra* note 6, at 643-49; *Trends in Privacy Law: Identity Fraud in the 50 States*, METRO. CORP. COUN., Aug. 1998, WL 8/98 METCC 37 (summarizing proposed statutes criminalizing identity theft in thirty-seven state legislatures). In 1999, Congress introduced the Financial Information Privacy Act, which purported to criminalize soliciting or obtaining customer information from a financial institution under false pretenses. *See* H.R. 30, 106th Cong. (1999) (reintroducing Financial Information Privacy Act of 1999); H.R. 4321, 105th Cong. (1998) (introducing Financial Information Privacy Act of 1999). In contrast to the other federal laws, this law would allow for civil liability against the identity thief. *See* Provenza, *supra* note 7, at 326-28. If adopted, this provision would allow plaintiffs to recover under tort law for other damages associated with identity theft. *See generally* R. Christian Bruce, *Financial Services*

example, the federal government recently criminalized identity theft with the Identity Theft and Assumption Deterrence Act ("the Act").⁹³ The Act makes it a felony to possess, transfer or produce personal identification information with unlawful intent.⁹⁴

The Act contains provisions designed to give the victims of identity theft certain rights.⁹⁵ Under the Act, victims have a right to investigative information from law enforcement officials.⁹⁶ In addition, the act requires the Federal Trade Commission to provide a centralized complaint and consumer education service for identity theft victims.⁹⁷ The Act, however, does not provide for any type of restitution to victims of identity theft.⁹⁸

In the last several years, multiple states have enacted similar legislation in an effort to deter identity theft.⁹⁹ For example, California

Reform: Leach Introduces New Version of H.R. 10, Hopes to Regain Momentum from Last Year, BANKING REP. (BNA) 47 (1999) (summarizing new proposed laws); Provenza, *supra* note 7, at 327 (discussing functions of proposed law). The Senate has also introduced a bill that addresses the protection of consumer's financial information. See S. 187, 106th Cong. (1999); Paul Sarbanes, *Senator Seeks to Protect Consumers Confidential Information*, Press Release, Jan. 21, 1999, available at 1999 WL 2221911.

⁹³ 18 U.S.C. § 1028 (1998).

⁹⁴ *Id.* § 1028(a)(1)-(3).

⁹⁵ See Identity Theft and Assumption Deterrence Act, Pub. L. No. 105-318, 112 Stat. 3010 (1998) (providing for centralized complaint service for victims).

⁹⁶ See *id.*; Michael A. Benoit, *Symposium on Electronic Commerce, Part I, Privacy and Electronic Commerce*, 52 CONSUMER FIN. L.Q. REP. 384, 387 (1998).

⁹⁷ Identity Theft and Assumption Deterrence Act, Pub. L. No. 105-318, 112 Stat. 3010 (1998) (requiring FTC to establish procedures to log and acknowledge complaints, provide information materials, and refer complaints to law enforcement and consumer reporting agencies).

⁹⁸ See Saunders & Zucker, *supra* note 19, at 671-72. See generally 18 U.S.C. § 1028 (containing no provision for victim restitution). The Senate's version of the act permitted victim restitution, but the House of Representative's version did not include victim restitution. Compare S. 512, 105th Cong. § 3 (1998), with H.R. 4151, 105th Cong. (1998).

⁹⁹ See Sabol, *supra* note 19, at 167; Tighe & Rosenblum, *supra* note 92, at 1018-19. See, e.g., ARIZ. REV. STAT. § 13-2008 (1998) (making it illegal for person to knowingly take or use any personal identifying information of another person, with intent to obtain or use other person's identity for any unlawful purpose or to cause loss to said person); ARK. CODE ANN. § 5-37-510 (Michie 1999) (defining financial identity fraud as obtaining financial records or attempting to access another's financial records with intent to appropriate another person's financial resources for one's own use); CAL. PENAL CODE § 530.5 (West 1999) (making it felony to assume another person's identifying information to obtain goods or services); COL. REV. STAT. § 13-21-109.5(1) (1998) (prohibiting individuals from obtaining, selling, or otherwise using another persons social security number to commit fraud or impersonate another); GA. CODE ANN. § 16-9-121 (1998) (defining identity fraud as action whereby person intending to unlawfully appropriate another's financial resources obtains or attempts to obtain financial resources with use of personal identifying information); KAN. STAT. ANN. § 21-4018 (2000) (establishing identity theft as knowingly

followed the trend of the federal government and criminalized identity theft.¹⁰⁰ A California penal statute makes it a felony to assume someone's name or any other form of identification to obtain credit, goods, or services.¹⁰¹ Although California law does not provide a civil remedy for victims, California has gone further than other states to enact laws that help identity theft victims restore their credit and initiate law enforcement investigations.¹⁰²

The state and federal statutory laws criminalizing identity theft attempt to deter the crime by punishing the identity thief.¹⁰³ Although

and with intent to defraud, obtaining, possessing, transferring, or using identification documents of another person); MASS. GEN. LAWS ch. 266 § 37E(b) (2000) (prohibiting any person, who with intent to defraud, poses as another person and uses other person's personal information to obtain anything of value); MISS. CODE ANN. § 97-19-85 (1998) (making it crime to make any false statement or representation as to anyone's identity for purpose of fraudulently obtaining anything of value); MO. REV. STAT. § 570.135 (1999) (prohibiting persons from willfully obtaining personal identifying information of another person and using that information fraudulently to obtain goods or services in name of other person); N.C. GEN. STAT. § 14-113.20(a) (1999) (making it felony for person to knowingly obtain, possess, or use another person's identifying information with intent to defraud); R.I. GEN. LAWS § 11-49.1-3 (1998) (establishing crime of identity fraud as wrongful possession or misuse of various forms of identification); 16 S.C. CODE ANN. REGS. § 13-510 (2000) (making it illegal to intentionally and unlawfully appropriate financial resources of another person to his or her own use by obtaining or accessing another's personal identifying information); UTAH CODE ANN. § 76-6-1102(2) (2000) (stating that person is guilty of identity fraud when that person knowingly or intentionally obtains personal identifying information of another person and uses that information with fraudulent intent to obtain anything of value); W. VA. CODE § 61-3-54 (1998) (criminalizing knowingly taking identifying information of another person with intent to fraudulently represent another person for purpose of making financial or credit transactions in other person's name); WIS. STAT. § 943.201 (1998) (making it felony to intentionally use any personal identifying information of another individual to obtain anything of value).

¹⁰⁰ CAL. PENAL CODE § 530.5 (West 1999).

¹⁰¹ See *id.* § 530.5.

¹⁰² See *id.* § 530.6 (providing procedure whereby victims of identity theft can initiate criminal investigation and expedited judicial determination of their innocence); *id.* § 530.7 (establishing identity theft data base to record instances of identity theft); CAL. CIV. CODE § 1785.16(k) (West 1998) (providing procedure for identity theft victim to file police report with credit reporting agency). In California, identity theft victims can file a police report and then submit the report to credit reporting agencies. See CAL. CIV. CODE § 1785.16(k). Upon receiving the report, the credit reporting agency is required to immediately block the reporting of any information that the consumer alleges resulted from identity theft. See *id.* The California Public Interest Research Group ("CalPRIG") has made a variety of recommendations to further protect victims and prevent identity theft. CALPIRG REPORT, *supra* note 46, at 28-37. CalPRIG has suggested amending California's Consumer Act to provide for civil liability to creditors for identity theft. *Id.* However, at the time of this article, the California legislature had not acted on this suggestion.

¹⁰³ See *supra* notes 93-94, 99 and accompanying text; see also Provenza, *supra* note 7, 326-28 (explaining criminal identity theft statutes); Ramirez-Palafos, *supra* note 7, at 485-88 (describing California legislative efforts to protect consumers from identity theft).

these statutes provide some assistance to identity theft victims, they do not sufficiently protect consumers.¹⁰⁴ Moreover, these statutes do not address the role financial institutions have in protecting consumer information, or whether these institutions can be held liable for identity theft.¹⁰⁵ Most state and federal courts have not directly addressed these issues either.¹⁰⁶ However, in contexts other than identity theft, numerous courts have recognized several causes of action against financial institutions for failure to keep their customers' personal information confidential.¹⁰⁷ These causes of action represent possible claims that an

¹⁰⁴ See *supra* note 74.

¹⁰⁵ See generally VARTANIAN ET AL., *supra* note 13, 297-99 (discussing how bank liability is novel issue); Provenza, *supra* note 7, at 326-30 (summarizing existing statutes and outlining cause of action under common law for banks); Eure, *supra* note 2, at CA3 (mentioning inadequacies of current law).

¹⁰⁶ See VARTANIAN ET AL., *supra* note 13, at 297-99 (explaining that existing standards do not address whether unauthorized attempts at identity theft would be actionable); Eure, *supra* note 2, at CA1-CA3 (discussing novelty of such claims). *But see* Stevens v. First Interstate Bank, 999 P.2d 554 (Or. Ct. App. 2000) (finding bank was not liable, under breach of confidence theory, for identity theft).

¹⁰⁷ See, e.g., Young v. United States Dep't of Justice, 882 F.2d 633, 640 (2d Cir. 1989) (indicating that New York law should allow bank customers to bring breach of confidence claim against bank); Jordan v. Shattuck Nat'l Bank, 868 F.2d 383, 386-87 (10th Cir. 1989) (determining that bank employee's disclosure of confidential loan application material constituted breach of duty of confidentiality); Peoples Bank of Virgin Islands v. Figueroa, 559 F.2d 914, 917 (3d Cir. 1977) (suggesting banks have general duty to keep customer information confidential); First Nat'l City Bank v. Gonzalez, 293 F.2d 919, 920-22 (1st Cir. 1961) (applying Puerto Rican negligence statute to permit borrower to recover from bank for damage to reputation and for mental anguish caused by bank's negligence in notifying several people about depositor's account remittances); Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 514-16, 209 Cal. Rptr. 551, 554-55 (1985) (recognizing tort duty of confidentiality); Rubenstein v. S. Denver Nat'l Bank, 762 P.2d 755, 758 (Colo. Ct. App. 1988) (holding bank has duty not to disclose customer information); Barnett Bank of West Fla. v. Hooper, 498 So. 2d 923, 925 (Fla. 1986) (affirming appellate court decision that held bank has implied contractual duty not to disclose information regarding customers' accounts); Schnier v. Barnett Bank of S. Fla., 595 So. 2d 143, 144 (Fla. Dist. Ct. App. 1992) (analyzing whether bank owed tort duty of confidentiality to borrower for inadvertent information that mistakenly appeared on borrower's credit report); Sun First Nat'l Bank of Lake Wales v. Stegall, 395 So. 2d 1248, 1248-49 (Fla. Dist. Ct. App. 1981) (recognizing bank has implied contractual duty not to disclose depositor's account information to third parties); Milohnich v. First Nat'l Bank, 224 So. 2d 759, 762 (Fla. Dist. Ct. App. 1969) (holding that bank owes implied contractual duty to its depositors to not disclose depositor's account information to third parties); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 289-90 (Idaho 1961) (rejecting invasion of privacy claim, but finding bank owed implied contractual duty to customer based on bank disclosing customer's personal account information to employer); Ind. Nat'l Bank v. Chapman, 482 N.E.2d 474, 481-82 (Ind. Ct. App. 1985) (considering cause of action for invasion of privacy and breach of implied contractual duty and recognizing general tort duty not to disclose); Burford v. First Nat'l Bank, 557 So. 2d 1147, 1150-51 (La. Ct. App. 1990) (recognizing bank's implied contractual duty to keep customer account information confidential); Rush v. Me. Sav. Bank, 387 A.2d

identity theft victim might bring against a financial institution whose carelessness resulted in the theft of the victim's information.¹⁰⁸

C. Causes of Action Available to Customers for Financial Institutions' Failure to Protect Customer Information

When a financial institution fails to keep a customer's confidential information secret, there are several different common law legal claims, which the customer may assert against the institution.¹⁰⁹ The customer may assert that the financial institution's disclosure of the customer's information constituted an invasion of privacy.¹¹⁰ The customer might

1127, 1128 (Me. 1978) (analyzing mortgagor's invasion of privacy claim based on bank disclosing personal information to Internal Revenue Service); *Suburban Trust Co. v. Waller*, 408 A.2d 758, 763-64 (Md. Ct. Spec. App. 1979) (holding bank has implied contractual duty not to make any disclosures concerning depositor's account); *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648, 651 (Minn. 1976) (determining whether bank vice president's releasing information regarding foreclosure action between bank and customer constituted invasion of privacy and recognizing that bank is generally under duty not to disclose depositor's financial condition); *Pigg v. Robertson*, 549 S.W.2d 597, 600 (Mo. Ct. App. 1977) (noting that bank has obligation not to disclose information related to customer's account without customer's consent); *Schoneweis v. Dando*, 435 N.W.2d 666, 669-71 (Neb. 1989) (addressing whether bank employee's disclosure of customer's account information to customer's father, mother-in-law, and brother-in-law constituted false light invasion of privacy cause of action); *Graney Dev. Corp. v. Taksen*, 400 N.Y.S.2d 717, 719-20 (Sup. Ct. 1978) (holding that there is reasonable expectation that bank will keep depositor's account information secret); *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982) (finding that bank's relationship to loan applicant imposes duty to keep content of loan application confidential); *McGuire v. Shubert*, 722 A.2d 1087, 1090-92 (Pa. Super. Ct. 1998); *Rycroft v. Gaddy*, 314 S.E.2d 39, 43-44 (S.C. Ct. App. 1984) (applying invasion of privacy and tort duty of confidentiality theories to bank's release of depositor account information in response to subpoenas); *Jacobsen v. Citizens State Bank*, 587 S.W.2d 480, 481-82 (Tex. Ct. App. 1979) (reviewing depositor's invasion of privacy claim based on bank disclosing depositor's account information in response to Internal Revenue Service summons); *Nicewander*, *supra* note 75, at 621-23; *Raymond*, *supra* note 1, §§ 5-30 (analyzing multiple cases addressing banks' liability for disclosing information concerning depositor or customer).

