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I Don't Remember Buying a \$20,000 Stereo System: Chapters 73 & 468—An Attempt to Solve the Increasing Problem of Identity Theft

Christopher L. Brooke

Code Sections Affected

Penal Code § 803.5 (new), § 803 (amended).

AB 1105 (Jackson); 2003 STAT. Ch. 73, SB 851 (Senate Committee on Public Safety); 2003 Stat. Ch. 468.

“God made each of us to be different from anyone else in the world, as our DNA and fingerprints prove. You don't have to work at having a separate identity; you already have one.”¹

I. INTRODUCTION

A few years ago, fliers were distributed in African-American communities throughout the South and Midwest purporting to explain people's rights under the “Slave Reparation Act.”² Citizens in these communities were informed that, under the Act, African-Americans born before 1928 could be eligible for slave reparations, and those born between 1917 and 1926 could apply for Social Security funds available due to “a fix in the social security system.”³ This information offered great relief to the elderly in those communities. There was only one problem: there was no “Slave Reparation Act.”⁴ The fliers were an attempt by identity thieves to gain access to personal information in order to create false credit cards and bank accounts.⁵ People who responded to the misleading fliers were potential victims of identity theft, and could have suffered large monetary losses or severe damage to their credit reports.⁶

1. James E. Faust, *The Devil's Throat*, ENSIGN, May 2003, at 52.

2. FED. TRADE COMM'N, HOAX TARGETS ELDERLY AFRICAN AMERICANS (2000), at <http://www.ftc.gov/bcp/online/pubs/alerts/hoaxalrt.pdf> (copy on file with the *McGeorge Law Review*).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Personal identity theft is a serious problem in the United States.⁷ Americans now worry more about the threat of identity theft than they do about losing their job.⁸ Last year, three men were charged in what is being called the largest case of identity fraud in United States history.⁹ Their identity theft ring produced over thirty thousand victims across the country, who suffered combined monetary losses of \$2.7 million.¹⁰ It is no wonder, then, that identity theft has become the fastest growing crime in the United States, justifying people's fear of becoming the next unsuspecting victim.¹¹

In order to stem the rising tide of identity theft it has become critical for legislators to identify and solve problems created by identity theft. The California Legislature identified that one of the many problems that identity theft creates is the fact that many victims are not immediately aware that someone has been using their personal information.¹² Sometimes it can take years for victims to discover they have been robbed by an identity thief.¹³ In such cases, identity thieves may escape prosecution if their crimes remain undetected until the statute of limitations has expired.¹⁴

Chapter 73 attempts to eliminate this problem by tolling the statute of limitations until identity theft victims are able to discover that the crime has taken place.¹⁵ Legislators hope that Chapter 73 will give victims and prosecutors a tool that will ensure all identity thieves are brought to justice no matter how long their crime goes undetected.¹⁶

7. See Dana Hawkins, *A Big-Time Identity Crisis*, US NEWS & WORLD REPORT, Dec. 9, 2002, at 34 (reporting that identity theft is common and can occur during normal activities such as going out to eat or purchasing a new automobile).

8. Sandra Block, *More Uneasy Consumers Purchase Identity Theft Insurance*, USA TODAY, May 5, 2003, at http://www.usatoday.com/money/perfi/columnist/block/2003-05-05-ym_x.htm (copy on file with the *McGeorge Law Review*).

9. Hawkins, *supra* note 7.

10. *Id.*

11. *Id.*; see Block, *supra* note 8 (explaining that identity theft can spoil a victim's "credit report for years").

12. See Press Release, Assemblymember Hannah-Beth Jackson, Assemblymember Jackson's Bill to Increase Prosecution of Identity Theft Passed Assembly Floor with Bipartisan Support, May 20, 2003, at <http://democrats.assembly.ca.gov/members/a35/press/p352003005.htm> [hereinafter Jackson Press Release] (copy on file with the *McGeorge Law Review*) (describing an incident where a victim's personal information was stolen and used to purchase a cell phone in 1998; the unpaid bill went on the victim's credit report and was not discovered until 2002, making it impossible to identify the offender until after the statute of limitations expired).