¹⁰⁸ See *Provenza*, *supra* note 7, at 330-32 (explaining cause of action available to victims of identity theft under common law); *Raymond*, *supra* note 1, §§ 5-30 (summarizing different legal claims for banks' disclosure of information concerning depositor or customer).

¹⁰⁹ See *supra* note 107.

¹¹⁰ See, e.g., *Peterson*, 367 P.2d at 289-90 (rejecting customer's invasion of privacy claim based upon bank manager's disclosure of confidential information to customer's employer); *Chapman*, 482 N.E.2d at 481-82 (considering cause of action for breach of implied contractual duty against bank); *Rush*, 387 A.2d at 1128 (analyzing mortgagor's invasion of privacy claim based on bank disclosing personal information to Internal Revenue Service); *Sjogren*, 244 N.W.2d at 651 (determining whether bank vice president's releasing information regarding foreclosure action between bank and customer constituted invasion of privacy); *Dando*, 435 N.W.2d at 669-71 (addressing whether bank employee revealing

also argue that the institution breached an implied contractual duty to keep the customer's information confidential.¹¹¹ In addition, the customer might contend that the institution breached a tort duty of confidentiality, requiring the institution to keep its customers' information undisclosed.¹¹² Although most courts have yet to apply these causes of action to identity theft, these actions have provided legal recourse for customers when financial institutions have disclosed customer information without authorization.¹¹³

customer's account information to customer's father, mother-in-law, and brother-in-law constituted false light invasion of privacy cause of action); *Rycroft*, 314 S.E.2d at 43-44 (analyzing invasion of privacy claim resulting from bank's release of depositor account information in response to subpoenas); *Jacobsen*, 587 S.W.2d at 481-82 (reviewing depositor's invasion of privacy claim based on bank disclosing depositor's account information in response to Internal Revenue Service summons).

¹¹¹ See, e.g., *Hooper*, 498 So. 2d at 925-26 (affirming decision holding that bank has implied contractual duty not to disclose information regarding its customer's accounts); *Stegall*, 395 So. 2d at 1249 (recognizing bank has implied contractual duty not to disclose depositor's account information to third parties); *Milohnich*, 224 So. 2d at 762 (holding that bank owes implied contractual duty to its depositors not to disclose depositor's account information to third parties); *Peterson*, 367 P.2d at 289-90 (finding bank owed implied contractual duty to customer based on bank disclosing customer's personal account information to employer); *Chapman*, 482 N.E.2d at 482 (considering cause of action for breach of implied contractual duty); *Burford*, 557 So. 2d at 1150-51 (recognizing bank's implied contractual duty to keep customer account information confidential); *Waller*, 408 A.2d at 763-64 (holding bank has implied contractual duty not to make any disclosures concerning depositor's account); *McGuire*, 722 A.2d at 1090-91 (ruling that bank has implied contractual duty to keep customer's bank account information confidential).

¹¹² See, e.g., *Young*, 882 F.2d at 640 (indicating that bank customers should be able to bring breach of confidence claim against bankers); *Jordan*, 868 F.2d at 386-87 (determining that bank employee's disclosure of confidential loan application material constituted breach of duty of confidentiality); *Figueroa*, 559 F.2d at 917 (noting that banks have general duty to keep customer information confidential); *Commercial Cotton*, 163 Cal. App. 3d at 514-16, 209 Cal. Rptr. at 554-55 (recognizing tort duty of confidentiality in case involving bank); *Schnier*, 595 So. 2d at 144 (determining whether bank owed tort duty of confidentiality to borrower for inadvertent information that mistakenly appeared on borrower's credit report); *Peterson*, 367 P.2d at 289-90 (stating that bank has general duty to customer to hold customers' information secret); *Chapman*, 482 N.E.2d at 481-82 (recognizing general tort duty not to disclose); *Sjogren*, 244 N.W.2d at 651 (acknowledging that bank is generally under duty not to disclose depositor's financial condition); *Robertson*, 549 S.W.2d at 599 (noting that bank has obligation not to disclose information related to customer's account without customer's consent); *Taksen*, 400 N.Y.S.2d at 719-20 (holding that there is reasonable expectation that bank will keep depositor's account information secret); *Djowharzadeh*, 646 P.2d at 619-20 (finding that bank's relationship to loan applicant creates duty to keep content of loan application confidential); *Rycroft*, 314 S.E.2d at 43-44 (applying tort duty of confidentiality to a bank's release of depositor account information in response to subpoenas).

¹¹³ See *supra* note 21. But see *Stevens v. First Interstate Bank*, 999 P.2d 551, 555 (Or. Ct. App. 2000) (refusing to apply tort duty of confidentiality to award identity theft victim damages against bank).

1. Invasion of Privacy

Courts have recognized a right to financial privacy for centuries.¹¹⁴ One of the first American common law causes of action courts developed to protect an individual's right to financial privacy was the invasion of privacy tort.¹¹⁵ The invasion of privacy tort originated from the idea that people have the right to be let alone.¹¹⁶

Courts have interpreted the invasion of privacy tort in a variety of ways.¹¹⁷ Courts subdivide the tort into four categories: public intrusion upon seclusion, public disclosure of personal facts (unwanted publicity), publicly placing someone in false light, and appropriation of someone's name or likeness.¹¹⁸ Although each of these categories protects a person's privacy, courts have typically resorted to the unwanted publicity category when deciding cases involving a financial institution customer's financial privacy.¹¹⁹

¹¹⁴ See *Tournier v. Nat'l Provincial & Union Bank of Eng.*, 1 K.B. 461, 462-64 (1924); Roy Elbert Huhs, Jr., *To Disclose or Not to Disclose Customer Records*, 108 BANKING L.J. 30, 52 n.3 (1991). An individual's right of financial privacy first appeared in the Code of Hammurabi, which was written in Babylon over 4000 years ago. See E. CHAMBOST, *BANK ACCOUNTS: A WORLD GUIDE TO CONFIDENTIALITY* 98 (P. Walton & M. Thompson, eds. 1983). The first recorded rule of law regarding bank secrecy was in Rules of Banco Ambrosiano Milano of 1593. See *id.* The relevant provision held that the penalty for a banker's violation of secrecy was forfeiture of the banker's license. See *id.*

¹¹⁵ See Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1438 (1982).

¹¹⁶ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 209 (1890); see also *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 75 (Ga. 1905) (adopting common law right to privacy).

¹¹⁷ See *Felis v. Greenberg*, 273 N.Y.S.2d 288, 295 (1966) (finding false light invasion of privacy action based on physician's submission of false information to patient's insurance company); *Feeny v. Young*, 181 N.Y.S. 481, 495 (1920) (holding exhibition of film footage of caesarian operation in public theatre constituted appropriation of name or likeness for purposes of invasion of privacy); *Doe v. Roe*, 400 N.Y.S.2d 668, 679 (Sup. Ct. 1977) (ruling that psychiatrist's publishing patient's secrets established unwanted publicity under invasion of privacy doctrine); *Clayman v. Bernstein*, 38 Pa. D. & C. 543, 551 (1940) (finding doctor's unauthorized photos of patient's facial disfigurement constituted invasion of privacy under public intrusion upon seclusion category); *Jerry Berman & Deirdre Mulligan, Privacy in the Digital Age: Work in Progress*, 23 NOVA L. REV. 551, 557 (1997); Nicewander, *supra* note 75, at 623.

¹¹⁸ See *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1995); *Rothstein v. Montefiore Home*, 689 N.E.2d 108, 116 (Ohio Ct. App. 1996); *William L. Prosser, Privacy*, 48 CAL. L. REV. 383, 389 (1960).

¹¹⁹ See, e.g., *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 287-88 (Idaho 1961) (rejecting but considering bank customer's unwanted publicity invasion of privacy claim based on bank disclosing customer's personal account information to employer); *Ind. Nat'l Bank v. Chapman*, 482 N.E.2d 474, 479 (Ind. Ct. App. 1985) (rejecting unwanted publicity invasion of privacy claim based on bank's disclosure of borrower's loan information to police officer); *Rush v. Me. Sav. Bank*, 387 A.2d 1127, 1128 (Me. 1978) (refusing to find

Unwanted publicity is the public disclosure of personal facts concerning the private life of another.¹²⁰ The tort requires that the publicized facts be highly offensive to a reasonable person.¹²¹ In addition, the personal facts cannot be of legitimate concern to the public.¹²² Although the unwanted publicity tort is well established, courts have carefully circumscribed the scope of the tort.¹²³

Generally, courts have limited the unwanted publicity tort to those cases demonstrating an outrageous intrusion on a person's seclusion.¹²⁴ Courts have narrowed the tort further by requiring that the tortfeasor

unwanted publicity invasion of privacy claim based on bank disclosing customers personal information to Internal Revenue Service); *Rycroft v. Gaddy*, 314 S.E.2d 39, 42-44 (S.C. Ct. App. 1984) (analyzing unwanted publicity invasion of privacy action based upon bank's release of depositor account information in response to subpoenas); *Vickery*, *supra* note 115, at 1439-40.

¹²⁰ See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

¹²¹ *Baldwin v. First Nat'l Bank*, 362 N.W.2d 85, 98 (holding that only unreasonable, serious, and offensive intrusions are regarded as tortious); RESTATEMENT (SECOND) OF TORTS, *supra* note 120, § 652D.

¹²² See RESTATEMENT (SECOND) OF TORTS, *supra* note 120, § 652D.

¹²³ See *Vickery*, *supra* note 115, at 1439-40. See, e.g., *Peterson*, 367 P.2d at 287-88 (rejecting bank customer's invasion of privacy claim because bank's disclosure was not considered public); *Chapman*, 482 N.E.2d at 477-79 (holding disclosure of borrower's loan information to police officer was not invasion of privacy); *Rush*, 387 A.2d at 1128 (finding bank disclosure of personal information to Internal Revenue Service was not invasion of privacy); *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648, 652 (Minn. 1976) (holding that bank vice president's releasing information regarding foreclosure action between bank and customer did not constitute invasion of privacy); *Schoneweis v. Dando*, 435 N.W.2d 666, 669-71 (Neb. 1989) (finding bank employee revealing customer's account information to customer's father, mother-in-law, and brother-in-law constituted false light invasion of privacy cause of action); *Rycroft*, 314 S.E.2d 39 at 43-44 (holding that subpoenas that contain customer account information are immune from invasion of privacy action); *Jacobsen v. Citizens State Bank*, 587 S.W.2d 480, 481-82 (Tex. Ct. App. 1979) (concluding that depositor's right of privacy was subordinate to banks duty to comply with Internal Revenue laws).

¹²⁴ See, e.g., *Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204, 1207 (10th Cir. 1985) (finding dissemination of credit report to 17 reporting services is not adequate publicity); *Peterson*, 367 P.2d at 288 (rejecting bank customer's claim for invasion of privacy because bank's disclosure to employer was not considered public); *Senogles v. Sec. Benefit Life Ins. Co.*, 536 P.2d 1358, 1370 (Kan. 1975) (holding that insurance companies dissemination of applicant's medical history was not adequate publicity); RESTATEMENT (SECOND) OF TORTS, *supra* note 120, § 652D cmt. a (stating that communication of fact concerning private life of another to one person or small group is not dissemination); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2392 (1996) (explaining stringent requirements for making out invasion of privacy claim against financial institution). But see, e.g., *McSurely v. McClellan*, 753 F.2d 88, 112-13 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 1005 (1985) (finding that disclosure of wife's premarital love letters to husband was public dissemination); *Beaumont v. Brown*, 257 N.W.2d 522, 529 (Mich. 1977) (holding that disclosure of embarrassing matters to several supervisors was dissemination).

widely disseminate the private facts.¹²⁵ Thus, for a financial institution customer to bring an unwanted publicity action against a financial institution, the customer must prove an outrageous intrusion upon her privacy and a widespread dissemination of private facts.¹²⁶

Bank customers have brought invasion of privacy actions, under the unwanted publicity category, in situations where the bank has made an unauthorized disclosure of their personal information.¹²⁷ For example, in *Peterson v. Idaho First National Bank*, Peterson sued his bank for invasion of privacy after the bank disclosed certain account information without his authorization.¹²⁸ Both Peterson and his employer, a financing corporation, were depositors at Idaho First National Bank.¹²⁹ In an attempt to keep tabs on his employees and maintain the integrity of the financial corporation, Peterson's manager asked the bank to notify him when any of his employees did anything to discredit his company.¹³⁰ Based on this request, a bank official, without Peterson's authorization, revealed to Peterson's manager that Peterson had written several bad checks.¹³¹ Peterson brought suit alleging the bank's disclosure of his personal information was an invasion of privacy.¹³² The lower court, appellate court, and Idaho Supreme Court dismissed Peterson's invasion of privacy cause of action for failure to state a claim.¹³³

The Idaho Supreme Court dismissed Peterson's invasion of privacy claim for one main reason.¹³⁴ The court found that the bank's disclosure to Peterson's employer was not a public disclosure.¹³⁵ Indeed, the disclosure of Peterson's financial information to one employer or agency was not sufficient to meet the standard of public dissemination.¹³⁶ Although unwilling to recognize an invasion of privacy claim, the court

¹²⁵ See *Polin*, 768 F.2d at 1206 (requiring more than dissemination to multiple credit reporting services); RESTATEMENT (SECOND) OF TORTS, *supra* note 120, § 652D cmt. a; Raymond, *supra* note 1, § 23.

¹²⁶ See RESTATEMENT (SECOND) OF TORTS, *supra* note 120, § 652D cmt. a. See, e.g., *Dando*, 435 N.W.2d at 671 (holding that false disclosure of financial information to three people was both reckless and considered publicity).

¹²⁷ See *supra* note 110.

¹²⁸ *Peterson*, 367 P.2d at 286-87.

¹²⁹ *Id.* at 286.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 285-86.

¹³³ *Id.* at 285, 288.

¹³⁴ See *id.*

¹³⁵ See *id.* at 286.

¹³⁶ See *id.*

remanded the case on other grounds.¹³⁷ The court found that the complaint alleged facts sufficient to establish that the bank breached its implied contractual duty of confidentiality.¹³⁸

2. Breach of an Implied Contractual Duty of Confidentiality

As the Idaho Supreme Court's remand in *Peterson* indicates, the contractual relationship between a financial institution and its customers creates certain duties, which a financial institution owes its customers.¹³⁹ Indeed, courts have acknowledged that the contractual relationship between a financial institution and its customers creates an "implicit" duty for those institutions to keep their customers' account information confidential.¹⁴⁰ Accordingly, many courts have recognized a cause of action against financial institutions for breach of an implied contractual duty when those institutions disclose customer information without authorization.¹⁴¹

The contract between a financial institution and a customer may include express or implied duties.¹⁴² A financial institution customer might attempt to prevent disclosure of personal information by expressly including rights and duties regarding personal information in a contract with a financial institution.¹⁴³ However, considering the imbalance of power between financial institutions and customers, an ordinary customer does not usually enter into this type of agreement.¹⁴⁴

¹³⁷ See *id.* at 288.

¹³⁸ See *id.* at 290-91.

¹³⁹ See *id.* at 288-91.

¹⁴⁰ See *supra* note 111 (listing cases where courts have found banks' contractual relationship with customers gives rise to implicit contractual duty of confidentiality); see also Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 16-18 (1995) (reviewing implied contractual duty of confidentiality).

¹⁴¹ See *supra* note 111.

¹⁴² See Gilles, *supra* note 140, at 15-19; Murphy, *supra* note 124, at 2407. The Supreme Court has recognized explicit privacy contracts. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (ruling that disclosure agreement did not implicate First Amendment); *Snapp v. United States*, 444 U.S. 507, 508 (1980) (holding that agreement not to publish anything regarding employment in CIA was valid).

¹⁴³ See Murphy, *supra* note 124, at 2408; see also Gilles, *supra* note 140, at 15 (describing contractual theories of recovery for breach of confidentiality and role of express and implicit contractual duties).

¹⁴⁴ See generally Kenneth J. Goldberg, Note, *Lender Liability and Good Faith*, 68 B.U.L. Rev. 653, 666-70 (1988) (explaining effects of imbalance of power between bank and in contract negotiation).

Despite the absence of an expressed contractual duty of confidentiality, courts have been willing to acknowledge an implied duty of confidentiality in the contract between a customer and a bank.¹⁴⁵ Courts have recognized that banks have an implied agreement with customers to keep the customers' financial affairs confidential.¹⁴⁶ Thus, it is an implied term of the contract between a customer and a bank that the bank will not disclose the customer's account information to third persons without authorization.¹⁴⁷

The *Peterson* court was the first court in the United States to suggest that a bank customer may have a cause of action against a bank for breach of the implied contractual duty of confidentiality.¹⁴⁸ In addition to examining Peterson's invasion of privacy claim, the Idaho Supreme Court of Idaho considered whether the bank breached a duty implied in the contract between Peterson and the bank.¹⁴⁹ The court held that when the bank disclosed to Peterson's employer that he had written bad checks, the bank breached an implied contractual duty not to disclose information concerning a customer's accounts.¹⁵⁰

The *Peterson* court asserted that one of the basic foundations of the relationship between a bank and its customers is "inviolable secrecy."¹⁵¹ In dicta, the court explained that inviolable secrecy requires a bank to keep a customer's personal information protected from the public.¹⁵² The court

¹⁴⁵ See Gilles, *supra* note 140, at 15-19; Raymond, *supra* at § 27-30.

¹⁴⁶ See *supra* note 111.

¹⁴⁷ See *supra* note 111.

¹⁴⁸ See *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961). British courts established the implied contract doctrine in the 1850s and later developed the doctrine in *Tournier v. National Provincial & Union Bank*. See *Tournier v. Nat'l Provincial & Union Bank of Eng.*, 1 K.B. 461, 462-64 (1924). In *Tournier*, the plaintiff, a customer of a local bank, mistakenly received another person's check. *Id.* at 218. The plaintiff forged the inadvertently sent check and gave it to someone else. *Id.* at 217-20. A bank employee noticed the forgery and reported it to the plaintiff's employer. *Id.* Thereafter, the employer terminated the plaintiff because he had forged the check. *Id.* at 218. Plaintiff then sued the bank, arguing that the bank breached its duty not to disclose his personal information. *Id.* at 221. The court of appeals reversed a lower court jury verdict, finding in favor of the bank. *Id.* at 224. The appellate court held that the obligation of secrecy was an implied term of the contract between the bank and the plaintiff customer. *Id.* at 225.

¹⁴⁹ *Peterson*, 367 P.2d at 286.

¹⁵⁰ *Id.* at 285.

¹⁵¹ *Id.* at 289.

¹⁵² *Id.* at 290-91; see also Raymond, *supra* note 1, at § 23. Inviolable secrecy has never been formally defined, but it essentially means an unbroken or indestructible form of confidentiality. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11190 (1966). Several jurisdictions have adopted the *Peterson* approach, but have limited the duty with exceptions. See *Schaut v. First Fed. Sav. Loan Ass'n.*, 560 F.Supp. 245, 248 (N.D. Ill. 1983) (recognizing exception for disclosures related to Internal Revenue Service subpoenas);

indicated that this obligation was an inherent and fundamental aspect of the relationship between banks and customers.¹⁵³

The dicta in *Peterson* suggests that a duty of confidentiality exists independent of any obligations implied from the contract between a financial institution and its customers.¹⁵⁴ Indeed, contracts are not the only source for duties a financial institution owes to its customers.¹⁵⁵ While some courts have looked to the contractual relationship to define the scope of a financial institution's duties, other courts have recognized duties implied by law and public policy.¹⁵⁶ Furthermore, tort law has typically recognized that certain relationships establish specific duties regardless of the existence of a contractual relationship.¹⁵⁷

3. Breach of the Tort Duty of Confidentiality

A number of courts have recognized a tort duty of confidentiality separate and distinct from expressed and implied contractual duties.¹⁵⁸ Commentators sometimes call the tort arising from this duty a breach of

Milohnich v. First Nat'l Bank of Miami Springs, 224 So. 2d 759, 760-61 (Fla. Dist. Ct. App. 1969) (acknowledging exception for disclosure under compulsion of law); *Suburban Trust Co. v. Waller*, 408 A.2d 758, 764 (Md. Ct. Spec. App. 1979) (accepting legal exception for disclosures made under compulsion of law). The exceptions apply when the law compels disclosure, a bank discloses pursuant to public interest, or the bank discloses based on the customer's expressed or implied consent. *See Ind. Nat'l Bank v. Chapman*, 482 N.E.2d 474, 485 (Ind. Ct. App. 1985) (recognizing certain exceptions to general rule of nondisclosure).

¹⁵³ *See Peterson*, 367 P.2d at 290.

¹⁵⁴ *See id.* at 289.

¹⁵⁵ *See Shaw v. Union Bank & Trust Co.*, 640 P.2d 953, 959 (Okla. 1981) (explaining duties bank has outside contract law); J. NORTON & S. WHITLEY, *BANKING LAW MANUAL* § 11.02 (1983) (describing banks duties derived from public policy); *see, e.g., First Nat'l City Bank v. Gonzalez*, 293 F.2d 919, 920-22 (1st Cir. 1961) (applying Puerto Rican negligence statute to impose liability on bank for negligent conduct associated with depositor's account); *Schnier v. Barnett Bank of S. Fla.*, 595 So. 2d 143, 144 (Fla. Dist. Ct. App. 1992) (analyzing whether bank owed tort duty of confidentiality to borrower for inadvertent information that mistakenly appeared on borrower's credit report); *Peterson*, 367 P.2d at 291 (suggesting in dicta that bank owes customer duty because of bank's relationship with customer); *Chapman*, 482 N.E.2d at 481-82 (recognizing general tort duty not to disclose); *Graney Dev. Corp. v. Taksen*, 400 N.Y.S.2d 717, 719-20 (Sup. Ct. 1978) (holding that there is reasonable expectation that bank will keep depositor's account information secret); *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 620 (Okla. Ct. App. 1982) (asserting that bank's relationship to loan applicant imposes tort duty of confidentiality); *Rycroft v. Gaddy*, 314 S.E.2d 39, 43-44 (S.C. Ct. App. 1984) (analyzing tort duty of confidentiality theories regarding bank's release of depositor account information in response to subpoenas).

¹⁵⁶ *See supra* note 155.

¹⁵⁷ *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 120, § 314(a) (discussing special relationships that give rise to duty).

¹⁵⁸ *See supra* note 112.

confidence.¹⁵⁹ Generally, commentators broadly define the breach of confidence tort as disclosure of information obtained from a confidential relationship.¹⁶⁰ Only a few courts have explicitly recognized a cause of action for breach of confidence, but even those courts have not clearly defined the parameters of the tort.¹⁶¹ Nevertheless, a number of courts that do not specifically recognize the breach of confidence tort have recognized a somewhat broader tort duty of confidentiality.¹⁶² Courts have found that financial institutions owe their customers a duty of confidentiality in situations where certain institutions have disclosed confidential customer information without authorization.¹⁶³

¹⁵⁹ See Gilles, *supra* note 140, at 52-53; Vickery, *supra* note 115, at 1426.

¹⁶⁰ Gilles, *supra* note 140, at 52-53. More specifically, the tort has been defined as "unconsented, unprivileged disclosure to a third party of non-public information that the defendant has learned within a confidential relationship." Vassiliades v. Garfinckel's, 492 A.2d 580, 591 (D.C. 1985) (quoting Vickery, *supra* note 115, at 1455); see also Scott L. Fast, Comment, *Breach of Employee Confidentiality: Moving Toward a Common-Law Remedy*, 142 U. PA. L. REV. 431, 460 (1993) (discussing each element of this definition).

¹⁶¹ See Gilles, *supra* note 140, at 53; Vickery, *supra* note 115, at 1437. California and New York are the only two states to overtly acknowledge the separate tort of breach of confidence. Gilles, *supra* note 140, at 53. Although it is unclear whether the California Supreme Court will recognize breach of confidence, several appellate courts have recognized the tort. See *Davies v. Krasna*, 14 Cal. 3d 502, 505-07, 535 P.2d 1161, 1163-64 (1975) (finding that breach of confidence existed as law of case, but refusing to decide generally whether tort is cognizable); *Balboa Ins. Co. v. Trans Global Equities*, 218 Cal. App. 3d 1327, 1331, 267 Cal. Rptr. 787, 789 (Ct. App. 1990) (acknowledging that several California courts have recognized breach of confidence tort); *Tele-Count Eng'rs, Inc. v. Pac. Tel. & Tel.*, 168 Cal. App. 3d 455, 461-62, 214 Cal. Rptr. 276, 279 (Ct. App. 1985) (stating that California has recognized breach of confidence as cause of action). Like California, the highest court in New York, the Court of Appeals, has not ruled on the issue, but several of the lower courts and federal courts have recognized such a tort. Gilles, *supra* note 140, at 53 n.229; see, e.g., *Young v. United States Dep't of Justice*, 882 F.2d 633, 640 (2d. Cir. 1989) (suggesting that New York law recognizes breach of confidence tort in bank-customer context, but abstaining to rule on issue); *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 945 F. Supp. 693, 720-21 (S.D.N.Y. 1996) (recognizing that bank owes depositor duty of confidentiality); *Norkin v. Hoey*, 181 A.D.2d 248, 255 (N.Y. App. Div. 1992) (discussing parameters of breach of confidence action in New York). Other jurisdictions have recognized a more general duty of confidentiality in situations where a disclosure violates a promise of confidentiality or where there is a special relationship. Gilles, *supra* note 140, at 56-58; see, e.g., *supra* notes 111 and 112 (citing cases recognizing tort duty of confidentiality). However, the law in these jurisdictions ambiguously vacillates between the implied contractual duty and the tort duty of confidentiality. *Id.*; see, e.g., *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290-91 (finding bank has implied contractual duty to keep customers' information confidential, but suggesting in dicta that duty is based on more than contractual relationship between bank and customer).