13. *Id.*

14. *Id.*

15. *Id.*

16. See *id.* (indicating that the enactment of Chapter 73 would allow identity thieves to be prosecuted for their crimes, even in cases where a victim is not immediately aware that an identity theft has occurred); see also Memorandum from John Maltbie, County Manager, to the County of San Mateo Board of Supervisors, May 8, 2003, at http://www.co.sanmateo.ca.us/bos.dir/BosAgendas/agendas2003/agenda20030513/20030513_m3_16.htm [hereinafter Maltbie Memo] (copy on file with the *McGeorge Law Review*) (recommending the passage of Chapter 73).

II. EXISTING LAW

A. *Identity Theft Statutes in California*

Section 115 of the California Penal Code deals with offenders who “obtain or make available” false or forged documents.¹⁷ This statute applies to the falsification of any document that could be “filed, registered or recorded under any” state or federal law.¹⁸ Any person who attempts to use, or is even in possession of, such a document is guilty of a felony.¹⁹ A person can be charged with a separate violation for each false document used.²⁰ The statute further specifies that probation can only be granted for violations of this law in “unusual cases,” and probation is never to be granted under certain specified conditions.²¹

In addition, section 530.5 of the California Penal Code, applies to individuals who obtain and use the personal information of another person for any unlawful purpose.²² This statute expressly defines what constitutes “personal information.”²³ A section 530.5 violation is punishable as either a misdemeanor or a felony, giving the statute a dual nature.²⁴ Misdemeanor punishments may include up to one year in a county jail, a fine of up to \$1,000, or both,²⁵ while felony punishments may include confinement in a state prison, a fine of up to \$10,000, or both.²⁶

B. *California Statutes of Limitations Applicable to Identity Theft Crimes*

California law contains various statutes of limitations, each applying to different types of crimes.²⁷ The statute of limitations for a “standard felony” is three years from the time the crime occurs,²⁸ while for a misdemeanor, the statute of limitations is one year from the time the crime occurs.²⁹ Before the passage of Chapters 73 and 468, Penal Code sections 115 and 530.5 were subject to these two

17. CAL. PENAL CODE § 115 (West 1999).

18. *Id.* § 115(a).

19. *Id.*

20. *Id.* § 115(b), (d).

21. *Id.* § 115(c)(1)-(2) (describing two situations where probation is unavailable: (1) when a person has a prior conviction under this statute from a separate proceeding, or (2) when a person is convicted of more than one violation of this section during the same proceeding if the total financial loss for all violations exceeds \$100,000).

22. *Id.* § 530.5 (West Supp. 2004).

23. *Id.* § 530.5(b) (defining personal information as, *inter alia*: name, address, telephone number, health insurance identification number, taxpayer identification number, school identification number and state or federal driver’s license number).

24. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 11 (June 17, 2003).

25. CAL. PENAL CODE § 530.5(a)(West Supp. 2004).

26. *Id.*

27. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 2 (June 17, 2003).

28. CAL. PENAL CODE § 801 (West 1999).

29. *Id.* § 802.

statutes of limitation.³⁰ Thus, whether the crime is for the illegal use of false documents under section 115,³¹ or for the felonious use of personal information under section 530.5, prosecution must have occurred within three years of the commission of the crime.³² However, if the crime was prosecuted under section 530.5 as a misdemeanor, the thief had to be prosecuted within one year from the time the identity theft occurred.³³

C. Tolling the Statute of Limitations

For specified offenses, California law allows for the tolling of the statute of limitations until the crime is discovered by the victim.³⁴ California Penal Code section 803(c) expressly states that crimes “punishable by imprisonment in the state prison, a material element of which is fraud or breach of a fiduciary obligation. . .” are subject to the tolling of the statute of limitations.³⁵ This statute also provides a list of offenses to which the tolling provision would apply automatically.³⁶ However, tolling of the statute of limitations under section 803(c) is “not limited to” the expressly listed offenses.³⁷ Prior California law did not include sections 115 or 530.5 in the list of offenses contained in section 803(c).³⁸