¹⁶² See Alvin C. Harrell, *The Bank Customer Relationship: Evolution of a Modern Form?*, 11 OKLA. CITY U.L. REV. 641, 643 (1986); *supra* note 112.

¹⁶³ See *supra* note 112.

In *Djowharzadeh v. City National Bank and Trust Co.*, an Oklahoma appellate court held that banks have an implicit, non-contractual duty to keep a loan applicant's information confidential.¹⁶⁴ In *Djowharzadeh*, the plaintiff visited a bank to complete a loan application for a prospective real estate venture.¹⁶⁵ As part of the loan application, the bank required the plaintiff to reveal the purchase price of the real estate.¹⁶⁶ After hearing the purchase price, a loan officer of the bank disclosed the price of the real estate to several family members of the bank's top executives.¹⁶⁷ The family members then used this inside information to purchase the land, before plaintiff could buy it.¹⁶⁸ Plaintiff sued the bank alleging that the bank had a duty to keep the information from his loan application confidential.¹⁶⁹ The lower court disagreed and granted summary judgment in favor of the bank.¹⁷⁰ The court of appeals reversed and remanded finding that the bank owed the customer a duty of confidentiality.¹⁷¹

The *Djowharzadeh* court found that, even without a contract and the duties implicit therein, banks owe customers a duty of confidentiality.¹⁷² The court noted that, in this case, there was no implicit contractual duty of confidentiality because at the time the loan officer disclosed the real estate information there was no contractual relationship between the bank and the plaintiff.¹⁷³ Nonetheless, the court found that a duty of confidentiality existed because of the unique relationship between banks and their customers.¹⁷⁴

The court presented several reasons for finding that banks have a duty to keep customers' information confidential.¹⁷⁵ First, the court noted the inequitable relationship that exists between a bank and a loan

¹⁶⁴ *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982). Although *Djowharzadeh* is only an Oklahoma Court of Appeal decision, there is no indication that the Oklahoma Supreme Court would not follow the decision. *Jordan v. Shattuck Nat'l Bank*, 869 F. 2d 383, 386 (10th Cir. 1989). In fact, a justice of the Oklahoma Supreme Court has cited *Djowharzadeh* with approval. See *Alva State Bank & Trust Co., v. Dayton*, 755 P.2d 635, at 639 n.18 (1988).

¹⁶⁵ *Id.* at 617-18.

¹⁶⁶ *Id.* at 618.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *id.* at 617, 619.

¹⁷⁰ *Id.* at 617.

¹⁷¹ See *id.* at 619-20.

¹⁷² See *id.* at 619-20.

¹⁷³ See *id.* at 619.

¹⁷⁴ *Id.* at 619-20.

¹⁷⁵ See *id.*

applicant.¹⁷⁶ Before there is any contractual relationship, a bank requires and compels a loan applicant to fully disclose various forms of highly personal information.¹⁷⁷ This places the customer in a vulnerable position and the bank in a comparatively superior position of power.¹⁷⁸ The court found that the inferior position of loan applicants and the relatively superior position of banks imposed a counterbalancing duty of confidentiality on the bank.¹⁷⁹

The *Djowharzadeh* court also asserted that the duty of confidentiality arises out of a bank's special status in society.¹⁸⁰ As the court posited, banks have a unique responsibility in society as money and credit lenders.¹⁸¹ Banks have a monopoly of financial power within the lending community, which the law requires them to exercise fairly and evenly.¹⁸² Banks also hold themselves out in tradition and practice as trusted, guaranteed, and secured institutions.¹⁸³ The court concluded that the

¹⁷⁶ *Id.* at 619.

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* at 619; Frances E. Freund, *Lender Liability: A Survey of Common Law Theories*, 42 VAND. L. REV. 855, 885 (1989). Traditionally, courts have not viewed the relationship between a bank and its customers as fiducial. *See* *Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 318 (2d Cir. 1993); *Wash. Steel Corp. v. TW Corp.*, 602 F.2d 594, 601 (3d Cir. 1979); *Rubenstein v. S. Denver Nat'l Bank*, 762 P.2d 755, 758 (Colo. Ct. App. 1988); *Klein v. First Edina Nat'l Bank*, 196 N.W.2d 619, 627 (Minn. 1972); *Pigg v. Robertson*, 549 S.W.2d 597, 600-02 (Mo. Ct. App. 1977); Mark Holland, *Banks-Corporations: Consolidation and Merger-Bank May Use Confidential Information Obtained from Prior Contracts with Target Company to Evaluate Takeover Loan*, 65 CORNELL L. REV. 292, 294 (1980). A fiduciary relationship exists when a person or entity undertakes a position of trust in relation to another person or entity. *See* BLACKS LAW DICTIONARY 640 (7th ed. 1999). Although banks undertake and solicit the trust of their customers, courts have held that no fiduciary relationship exists. *See* 10 AM. JUR. 2D *Banks and Financial Institutions* § 720 (1997). In *Dolton v. Savings & Loan Ass'n*, the court found that there was no per se fiduciary duty between a bank and customer. 250 U.S. 504, 505 (1988). There, a long-standing customer of the bank informed a bank officer of the terms of a real estate sale before securing his loan with the bank. *Id.* at 504. Immediately after, the bank purchased the property for cash in an amount less than the existing listing price. *Id.* at 506. The Court held that there is no per se fiduciary duty between a borrower and a lender, but a fiduciary duty may arise from a business relationship that induces one party to reduce their standard of care. *See id.* at 508. Despite the lack of a fiduciary relationship between a bank and a customer, some courts have been willing to assign special duties to banks beyond the implied contractual duty. *See* *Commercial Cotton Co. v. United Cal. Bank*, 163 Cal. App. 3d 511, 516-14, 209 Cal. Rptr. 551, 554 (1985); *Ind. Nat'l Bank v. Chapman*, 482 N.E.2d 474, 481-82 (Ind. Ct. App. 1985); *Pigg*, 549 S.W.2d at 601-02; *Shaw v. Union Bank & Trust Co.*, 640 P.2d 953, 955-57 (Okla. 1982); *Djowharzadeh*, 646 P.2d at 619-20.

¹⁷⁹ *Djowharzadeh*, 646 P.2d at 619-20.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 619.

¹⁸² *Id.*

¹⁸³ *Id.*

bank's financial power and the public's trust in banks mandates distinctive duties for these financial institutions.¹⁸⁴ Therefore, the court found that banks have an implied duty to keep the contents of a loan application confidential.¹⁸⁵

Once the court established that the bank had a duty to keep plaintiff's information confidential, the issue became whether the bank was vicariously liable for the loan officer's disclosure.¹⁸⁶ The bank argued that when the loan officer disclosed the real estate price, he acted outside the scope of his employment.¹⁸⁷ However, as the court pointed out, the loan officer's duties were to collect and keep the applicant's information.¹⁸⁸ Consequently, the court ruled that the bank could be held liable for the harm its employee's carelessness caused.¹⁸⁹

The *Djowharzadeh* court cited *Peterson* as the singular authority for the proposition that banks owe a duty of confidentiality to customers.¹⁹⁰ However, *Peterson* was not directly on point because the holding in *Peterson* clearly relied on the implied contract doctrine.¹⁹¹ Nevertheless, the *Peterson* court did mention, in dicta, a separate public policy rationale for holding a bank liable for disclosing customer information.¹⁹² Aside from the contract, the *Peterson* court indicated that the relationship between a bank and its customers is special.¹⁹³ The *Djowharzadeh* court agreed and affirmed the language in *Peterson* that suggested inviolate secrecy is a basic aspect of the relationship between a bank and its customers.¹⁹⁴ Accordingly, *Peterson* and *Djowharzadeh* established that a

¹⁸⁴ See *id.* at 620.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 619.

¹⁹¹ See *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290-91 (Idaho 1961); Harrell, *supra* note 162, at 644.

¹⁹² See *Peterson*, 367 P.2d at 290-91.

¹⁹³ See *Peterson*, 367 P.2d at 290-91; *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 619 (Okla. Ct. App. 1982) (quoting *Peterson*); Vickery, *supra* note 115, at 1431 n.16.

¹⁹⁴ *Djowharzadeh*, 646 P.2d at 619. The court quoted several passages from *Peterson*, including the following language:

It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. . .

Id.

bank has a duty, based on public policy and independent of any contractual duties, to keep customer information secure and confidential.¹⁹⁵

Although some jurisdictions have adopted the theories discussed in *Peterson* and *Djowharzadeh*, it is unsettled as to whether these theories apply to identity theft.¹⁹⁶ *Peterson* and *Djowharzadeh* involved situations in which bank employees intentionally communicated customer information to third parties.¹⁹⁷ However, identity theft often involves third parties accessing a financial institutions' information without the involvement of an employee.¹⁹⁸ As *Stevens* illustrates, identity theft can involve a bank employee's surreptitious use of customer information.¹⁹⁹

The Oregon Court of Appeal in *Stevens* was the first court in the country to determine whether a victim of identity theft could assert a cause of action against a bank for breach of the duty of confidentiality.²⁰⁰

¹⁹⁵ See *Peterson*, 367 P.2d at 289-91; *Djowharzadeh*, 646 P.2d at 619-20.

¹⁹⁶ See *Jordan v. Shattuck Nat'l Bank*, 869 F.2d 383, 386-87 (10th Cir. 1989) (applying Oklahoma law and citing *Djowharzadeh* with approval); *Rubenstein v. S. Denver Nat'l Bank*, 762 P.2d 755, 756-57 (Colo. Ct. App. 1988) (citing *Djowharzadeh* for proposition that bank's relationship to loan applicant implicitly imposes duty to keep contents of loan application confidential); *Pigg v. Robertson*, 549 S.W.2d 597, 600 (Mo. Ct. App. 1977) (citing *Peterson* for proposition that bank has duty of confidentiality not to disclose customers' information); *Banaitis v. Mitsubishi Bank*, 879 P.2d 1288, 1294-95 (Or. Ct. App. 1994) (citing *Peterson* and *Djowharzadeh* for proposition that bank has duty not to divulge to third party any information relating to customer acquired through keeping of customers' account); VARTANIAN ET AL., *supra* note 13, at 299 (acknowledging that it is unsettled whether standards set forth in disclosure cases will apply to identity theft). *But see Stevens v. First Interstate Bank*, 999 P.2d 551, 554 (Or. Ct. App. 2000) (deciding issue and finding banks do not owe duty of confidentiality to protect customers' information from identity theft).

¹⁹⁷ See *Peterson*, 367 P.2d at 286-87; *Djowharzadeh*, 646 P.2d at 617-18.

¹⁹⁸ See *supra* notes 30-38 and accompanying text.

¹⁹⁹ See *infra* notes 200-06 and accompanying text.

²⁰⁰ See *Stevens*, 999 P.2d at 551-54; *Eure*, *supra* note 2, at CA3. Although *Stevens* was the first published case deciding whether a bank owes its customers a duty of confidentiality in the identity theft context, other lower courts have faced the issue. See *Eure*, *supra* note 2, at CA3. Despite the lack of clear standards, recent jury verdicts indicate that courts are willing to apply common law principles to the problem of identity theft to fashion remedies for victims. See *id.* In 1999, a jury in California awarded Steve Shatnawi emotional distress damages from his health club after an employee from the club stole Shatnawi's credit identity. See *id.* In 1995, a federal judge in Texas awarded a victim of identity theft \$1.45 million in damages against the alleged defrauder. See *McBribe v. McBribe*, No. H-95-1037, slip op. at 2 (S.D. Tex. Oct. 2, 1995); VARTANIAN ET AL., *supra* note 13, at 299. The perpetrator was a loan officer who obtained the information by using the bank's terminal to access the victim's credit report. VARTANIAN ET AL., *supra* note 13, at 299. The court awarded damages against the identity thief. See *id.* The victim also successfully brought a separate action against the bank, credit bureaus, department stores, and collection agencies alleging invasion of privacy and violations of federal and state collection laws. See *id.*; Albert B. Crenshaw, *Identity Crisis: The Theft That's Tough to Thwart*,

In *Stevens*, Harriet and Stanley Stevens opened and maintained a checking account with First Interstate Bank of Oregon.²⁰¹ Upon opening the account, the bank required the Stevenses to reveal personal and confidential information, such as their social security numbers and their birth dates.²⁰²

While the Stevenses held a checking account with the bank, the bank hired Stanley Stevenson to work as a collector in the bank's credit card department.²⁰³ The bank did not know, however, that when Stevenson completed the employment application he concealed that he was a convicted felon.²⁰⁴ Nevertheless, the bank allowed Stevenson to work while they completed his background check.²⁰⁵ While the bank waited for the FBI to complete Stevenson's background check, he was given access to the bank's entire customer database.²⁰⁶ Stevenson used the database to steal Stanley Stevens' confidential information, which he exploited to obtain over \$50,000 in loans and credit card debt.²⁰⁷

The Stevenses sued alleging that the bank was liable for breach of confidentiality.²⁰⁸ The Stevenses sought emotional distress damages for the significant effort they exhausted and the embarrassment and anxiety they experienced while correcting their credit record and credit reputation.²⁰⁹ The trial court granted the bank's motion for summary judgment, finding that the Stevenses did not have a claim for breach of confidentiality.²¹⁰ The Stevenses then appealed, and the Oregon Court of Appeal affirmed summary judgment.²¹¹

Regarding the Stevens' breach of confidentiality claim, the court held that the bank could not be liable because the bank had not made an "affirmative" disclosure.²¹² The court distinguished this case from cases

WASH. POST, Aug. 25, 1996, at H1; Kelly McMurry, *Judge Favors Plaintiffs in Theft of Identity Case*, TRIAL, Jan. 1, 1996; *Biggest Yet! Texas Couple Wins \$1.45 Million for 'ID Theft'*, PRIVACY TIMES, Oct. 5, 1995, at 1.

²⁰¹ *Stevens*, 999 P.2d at 552.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*; Eure, *supra* note 2, at CA3 (indicating amount stolen was over \$50,000).

²⁰⁸ *Stevens*, 999 P.2d at 552.

²⁰⁹ *Id.* The Stevenses did not allege any damages other than emotional distress damages. *Id.* at 553.

²¹⁰ *Id.* at 552-53.

²¹¹ *Id.*

²¹² *Id.* at 553-54.

like *Peterson*, which involved banks affirmatively turning over confidential information without authorization.²¹³ In the court's view, this case was not about affirmative disclosure, rather it was about failure to protect confidential information.²¹⁴ According to the court, the Stevenses had not provided nor could they find any authority extending the breach of confidentiality tort to situations where a defendant had not made an affirmative disclosure.²¹⁵ Without such authority, the court declined to extend the breach of confidentiality tort to find the bank liable for failure to protect the Stevens' information from misappropriation by an identity thief.²¹⁶

²¹³ *Id.* at 555-56. The court was very particular about carefully describing the exact narrow issue they were determining. *See id.* 553. The court defined the issue as follows: "Where a third party misappropriates personal or credit information that a depositor had provided to a bank, and that misappropriation is the result of the bank's failure to adequately protect the information from such misappropriation, is the bank liable for the depositor's resulting emotional distress?" *Id.*

²¹⁴ *Id.* at 553-54.

²¹⁵ *Id.*

²¹⁶ *Id.* After rejecting the breach of confidentiality claim, the court went on to determine whether the Stevenses' complaint could otherwise support a claim for emotional distress damages based on negligent infliction of emotional distress. *Id.* at 554. The court determined that the relationship between a bank and its depositors did not create any duty transcending the ordinary common law duty of reasonable care. *Id.* at 556. Specifically, the court found that the bank-depositor relationship did not create a duty for the bank to protect a depositor's information from misappropriation by a third party. *Id.*

The court reached this conclusion by distinguishing depositor-bank relationships from lender-borrower relationships. *Id.* According to the court, a bank's relationship with its depositor is an arms length relationship, which is limited and highly regulated. *Id.* at 554. This relationship is materially different from the borrower-lender relationship where parties give confidential information to the bank for a specific purpose. *Id.* The borrower, unlike the depositor, relies on the bank's expertise to achieve an agreed upon purpose. *Id.* In contrast, a depositor, like a customer at a store, provides certain information, which does not require the bank to exercise its independent judgment on the customer's behalf. *Id.* at 554-55. Based on this distinction, the court found that the bank-depositor relationship did not create a duty for the bank to protect a depositor's information from misappropriation by an employee identity thief. *Id.*

Other jurisdictions have not limited a financial institution's duty to borrowers rather than depositors. *See, e.g.,* *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961) (stating that "inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors"); *Ind. Nat'l Bank v. Chapman*, 482 N.E.2d 474, 481 (Ind. Ct. App. 1985) (stating that bank has duty not to disclose information regarding one of its "customers"). In fact, some jurisdictions make the opposite distinction, finding banks owe a greater duty to depositors than borrowers. *See, e.g.,* *Norkin v. Hoey*, 181 A.D.2d 248, 255 (N.Y. App. Div. 1992) (explaining that expectations of confidentiality inherent in relationship between bank and depositor are lacking in the context of bank-borrower relationship). Jurisdictions recognizing a tort duty of confidentiality approve of a broader duty that extends to all bank "customers." *See* Raymond, *supra* note 1, § 30(a); *see, e.g., Peterson*, 367 P.2d at 290 (suggesting that duty is owed to all "customers"); *Chapman*,

It is important to note that, in rejecting the Stevens' duty of confidentiality claim, the court relied primarily on the absence of controlling law.²¹⁷ Although the court briefly mentioned *Peterson*, they did not address *Djowharzadeh* or numerous other cases that have found banks have a tort duty of confidentiality.²¹⁸ As such, other jurisdictions, facing similar issues, must determine de novo whether a financial institutions have a duty of confidentiality to protect customers' information from identity theft.²¹⁹

II. ANALYSIS

Most federal and state legislatures and judiciaries have yet to address the problem of identity theft and its relationship to financial institutions.²²⁰ The common law, however, has provided several causes of action for customers against a financial institution for failing to keep the customer's information confidential.²²¹ The *Stevens* case was the first case in the country to consider whether a common law cause of action exists against a financial institution for failure to protect customer information from identity theft.²²² Despite the holding in *Stevens*, courts should recognize a broad tort duty of confidentiality that requires financial institutions to secure their customers information from the threat of identity theft.²²³ The recognition of such a duty will provide identity theft victims with adequate compensation and encourage banks to adopt appropriate security measures.²²⁴

482 N.E.2d at 481 (finding bank owes "customer" duty not to disclose); *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982) (indicating that bank owes duty of confidentiality to all customers).

²¹⁷ See *Stevens*, 999 P.2d at 553-54.

²¹⁸ See *id.* at 555-56 (citing *Peterson*, which was only case outside of Oregon jurisprudence that court mentioned); see also *supra* note 112 (citing numerous cases from various jurisdictions recognizing bank's have tort duty of confidentiality to keep customers information confidential).

²¹⁹ See *supra* note 196 and accompanying text.

²²⁰ See *supra* notes 105-06 and accompanying text.

²²¹ See *supra* notes 109-12 and accompanying text.

²²² See *supra* note 200.

²²³ See *infra* notes 325-71 and accompanying text.

²²⁴ See *infra* notes 309-71 and accompanying text.

A. Identity Theft and Federal and State Statutory Law

Federal and state identity theft statutes criminalize identity theft.²²⁵ In addition, federal law requires financial institutions to pay for the debt that identity thieves incur.²²⁶ Despite having federal and state laws on the books, however, many of these crimes go unpunished.²²⁷ Law enforcement often struggles with enforcing identity theft laws because of the epidemic proportions of the crime.²²⁸ In addition, it is hard for law enforcement to track the crime because identity thieves often obtain stolen information from multiple sources and use the information in different states.²²⁹

Additionally, enforcement is difficult because financial institutions often have little incentive to press charges against the identity thief.²³⁰ Because the criminal may be insolvent, financial institutions consider their chance of recovery slim.²³¹ Further, financial institutions often have insurance to cover their losses.²³² In addition, these institutions can write off the insurance losses or pass them off to customers in the form of higher interest rates or fees.²³³

Even if law enforcement becomes involved, prosecutors may decide not to prosecute the theft.²³⁴ In the past, prosecutors have failed to act on identity theft cases because of the difficulty, time, and expense associated with the identity theft prosecution.²³⁵ These cases are often expensive to

²²⁵ See *supra* notes 92-103 and accompanying text.

²²⁶ See *supra* notes 53-56 and accompanying text.

²²⁷ See generally GAO REPORT, *supra* note 50, at 3 (explaining that identity theft laws are hard to enforce because no federal agency has overall jurisdiction, there is no standardized definition of identity theft, and identity theft is element of many crimes); Higgins, *supra* note 14, at 45 (describing how police did not consider two victims of identity theft actual victims of crime and federal investigators refused to investigate identity theft because amount stolen did not meet requisite amount to warrant investigation); see, e.g., *Former Insurance Company Employee Pleads Guilty to Identity Theft*, MEALEY'S LITIG. REP. 25 (Oct. 17, 1999) (reporting that identity theft conviction on October 14, 1999, was first conviction in Central District of California).

²²⁸ See GAO REPORT, *supra* note 50, at 5; Higgins, *supra* note 14, at 45; see also *supra* notes 50-52 and accompanying text (discussing prevalence of identity theft).

²²⁹ GAO REPORT, *supra* note 50, at 3.

²³⁰ Higgins, *supra* note 14, at 45. The codification of new federal and state identity theft statutes, which specifically define the crime of identity theft, may negate the need for banks to press charges in jurisdictions with such statutes. See generally *supra* notes 93-102 and accompanying text (discussing recently enacted criminal identity theft statutes).

²³¹ Higgins, *supra* note 14, at 45.

²³² *Id.*

²³³ Sabol, *supra* note 19, at 168.

²³⁴ See Higgins, *supra* note 14, 45-46.

²³⁵ See Higgins, *supra* note 14, at 16. Donald Grant, a deputy district attorney for

litigate because they usually require the court to subpoena bank employees, records, and witnesses that may be located across the country.²³⁶ Prosecutors are often hesitant to expend time and effort on identity theft cases because they are non-violent crimes and they are extremely costly to taxpayers.²³⁷

Because of the unlikelihood of prosecution, identity theft victims often do not receive any retribution.²³⁸ Although statutory law provides that victims are not responsible for the debt that identity thieves accumulate, these laws offer little assistance to the victims of identity theft.²³⁹ Indeed, victims of identity theft may spend thousands of dollars and hundreds of hours restoring their financial health.²⁴⁰ Under current statutes, victims cannot recover for true losses suffered, such as lost time and damaged reputation.²⁴¹

Therefore, identity theft victims are left with the burden of completely restoring their credit history and preventing the future misuse of their personal information.²⁴² The inadequacies of statutory law have left plaintiffs without recovery for the emotional and pecuniary losses associated with experiencing identity theft and repairing credit.²⁴³ The common law has traditionally offered recovery for such losses, if plaintiff can establish an appropriate cause of action.²⁴⁴ Therefore, the common law may offer identity theft victims superior legal recourse.²⁴⁵

Ventura County California, says, "To prosecute these cases is a god-awful pain in the neck. . . We generate a lot of expense to taxpayers, and its not a prison case. Its sort of a no win situation for the victims." See *id.* Prosecutors' reluctance to prosecute may change in light of the recently codified state and federal identity theft statutes. See generally *supra* notes 93-102 and accompanying text (describing recently enacted identity theft statutes).

²³⁶ Higgins, *supra* note 14, at 16 (explaining that prosecutors have strong incentive to plea bargain because of difficulty of trying such cases, likelihood that judges will not give jail time to non-violent criminal, and expense to taxpayers).

²³⁷ *Id.* at 45.

²³⁸ See *id.*

²³⁹ See *supra* notes 53-56 and accompanying text; see also Higgins, *supra* note 14, at 44-46 (giving several examples of identity theft victims that requested help from state and federal agencies, but were given little assistance); Sabol, *supra* note 19, at 167-68 (noting that state law offers some help to victims, but harm to victim is difficult to determine because victim does not bear entire financial loss).

²⁴⁰ See *supra* notes 59-73 and accompanying text.

²⁴¹ See *supra* note 74 (discussing inadequacies of current law in protecting identity theft victims).

²⁴² See *supra* notes 59-65 and accompanying text.

²⁴³ See *supra* note 74.

²⁴⁴ See generally Gilles, *supra* note 140, at 58-59 (discussing reasons for creating a new civil remedy); Provenza, *supra* note 7, at 322 (discussing possibility of common law doctrines which provide cause of action for identity theft).

²⁴⁵ See *infra* notes 256-343 and accompanying text (discussing pros and cons of common

B. Invasion of Privacy Applied to Identity Theft

Because identity theft interferes with an individual's private information, invasion of privacy seems like a logical cause of action for identity theft victims.²⁴⁶ When individuals provide information to a financial institution, they expect privacy.²⁴⁷ Customers expect that financial institutions will keep their information secure and that they will only use the information to obtain a loan, secure collateral, or to make a bank transaction.²⁴⁸

Nevertheless, courts have interpreted the invasion of privacy tort as protecting private financial information only in certain narrow circumstances.²⁴⁹ Generally, courts apply the unwanted publicity tort to cases in which a financial institution discloses a customer's information to the public.²⁵⁰ However, actions against financial institutions brought under the unwanted publicity theory are often unsuccessful.²⁵¹ As in *Peterson*, most financial institution customers cannot satisfy the requirement of public dissemination.²⁵² When the information is only disclosed to a small number of third parties, the disclosures will not

law causes of action as applied to identity theft). See generally Provenza, *supra* note 7, at 324-36 (juxtaposing statutory law with common law causes of action).

²⁴⁶ See generally *id.* at 330-32 (describing invasion of privacy as possible cause of action available for identity theft victims); Murphy, *supra* note 124, at 2381-88 (discussing notion that privacy rights protect personal information, but indicating that invasion of privacy tort has not developed in that direction).

²⁴⁷ See generally Matthew N. Kleiman, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U. L. REV. 1169, 1176-78 (1992) (discussing importance of financial privacy). An individual's financial information directly reflects that individual's lifestyle, personal interests, and political beliefs. *Id.* at 1176. From studying a person's financial information one could discover the groups and associations to which the individual belongs and the social causes the individual supports. *Id.*

²⁴⁸ See generally James E. Eldridge, *The Bank Secrecy Act: Privacy, Comity, and the Politics of Contraband*, 11 N.C. J. INT'L L. & COM. REG. 667, 675-76 (1986) (stating that bank customers normally expect that their contractual relationship with bank will control unauthorized disclosure of account information).

²⁴⁹ See *supra* notes 123-36 and accompanying text.

²⁵⁰ See *supra* notes 124-36 and accompanying text.

²⁵¹ See *id.* Generally, the unwanted publicity tort has fared poorly as a cause of action against banks, but it is still a viable cause of action in some instances. See Murphy, *supra* note 124, at 2388 (discussing common law invasion of privacy tort); see, e.g., Hawkins v. Multimedia, Inc., 344 S.E.2d 145, 145-46 (S.C. 1985) (holding newspaper liable for disclosing name of teenage father of illegitimate child in story on teenage pregnancies). However, some commentators consider the unwanted publicity tort dead. See R. FISCHER, *THE LAW OF FINANCIAL PRIVACY* 5 (1983) (discussing effects of common law on actions concerning disclosure of information); Nicewander, *supra* note 75, at 623-24.

²⁵² See *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 288 (Idaho 1961) (finding that disclosures to one employer did not establish publicity); see also *supra* note 125 (discussing dissemination requirement for unwanted publicity invasion of privacy).

fulfill the public dissemination requirement under the unwanted publicity tort.²⁵³

Despite the unwanted publicity tort's obstacles, victims of identity theft could attempt to bring a claim based on this theory.²⁵⁴ The unwanted publicity tort requires public dissemination because the courts designed the tort to secure a person's interest in reputation.²⁵⁵ One of the major damages identity theft victims suffer is the loss of reputation.²⁵⁶ Identity theft damages the victim's reputation when the theft discloses a victim's private information to multiple third party creditors who, in turn, distribute this information to credit bureaus and banks.²⁵⁷

When applying the unwanted publicity tort to identity theft, courts must ultimately decide whether the disclosure resulting from the identity theft constitutes public dissemination.²⁵⁸ Under *Peterson*, the public disclosure rule requires the bank to disclose information to more than one person or agency.²⁵⁹ This standard may be flexible enough to permit a victim of identity theft to properly allege public disclosure.²⁶⁰ Thus, identity theft victims could argue that when identity thieves use their information to defraud multiple creditors, the thieves have essentially disclosed the victim's account information to the public.²⁶¹ In *Peterson*, the financial institution only disclosed information to Peterson's employer.²⁶² However, identity theft often involves an identity thief disclosing a customer's personal information to multiple agencies or institutions.²⁶³

²⁵³ See *supra* notes 124-26 and accompanying text.

²⁵⁴ See generally *Murphy*, *supra* note 124, at 2388-93 (recognizing that disclosure tort is still viable cause of action in many states); *Provenza*, *supra* note 7, at 330-35 (listing invasion of privacy as possible cause of action against bank for identity theft).

²⁵⁵ *Prosser*, *supra* note 118, at 398-401; *Vickery*, *supra* note 115, at 1439.

²⁵⁶ See *supra* notes 61-71 (discussing damages that identity theft victims suffered, including reputation damages).

²⁵⁷ See *id.*

²⁵⁸ See *supra* notes 123-36, 259-63 and accompanying text.

²⁵⁹ See *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961).

²⁶⁰ See, e.g., *Beaumont v. Brown*, 257 N.W.2d 522, 531-32 (Mich. 1977) (finding Army's publication concerning employee's fitness to small group of Army officials and clerks was adequate publicity). See generally *Vickery*, *supra* note 115, at 1339-43 (discussing controversy over what constitutes public dissemination).

²⁶¹ See generally *Provenza*, *supra* note 7, at 330-35 (indicating that invasion of privacy may be appropriate cause of action for identity theft victims); *Vickery*, *supra* note 115, at 1339-43 (discussing disclosure requirements for invasion of privacy suits).

²⁶² *Peterson*, 367 P.2d at 285-88.

²⁶³ See *Provenza*, *supra* note 7, at 321 (explaining how identity thieves use stolen information to defraud multiple creditors).

Nevertheless, the invasion of privacy doctrine may be inadequate because courts have closely circumscribed the zone of protection around public disclosures.²⁶⁴ Identity theft might only involve a single disclosure to a single financial institution, and thus would not fulfill the public disclosure requirement.²⁶⁵ In this situation, the victim would have no legal recourse under the invasion of privacy doctrine.²⁶⁶ Therefore, common law theories that focus on the relationship between a financial institution and a customer, rather than on the nature of the dissemination, may better suit the problems associated with identity theft.²⁶⁷

C. *Implied Contractual Duty Applied to Identity Theft*

The implied contractual duty is based upon the contractual relationship between a customer and a financial institution.²⁶⁸ Under the implied contractual duty theory, an implied term of a contract between a customer and a financial institution is that the institution will keep the financial affairs of the customer confidential.²⁶⁹ Cases applying the implied contractual duty doctrine demonstrate that courts are willing to recognize that financial institutions have some responsibility for handling customers' information confidentially.²⁷⁰

A plaintiff can gain several advantages by bringing an action based on the breach of an implied contractual duty.²⁷¹ First, a plaintiff bringing such an action clearly has solid precedent to support an action for

²⁶⁴ See *supra* notes 124-26 and accompanying text; see also Vickery, *supra* note 115, at 1339-40 (discussing doctrinal limitations on unwanted publicity tort).

²⁶⁵ See GAO REPORT, *supra* note 50, at 5 (discussing variety of ways that identity theft can be perpetrated); see, e.g., *Peterson*, 367 P.2d at 291 (finding that disclosures to one employer did not establish publicity); *Palmatier v. Beck*, 636 S.W.2d 575, 577 (Tex. Ct. App. 1982) (deciding that plaintiff's invasion of privacy claim failed because there was no proof or allegation regarding public disclosure).

²⁶⁶ See *supra* notes 124-26 and accompanying text (describing how invasion of privacy claims fail for lack of public disclosure).

²⁶⁷ See generally Harrell, *supra* note 162, at 654-55 (summarizing cases which focus on bank's duty to society and indicating that these cases are better suited for modern relationship between bank and customer); see also *infra* notes 268-317 and accompanying text (describing causes of action based on relationship between financial institutions and customers).

²⁶⁸ See *supra* notes 139-47 and accompanying text (surveying implied contract doctrine as it relates to banks).

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See generally Vickery, *supra* note 115, at 1444-47 (discussing merits of contract cause of action and tort cause of action).

wrongful disclosure.²⁷² Common law courts have recognized an implicit duty regarding financial information since the nineteenth century.²⁷³

Second, it may prove easier for a litigant to establish a breach of the implied contractual duty because courts define the duty based on the contractual relationship.²⁷⁴ As with any action based in contract, the customer's expectations and the industry practice serves as the basis for determining the nature of the contractual relationship.²⁷⁵ For example, in *Peterson*, the court examined the current ethical standards for bankers, which indicated a duty to keep customer information confidential.²⁷⁶

Because the banking industry accepts the general ethical standards referenced in *Peterson*, the court can refer to these for a bright-line standard.²⁷⁷ The American Banker's Association posits that banks should keep customer information confidential and acknowledges that most customers expect the banks to keep their information private.²⁷⁸ Due to the rise of identity theft and its effect on both customers and banks, customers are justified in expecting an elevated level of confidentiality.²⁷⁹ As financial institutions experience enormous losses as a result of identity theft, the industry's knowledge of the problem increases as do the efforts to address the problem.²⁸⁰ Based on the industry's knowledge and heightened industry standards, plaintiff's can assert that the banks

²⁷² See *supra* note 111 (listing multiple cases in various jurisdictions recognizing implied contractual duty of confidentiality in bank-customer context).

²⁷³ See Huhs, Jr., *supra* note 21, at 52; see also *supra* note 148, 114 (describing history behind implied contract cause of action).

²⁷⁴ See Vickery, *supra* note 115, at 1444 (describing implied contract doctrine); see, e.g., *Barnett Bank of West Fla. v. Hooper*, 498 So. 2d 923, 924-26 (Fla. 1986) (deciding bank has duty based on contract between bank and customer); *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 289, 291 (Idaho 1961) (finding implicit duties in contract between bank and customers); *Suburban Trust Co. v. Waller*, 408 A.2d 758, 764 (Md. Ct. Spec. App. 1979) (determining bank has duties implicit in contract).

²⁷⁵ Vickery, *supra* note 115, at 1444-45.

²⁷⁶ See *Peterson*, 367 P.2d at 290.

²⁷⁷ See generally Tracy K. Evans, *ADT Operations, Inc. v. Chase Manhattan Bank, N.A.: Is There A Remedy for Disclosure of Confidential Information by a Bank Regarding a Customer Targeted for Takeover by Another Customer Financed by the Bank?*, 18 ANN. REV. BANKING L. 479, 485 (1999) (discussing recent bank litigation and importance of clear industry standards).

²⁷⁸ See generally *Norkin v. Hoey*, 586 N.Y.S.2d 926, 928-31 (Sup. Ct. 1992) (summarizing American Bankers Association's position on confidentiality); Evans, *supra* note 277, at 485 (explaining bank's duty of confidentiality in relation to industry standards).

²⁷⁹ See *supra* notes 14-18 and accompanying text; see also VARTANIAN ET AL., *supra* note 13, at 297-99 (discussing need for new or evolving standards regarding bank's duty to keep customer information secure).

²⁸⁰ See generally GAO REPORT, *supra* note 50, at 3-7 (discussing identity theft's effect on financial industry).

owe an elevated duty of care.²⁸¹

However, despite the presence of strict industry-wide standards that define the implied contractual duty, contract law itself may be theoretically and practically inadequate to protect identity theft victims.²⁸² The aim of contract law is to enforce bargains to which parties mutually assented.²⁸³ When personal information is at issue, duties associated with keeping such information confidential may not arise out of bargained for terms.²⁸⁴ For example, financial institutions do not ordinarily base loan rates on whether the applicant insists on confidentiality.²⁸⁵ Because contract law is based on the will or intention of the parties, financial institutions could simply write a lower standard of confidentiality into their contracts.²⁸⁶ This would result in financial institutions surreptitiously avoiding identity theft litigation.²⁸⁷

To create an avenue of judicial relief for identity theft victims, courts must establish a doctrine that provides suitable remedies for customers.²⁸⁸ As a result of identity theft, plaintiffs may suffer pecuniary loss, damage to their reputations, humiliation, and emotional suffering.²⁸⁹ However, contract law is not a suitable remedy for non-pecuniary injuries for several reasons.²⁹⁰ First, courts typically limit recovery in contract claims to damages that both the parties reasonably

²⁸¹ See *supra* note 285 and accompanying text (explaining that customer expectation and industry practice shape duties flowing from contract); see also Provenza, *supra* note 7, at 335 (noting that customers will expect financial institutions to have stricter security standards due to available technology and ease with which identity thieves can access personal information).

²⁸² See generally Vickery, *supra* note 115, at 1444-47 (discussing inadequacies of contract law for breach of confidence cases).

²⁸³ See E. ALLEN FARNSWORTH, CONTRACTS at 141-44 (1988) (providing case law examples).

²⁸⁴ See Vickery, *supra* note 115, at 1444-45 (explaining that when personal information is at issue, obligations to confidence arise out of policy rather than bargained for terms).

²⁸⁵ *Id.* at 1445.

²⁸⁶ See *id.*

²⁸⁷ See generally *id.* at 1444-47 (maintaining that contract actions are inadequate for breach of confidentiality actions).

²⁸⁸ See generally VARTANIAN ET AL., *supra* note 13, at 297-99 (indicating that courts need to set standards for identity theft adjudication); Higgins, *supra* note 14, at 42-45 (describing lack of remedies for identity theft victims); Provenza, *supra* note 7, at 335 (explaining rise in customers expectations with regard to identity theft).

²⁸⁹ See *supra* notes 57-73 (describing identity theft's impact on victims).

²⁹⁰ See Gilles, *supra* note 140, at 24-32, 58-62 (examining tort versus contract damages); Vickery, *supra* note 115, at 1444-47 (explaining inadequacies of contract law for breaches of confidentiality).

contemplated at the time of the contract.²⁹¹ Because identity theft is an independent criminal activity, it is unlikely that a court would consider the damages related with identity theft as contemplated by the parties.²⁹²

Another reason contract remedies are inadequate is because the loss of reputation, humiliation, and emotional suffering damages are only recoverable under certain strict conditions in contract law.²⁹³ A plaintiff bringing a contract claim can only recover for emotional suffering if serious emotional suffering was the likely result of the breach.²⁹⁴ While this exception may apply to a contract involving a doctor and patient, the banker's contract with a customer will not likely encompass this exception.²⁹⁵

Finally, actions under the implied contractual duty are inadequate because punitive damages are generally not available in contract cases.²⁹⁶ Plaintiffs may bring identity theft actions against large financial institutions.²⁹⁷ However, the inability of a plaintiff to obtain punitive damages limits the opportunity for individuals to effectuate significant changes in large financial institutions' confidentiality standards.²⁹⁸

Contract law's prohibition on recovery for emotional suffering, loss of reputation, and punitive damages is designed to limit damages to what the parties reasonably contemplated from the contract.²⁹⁹ However, this method of assessing damages would result in inadequate compensation for identity theft victims.³⁰⁰ Therefore, common law tort theories

²⁹¹ RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

²⁹² See generally VARTANIAN ET AL., *supra* note 13, at 297-99 (noting that it is unclear how courts will treat unauthorized intrusions under current common law standards); Gilles, *supra* note 140, at 24-32, 58-62 (explaining remedies available in contract for breach of confidence); Vickery, *supra* note 115, at 1433 (discussing negative aspects of contract damages in suits for breach of confidence).

²⁹³ Gilles, *supra* note 140, at 25-32; Vickery, *supra* note 115, at 1444-45.

²⁹⁴ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 291, § 353.

²⁹⁵ Vickery, *supra* note 115, at 1445-46.

²⁹⁶ RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 291, § 355. (explaining that litigant may recover punitive damages in situations where conduct constituting breach is also tort).

²⁹⁷ See, e.g., *Stevens v. First Interstate Bank*, 999 P.2d 551, 552 (Or. Ct. App. 2000) (involving action against two large state banks).

²⁹⁸ See generally Gilles, *supra* note 140, at 25-32 (noting inadequacies of contract damages); Vickery, *supra* note 115, at 1445 (explaining detrimental effects of contract law limits on damages).

²⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 291, § 355; Vickery, *supra* note 115, at 1444.

³⁰⁰ See *supra* notes 57-73 (describing identity theft's impact on victims, including loss of reputation and emotional suffering); see also Gilles, *supra* note 140, at 25-32 (explaining that contract actions do not compensate plaintiffs for loss of reputation, emotional suffering, or

focusing on the relationship between banks and customers, rather than on the nature of the contract, may better suit the problems associated with identity theft.³⁰¹

D. Tort Duty of Confidentiality Applied to Identity Theft

The primary difference between tort law and contract law is the nature of the interest protected.³⁰² Contract law enforces promises, whereas tort law compensates individuals for injuries suffered as a result of the acts of another.³⁰³ Although contractual duties are limited to obligations arising out of a bargained for exchange, tort duties are not limited in such a fashion.³⁰⁴ Instead, tort duties are based on social policy surrounding the particular relationship at issue.³⁰⁵

Tort law is not confined to the scope of a bargained for agreement.³⁰⁶ This allows courts to use public policy, industry custom, and judicial reasoning to define the relationship between customers and banks.³⁰⁷ The recent rise in identity theft indicates that courts must make new determinations regarding the bank-customer relationship.³⁰⁸

Tort law damages are also more extensive than contract damages.³⁰⁹ Damages are comprehensive, allowing compensation for emotional suffering, loss of reputation, and punitive damages.³¹⁰ Thus, if an identity theft victim brought an action against a financial institution and the court recognized a tort claim rather than a contract claim, the victim would be able to receive compensation for lost time and money and

punitive damages); Vickery, *supra* note 115, at 1444-47 (maintaining that contract actions are inadequate for breach of confidentiality actions).

³⁰¹ See generally Gilles, *supra* note 140, at 52-62 (discussing benefits of tort remedy for breach of confidence); Harrell, *supra* note 162, at 654-55 (comparing focus of contract law and tort law); Vickery, *supra* note 115, at 1445 (noting that tort duties make injured party whole as compared to contract damages).

³⁰² W. PROSSER, HANDBOOK ON THE LAW OF TORTS 613 (4th ed. 1971); Vickery, *supra* note 115, at 1444 n.83.

³⁰³ PROSSER, *supra* note 302, at 613.

³⁰⁴ *Id.*; Vickery, *supra* note 115, at 1444.

³⁰⁵ PROSSER, *supra* note 302, at 613.

³⁰⁶ See Vickery, *supra* note 115, at 1444-47.

³⁰⁷ See generally *id.* at 1445 (explaining that obligations surrounding personal information arise out of public policy).

³⁰⁸ See *supra* notes 13-18 and accompanying text (discussing rise of identity theft and its impact on judicial system).

³⁰⁹ Gilles, *supra* note 140, at 52-62; Vickery, *supra* note 115, at 1444-47.

³¹⁰ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98 (5th ed. 1984).

damage to their reputation.³¹¹

Because tort law provides a remedy that allows plaintiffs to receive punitive damages, an action brought in tort may effectuate changes in the financial industry.³¹² A commentator recently attributed the rise in identity theft to financial institutions' relaxed security provisions, deficient technology, poor screening of new employees and improper methods of information waste disposal.³¹³ Faced with the threat of punitive damages, the industry may take notice and vie for self-regulation.³¹⁴

Currently, financial institutions have little incentive to protect their customers' information.³¹⁵ Financial institutions can protect themselves with insurance, write off the losses associated with identity theft, or distribute the losses to the customers by increasing costs and interest rates.³¹⁶ A court recognized tort duty of confidentiality might give banks an incentive to avoid litigation by improving information security.³¹⁷

Although a tort cause of action may provide attractive remedies for identity theft victims and encourage increased security in the financial industry, courts may be cautious when assigning liability to financial

³¹¹ See *supra* notes 59-68 and accompanying text (explaining damages that identity theft victims suffer, including lost time, loss of reputation, and emotional distress). See generally W. PAGE KEETON ET AL., *supra* note 310, § 98 (indicating that such damages are cognizable under tort recovery).

³¹² See generally Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & ECON. 527, 527-28 (1999) (discussing influence of punitive damages on industry).

³¹³ See Beth Givens, *Identity Theft: How it Happens, Its Impact on Victims, and Legislative Solutions*, at http://www.privacyrights.org/AR/id_theft.htm (last visited May 1, 2001); see also *supra* note 42 and accompanying text (discussing financial institutions' inadequate screening measures).

³¹⁴ See generally Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1002-05 (1999) (discussing deterrent effect of punitive damages).

³¹⁵ Sabol, *supra* note 19, at 167-68.

³¹⁶ See *supra* notes 232-33 and accompanying text.

³¹⁷ See generally VARTANIAN ET AL., *supra* note 13, at 297-99 (discussing litigation and industry standards related to identity theft); Karpoff & Lott, *supra* note 312, at 527-28 (discussing how threat of large punitive damages affected tobacco industry); Provenza, *supra* note 7, at 335 (noting that customers will expect greater security). To protect the independence of the financial industry, financial institutions may prefer independent control rather than regulatory initiatives. See Provenza, *supra* note 7, at 328. For example, the American Bankers Association supports legislation, but prefers self-regulation over codified industry guidelines. *Id.* at 328. Furthermore, one survey indicates that American citizens also prefer voluntary measures by businesses over government regulation. See *Executive Summary Survey*, *supra* note 8.

institutions.³¹⁸ Cases recognizing a tort duty of confidentiality, such as *Peterson* and *Djowharzadeh*, involved fact patterns unlike the typical identity theft scenario.³¹⁹ Moreover, *Peterson*, *Djowharzadeh*, and other tort duty of confidentiality cases involved claims brought against a financial institution for affirmative disclosure of customer information, rather than a mere failure to protect that information.³²⁰ Unlike the fact patterns in tort duty of confidentiality cases, identity theft involves a third party obtaining access to a financial institution's information without the direct involvement of the institution's employees.³²¹

If financial institutions have to defend a breach of confidentiality claim in a case involving identity theft, they will inevitably argue that the identity thief's independent criminal activity does not constitute an affirmative disclosure by the bank.³²² Even in situations where the institution's employee is the identity thief, the institution will assert that the employee was acting outside the scope of her employment.³²³ The court in *Stevens* accepted similar arguments and refused to find that banks owe their customers a duty of confidentiality when the bank has not made an "affirmative" disclosure.³²⁴

Although *Stevens* is the only current opinion addressing a financial institution's liability for identity theft, other courts should reject the opinion for several reasons.³²⁵ First, the court placed unfounded significance on the fact that duty of confidentiality cases, such as *Peterson*, have historically involved "affirmative" disclosures.³²⁶ The fact that the financial institutions involved in these cases affirmatively disclosed customer information was not the reason that courts recognized a duty of confidentiality.³²⁷ Instead, courts established the duty of confidentiality based on public policy and the relationship

³¹⁸ See *supra* notes 195-197 and accompanying text.

³¹⁹ See *id.*

³²⁰ See *supra* notes 212-16 and accompanying text.

³²¹ See *supra* notes 195-197 and accompanying text.

³²² See VARTANIAN ET AL., *supra* note 13, at 298 (discussing case law exceptions to confidentiality rule).

³²³ See generally *Eure*, *supra* note 2, at CA3 (mentioning bank's defense to suit involving employee identity theft).

³²⁴ See *supra* notes 211-15 and accompanying text.

³²⁵ See *supra* note 200 (discussing novelty of *Stevens* opinion).

³²⁶ Neither *Peterson* nor *Djowharzadeh* mention the words "affirmative disclosure." See *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284 (Idaho 1961); *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616 (Okla. Ct. App. 1982).

³²⁷ See *supra* notes 151-57, 175-95 and accompanying text (explaining that relationship between bank and customer and public policy are basis for tort duty of confidentiality).

between financial institutions and customers.³²⁸ Thus, the financial institution's affirmative disclosures, in these cases, was not the foundation for a duty, but merely a breach of a pre-existing general duty of confidentiality.³²⁹

The *Stevens* opinion is also unpersuasive because the court failed to adequately address a novel issue of law.³³⁰ The *Stevens* court's myopic focus on the affirmative disclosure issue, allowed them to reject the *Stevens*' claim based on the absence of law.³³¹ The absence of law, however, in such a novel area, should not close the doors of the courts to identity theft victims.³³² As the court in *Djowharzadeh* indicated, the absence of legal precedent does not establish an absence of a duty.³³³ Furthermore, the broad duty of confidentiality established in *Peterson* and *Djowharzadeh* questions the *Stevens* court's conclusion that there is a lack of relevant law in this area.³³⁴

The duty of confidentiality alluded to in *Peterson* and later established in *Djowharzadeh* is based upon the notion that financial institutions have an independent obligation to keep their customers' information secret.³³⁵ Thus, if a financial institution fails to take adequate steps to keep customer information secret, it is in violation of that obligation.³³⁶ Therefore, a financial institution can be held liable for breach of the duty of confidentiality when its failure to protect a customer's information

³²⁸ See *id.*

³²⁹ See *id.*

³³⁰ See *supra* note 21 (explaining novelty of cases involving identity theft).

³³¹ See *Stevens v. First Interstate Bank*, 999 P.2d 551, 553-54 (Or. Ct. App. 2000) (defining issue narrowly and rejecting claim due to absence of affirmative disclosure law).

³³² See Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936) (maintaining that vitality of common law rests on ability of judges to adapt principles to new concepts); Vickery, *supra* note 115, at 1451 (suggesting that courts should not be reluctant to recognize new cause of action in absence of law); see also *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 618-19 (Okla. Ct. App. 1982) (rejecting argument that because there is no law on point no duty of confidentiality exists). As one court stated when addressing an issue of first impression: This is not the first time, nor will it be the last, that a court, confronted with a unique situation, must, after an unsuccessful search for binding precedent on point, repair to the dictates of public policy to do justice between litigants at the bar of justice. *Hammonds v. Aetna Casualty & Surety Co.*, 243 F.Supp. 793, 796 (N.D. Ohio 1965).

³³³ *Djowharzadeh*, 646 P.2d at 618-19.

³³⁴ See *supra* notes 151-95 and accompanying text (describing tort duty of confidentiality as established by *Peterson* and *Djowharzadeh*); see also *supra* note 112 (citing numerous other cases recognizing tort duty of confidentiality).

³³⁵ See *supra* notes 151-95 and accompanying text.

³³⁶ See *id.*

results in damage to the customer.³³⁷

Banks and other financial institutions hold and utilize customers' personal information.³³⁸ Despite this large responsibility, the financial institutions' self-regulatory response has been erratic at best.³³⁹ Financial institutions that are careless with customers' personal information contribute to the onslaught of identity theft.³⁴⁰ Such careless activities may include failing to shred discarded documents, providing inadequate security measures, maintaining poor informational technology, giving employees access to bank records without a proper background check, and allowing easy access to records by employees or outsiders.³⁴¹ Under the standards established in *Peterson* and *Djowharzadeh*, courts should find financial institutions have breached their duty of confidentiality when such lax procedures or practices result in identity theft that damages a customer.³⁴²

A portion of the financial industry has begun to recognize the overwhelming problem of identity fraud and has begun to take identity theft more seriously by instituting self-regulation.³⁴³ However, without universal standards, advances in technology, including banking on the internet, could defeat any efforts at self-regulation.³⁴⁴ Technological advances combined with the increase in identity theft require courts to recognize a broad tort duty of confidentiality to protect an individual's personal financial information from identity theft.³⁴⁵

³³⁷ See *id.*

³³⁸ See Preston, *supra* note 21, at 950.

³³⁹ See SCHWARTZ & REIDENBERG, *supra* note 14, at 161-64 (describing financial industry's self-regulation).

³⁴⁰ See *supra* note 313.

³⁴¹ See *id.*

³⁴² See generally *supra* notes 151-95 (indicating expansive duty of confidentiality for financial institutions to keep customer information secure).

³⁴³ See Provenza, *supra* note 7, at 328; see also R. Christian Bruce, *Privacy Bill Clears House Banking Panel With Amendments Allowing Court Action*, BANKING REP. (BNA) 256-57 (Aug. 10, 1998) (discussing banking industries role in prevention of identity theft).

³⁴⁴ See SCHWARZ & REIDENBERG, *supra* note 14, at 123 (explaining need for uniform data privacy laws).

³⁴⁵ See *supra* notes 39-48 (describing susceptibility of financial institutions to identity theft and role of the internet); SCHWARTZ & REIDENBERG, *supra* note 11, at 161-64 (explaining how industry self-regulation has been inadequate); VARTANIAN ET AL., *supra* note 13, at 298 (discussing increased threat of identity theft arising from online banking and need to develop common law standards to determine banks' liability).

III. PROPOSAL

The rise in identity theft indicates that the financial industry's attempt to protect customers' personal information through self-regulation is insufficient.³⁴⁶ Legislative attempts have also been unfruitful.³⁴⁷ Consequently, the judiciary should recognize a broad tort duty of confidentiality that requires financial institutions to properly secure and guard customer information.³⁴⁸

When confronted with identity theft, courts should not concentrate on the absence of any existing statute or cases on point in their jurisdiction.³⁴⁹ As the court in *Djowharzadeh* pointed out, the absence of law in this area is a tribute to the past performance of financial institutions.³⁵⁰ Moreover, the absence of law is not evidence that no such duty exists or should exist.³⁵¹ The common law has often adapted to meet the needs of public policy without waiting for legislation.³⁵² Furthermore, if the judiciary recognized such a duty of confidentiality, it would not be a significant departure from existing law.³⁵³ *Peterson* and *Djowharzadeh* have already established that banks have an independent duty to keep their customers' information confidential.³⁵⁴

³⁴⁶ See *supra* notes 39-48, 338-40 and accompanying text.

³⁴⁷ See *supra* notes 228-55 and accompanying text.

³⁴⁸ See generally VARTANIAN ET AL., *supra* note 13, at 298 (noting need to develop common law standards determining banks' liability for identity theft); Harrell, *supra* note 162, at 641-47 (analyzing emerging pattern of bank liability cases which are based on new conception of relationship between bank and customer); Vickery, *supra* note 115, at 1451 (advocating adoption of similar confidentiality tort which should apply to various unconsented disclosures). *But see* Gilles, *supra* note 140, at 84 (asserting that breach of confidence is not effective remedy for unauthorized disclosure of private facts).

³⁴⁹ See *supra* notes 332-33 and accompanying text.

³⁵⁰ See *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 620 (Okla. Ct. App. 1982).

³⁵¹ See *supra* notes 332-33 and accompanying text.

³⁵² See *id.*

³⁵³ See *supra* note 112 (listing numerous cases from various jurisdictions some form of tort duty of confidentiality); see also Vickery, *supra* note 115, at 1455 (indicating that recognition of breach of confidence tort would not be exodus from existing law).

³⁵⁴ See *supra* notes 151-95 and accompanying text; see also *supra* note 195 (listing cases that have cited *Peterson* and *Djowharzadeh* with approval). The judiciary's recognition of such a tort duty will not be unfair to prospective defendants. See Vickery, *supra* note 115, at 1455 (claiming that recognition of new tort for breach of confidence, which is not radical departure from existing confidentiality doctrines, would not prejudice prospective defendants). Given the existing ethical standards recognized by financial institutions, it is highly unlikely that a defendant bank would have relied on the absence of such a duty when handling customer information. See *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 289-90 (Idaho 1961) (acknowledging ethical standards which hold that banks have duty to keep customer information secure); Vickery, *supra* note 115, at 1455 (explaining that

Initially, courts should clearly define the duty of confidentiality that financial institutions owe to their customers.³⁵⁵ Because financial institutions hold themselves out as intermediaries to the public welfare, the duty should transcend the ordinary obligations imposed pursuant to a contractual relationship.³⁵⁶ Moreover, because banks occupy a position of trust and integrity in society the obligation should be greater than an ordinary tort duty of reasonable care.³⁵⁷ *Peterson* and *Djowharzadeh* represent a court's willingness to view the relationship between a financial institution and the public as a relationship that imposes an expansive duty of confidentiality on such institutions.³⁵⁸

Courts should use the reasoning in *Peterson* and *Djowharzadeh* to develop their definitions of the tort duty of confidentiality.³⁵⁹ In *Djowharzadeh*, the court defined the duty a bank owed to its loan applicant as an implicit duty to keep the contents of the application confidential.³⁶⁰ In *Peterson*, the court described the duty as being based upon "inviolate secrecy."³⁶¹ Based on these two decisions, courts should define the duty as a substantial obligation to take reasonable measures to keep a customer's personal information secure and confident.

A financial institution's duty of confidentiality should arise whenever it receives information from a customer in confidence.³⁶² The duty of confidentiality should attach even if the communication does not establish a contractual relationship between the institution and the customer.³⁶³ In short, the duty of confidentiality should encompass any communication of information, which a reasonable person would expect

existing obligations in confidential relationships put potential defendants on notice). In fact, the American Bankers Association already takes the position that banks should keep customer information confidential and private. *See supra* note 317.

³⁵⁵ *See Vickery, supra* note 115, at 1451-55 (recognizing that it is job of judiciary to name and define novel tort).

³⁵⁶ *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982).

³⁵⁷ *See Djowharzadeh*, 646 P.2d at 619-20.

³⁵⁸ *See id.*; *see also Harrell, supra* note 162, at 641-47 (maintaining that *Djowharzadeh* is illustrative of modern view of relationship between bank and customer).

³⁵⁹ *See generally Harrell, supra* note 162, at 641-44 (describing *Djowharzadeh* as seminal case which took novel approach to find that banks owe obligations to their customers based on their relationship with public).

³⁶⁰ *Djowharzadeh*, 646 P.2d at 619-20.

³⁶¹ *Peterson*, 367 P.2d at 290.

³⁶² *See Djowharzadeh*, 646 P.2d at 619-20 (suggesting that duty arose at time bank solicited personal information from loan applicant, which was before any contractual relationship existed).

³⁶³ *See id.*

a bank to keep confidential.³⁶⁴

Financial institutions should be liable in tort for the breach of this duty.³⁶⁵ Thus, if a financial institution does not exercise reasonable care in discarding documents, adopting security measures, maintaining informational technology, or hiring employees a court should find such an institution in breach of its duty of confidentiality.³⁶⁶ Consequently, the financial institution should have to pay all reasonably foreseeable damages incurred by the customer as a result of the institution's carelessness.³⁶⁷

Holding financial institutions liable for a breach of the duty of confidentiality is well supported by public policy.³⁶⁸ Indeed, banks use public funds and hold themselves out as intermediaries of the public trust.³⁶⁹ A financial institution's position of trust in society requires a corresponding duty of confidentiality for the personal information that financial institutions solicit from their customers.³⁷⁰ Because such institutions occupy a special position of responsibility and power in society, courts should impose a duty on these institutions to keep their customers' information confidential.³⁷¹ Furthermore, courts should hold financial institutions liable for a breach of this duty of confidentiality when it results in identity theft.

CONCLUSION

Identity theft is a crime of epidemic proportions that has serious consequences for its victims.³⁷² The exponential rise in identity theft has inspired state and federal legislation, making identity theft a serious crime.³⁷³ These criminal statutes, however, do not provide adequate

³⁶⁴ See generally Vickery, *supra* note 115, at 1456 (showing that this type of rule already successfully governs copyright and trade secret law).

³⁶⁵ See *supra* notes 335-37 and accompanying text.

³⁶⁶ See *supra* notes 335-37 and accompanying text.

³⁶⁷ See *supra* notes 309-11 and accompanying text. The duty of confidentiality includes a duty for financial institutions to take reasonable measures to prevent employees from compromising confidential customer information. See *supra* notes 186-89 and accompanying text.

³⁶⁸ See *supra* notes 175-85 and accompanying text.

³⁶⁹ See *supra* notes 175-85 and accompanying text.

³⁷⁰ See *supra* notes 175-85 and accompanying text.

³⁷¹ See also Harrell, *supra* note 162, at 646 (recognizing that banks have special obligation of confidentiality based on their relationship with society).

³⁷² See *supra* notes 19-73 and accompanying text.

³⁷³ See *supra* notes 93-103 and accompanying text.

retribution, relief, or recovery to compensate identity theft victims.³⁷⁴

Although identity theft usually involves financial institutions, there is an absence of statutory law prescribing the duties these institutions have to protect their customers' information from identity theft.³⁷⁵ Because financial institutions can write off the insurance losses associated with identity theft or pass them off to consumers, they have little incentive to establish standards to protect customers from identity theft.³⁷⁶ In the absence of ample industry standards or statutes protecting individual financial information, the customers of financial institutions are left vulnerable to identity theft.³⁷⁷ Moreover, when a financial institution fails to protect their customers' information and identity theft results, the victimized customer is without adequate legal recourse.³⁷⁸

An identity theft victim, turning to the common law, will find several possible causes of action that customers have brought against banks when a financial institution has disclosed a customer's confidential information without authorization.³⁷⁹ However, none of these causes of action directly apply to a situation where a financial institution has failed to protect a customer's information from misappropriation by a third party identity thief.³⁸⁰ Nevertheless, cases recognizing a broad tort duty of confidentiality, such as *Peterson and Djowharzadeh*, suggest that banks have a fundamental duty to keep their customers' personal information confidential and secure.³⁸¹

Courts should construe the duty of confidentiality broadly to provide adequate relief to victims of identity theft that results from a financial institution's failure to protect its customers' information.³⁸² An action for breach of the tort duty of confidentiality presents the best vehicle for a victim's recovery for identity theft.³⁸³ The tort duty provides more complete remedies for identity theft victims than the remedies available in contract for breach of an implied contractual duty.³⁸⁴ Moreover, the tort duty is devoid of many of the doctrinal trappings inherent in the

³⁷⁴ See *supra* notes 225-45 and accompanying text.

³⁷⁵ See *supra* notes 104-05 and accompanying text.

³⁷⁶ See *supra* notes 232-33 and accompanying text.

³⁷⁷ See *supra* notes 39-48, 338-41 and accompanying text.

³⁷⁸ See *supra* notes 57-73 and accompanying text.

³⁷⁹ See *supra* notes 109-12 and accompanying text.

³⁸⁰ See *supra* notes 196-98 and accompanying text.

³⁸¹ See *supra* notes 151-95 and accompanying text.

³⁸² See *supra* notes 346-71 and accompanying text.

³⁸³ See *supra* notes 306-17 and accompanying text.

³⁸⁴ See *supra* notes 309-14 and accompanying text.

invasion of privacy doctrine.³⁸⁵ Accordingly, a broadly construed tort duty of confidentiality will allow victims to receive adequate compensation for the devastating crime of identity theft and encourage security measures in the financial industry.³⁸⁶

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³⁸⁵ See *supra* notes 246-67 and accompanying text.

³⁸⁶ See *supra* notes 309-45 and accompanying text.

* I would like to dedicate this article to my wife Alicia McKelvey and my parents, Pamela McKelvey and Terrence McKelvey. I would also like to thank Brian Blackney, Dawn and Richard Rudolph, Professor Alison Landsberg, Debra L. Bassett, Professor of Law, Attorney Phil Goldsmith, and Robert Milligan, whose help made this Comment possible. Above all, I thank Jesus Christ, "in whom are hidden all the treasures of wisdom and knowledge." (Colossians 2:3)