Despite the tolling provision of section 803(c), the statute of limitations may be triggered before the victim gains actual knowledge that a crime has occurred. However, discovery of a crime and actual knowledge of the crime are not synonymous.³⁹ Section 803(e) states that the statute of limitations “does not commence to run until the offense has been discovered, *or could have reasonably been discovered.*”⁴⁰ This means that even if the victim is without actual knowledge that the crime has occurred, the statute of limitations may begin to run despite the tolling provision of 803(c) if the victim gains “knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry.”⁴¹ Thus, victims must be reasonably diligent in discovering facts

30. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 9 (May, 2003) (clarifying existing law).

31. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 3-4, 7-12 (June, 17, 2003) (explaining the interaction of identity theft crimes, prosecution, and the statute of limitations).

32. *Id.*

33. *Id.*

34. CAL. PENAL CODE § 803(c) (West Supp. 2004).

35. *Id.*

36. *Id.* § 803(c)(1)-(11) (including, *inter alia*: fraudulent claims, forgery, perjury, violations of corporate securities laws, welfare fraud, and insurance fraud).

37. *Id.* § 803(c).

38. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 10-12 (June 17, 2003) (indicating that sections 115 and 530.5 were not included in section 803(c) before the passage of Chapter 73).

39. *Id.* at 3.

40. CAL. PENAL CODE § 803(e) (West Supp. 2004) (emphasis added).

41. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 3 (June 17, 2003) (quoting the California Supreme Court in *People v. Zamora*, 18 Cal. 3d 538, 561 (1976)).

of a possible crime in order for the tolling provision of section 803(c) to offer real protection.⁴²

I. CHAPTERS 73 AND 468

The California Legislature passed Chapter 73 in order to correct the problems created when identity theft crimes go undetected for many years.⁴³ Chapter 73 placed identity theft among those crimes for which the statute of limitations is tolled until the victim can discover that the crime has occurred.⁴⁴ Specifically, Chapter 73 added sections 115 and 530.5 of the California Penal Code to the list of offenses to which Penal Code section 803(c) applies.⁴⁵ By adding the California identity theft statutes to section 803(c), the Legislature made it clear that the statute of limitations would be tolled for identity theft crimes.⁴⁶

In an effort to clarify their intent, the Legislature then passed Chapter 468.⁴⁷ The passage of Chapter 468 removes Penal Code sections 115 and 530.5 from the list of crimes contained in section 803, and creates a new statute—Penal Code section 803.5.⁴⁸ This addition to the Penal Code provides that the statute of limitations of Penal Code sections 115 and 530.5 (California's identity theft statutes) will be tolled until the commission of the crime is discovered.⁴⁹

III. ANALYSIS

A. *The Purpose of the Statute of Limitations Generally*

The fundamental purpose of statutes of limitations is to promote justice.⁵⁰ After a certain period following the commission of a crime, society no longer has a justifiable interest in prosecuting that crime.⁵¹ Over time, evidence becomes less reliable, or possibly unavailable.⁵² The statute of limitations serves to protect the accused from prosecutions based on such stale evidence.⁵³ Further, there comes a

42. *Id.*

43. *Id.* at 6-7.

44. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1105, at 1 (July 1, 2003).

45. *Id.*

46. See Jackson Press Release, *supra* note 12 (offering support because the statutory change would make it clear that the statute of limitations would be tolled for identity theft crimes).

47. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 851, at 2 (Apr. 29, 2003).

48. CAL. PENAL CODE § 803.5 (enacted by Chapter 468); see *id.* § 803 (containing no reference to Penal Code sections 115 and 530.5).

49. CAL. PENAL CODE § 803.5.

50. Christopher J. Franzmann, Note, *The Proper Statute of Limitations on Rule 10b-5 Action*, 23 IND. L. REV. 731, 733 (1990).

51. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 6 (June 17, 2003).

52. See James M. Fisher, *The Limits of Statutes of Limitation*, 16 SW. U. L. REV. 1, 2-3 (1986) (discussing the important purposes for which the statute of limitations has traditionally been implemented).

53. *Id.*

time when people should be relieved of the prospect of prosecution.⁵⁴ Statutes of limitations prevent people from living with the fear of potential prosecution hanging over their heads for an indefinite length of time.⁵⁵ Commentators point out that the most meritorious charges are likely to be brought quickly, while less meritorious charges are more likely to be put off until a future time.⁵⁶ By limiting the time in which charges can be brought, the statute of limitations helps to weed out less meritorious claims.⁵⁷ Such a limit helps control court dockets and makes it less likely that prosecutors will bring non-meritorious charges.⁵⁸

Without the protection afforded by statutes of limitations, many people fear trials that occur long after the crime is committed could result in questionable decisions that would undermine the fairness of our judicial system.⁵⁹ However, due to the nature of some crimes, the statute of limitations is tolled until victims have a chance to discover that the crime has taken place.⁶⁰ Tolling the statute of limitations until the discovery of the crime achieves a protective purpose and prevents criminals from avoiding prosecution simply because the nature of a particular crime may prevent its discovery for several years.⁶¹

B. *The Unique Nature of Identity Theft*

While the statute of limitations serves important public policy functions, the limitations create a problem for identity theft victims. Often, identity theft goes undetected for extended periods of time.⁶² Victims may not feel the consequences of identity theft until long after the crime has occurred.⁶³ In some cases, identity theft goes undetected for several years.⁶⁴ In fact, 12.5 months is the average time it takes a victim to realize she has been the target of identity theft.⁶⁵ Additionally, twenty percent of identity theft victims do not learn of the crime until over two

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 6 (June 17, 2003).

60. *See id.* at 2-3 (describing crimes for which the existing law allows the statute of limitations to be tolled).

61. *See id.* at 6-7 (explaining that the policy consideration in tolling the statute of limitations for identity theft crimes is the unique nature of the crime, which makes it possible for the crime to go undetected long after it has been committed).

62. *Id.* at 5.

63. *See id.* at 6-7 (listing consequences of identity theft that may not be discovered for several years as: ruined credit, clouds on real property title, and newly discovered debt).

64. FED. TRADE COMM'N, IDENTITY THEFT VICTIM COMPLAINT DATA: FIGURES AND TRENDS ON IDENTITY THEFT 1-DECEMBER 31, 2001 (2002), available at <http://www.consumer.gov/sentinel/images/charts/idthef01.pdf> (copy on file with the *McGeorge Law Review*) (displaying data collected from identity theft victims indicating how much time had passed before each victim learned that the crime had occurred).

65. Eric M. Shoudt, Comment, *Identity Theft: Victims "Cry Out" for Reform*, 52 AM. U. L. REV. 339, 358 (2002).

years after the crime has taken place.⁶⁶ If the law allows the statute of limitations to begin running at the time an identity theft crime is committed, the unique nature of identity theft is not taken into account, and many guilty parties could escape prosecution.⁶⁷ By passing Chapter 73, and later Chapter 468, the Legislature attempts to balance the important public policy concerns that underlie the statute of limitations with the unique nature of identity theft crimes, and to allow fewer identity thieves to escape prosecution.⁶⁸

C. *Were Chapters 73 and 468 Necessary?*

The tolling provisions of section 803(c) are not limited to crimes expressly listed in the statute. Therefore, it is possible that the tolling provision could have applied to California's identity theft statutes without adding sections 115 and 530.5 to section 803(c), or creating a new statute.⁶⁹ Dicta from a California Supreme Court case suggests that the language of section 803(c) is broad enough to include the crime of using false and forged documents, which would have brought section 115 under the control of 803(c).⁷⁰ Section 530.5 likely would have fallen under the tolling provision of 803(c) because fraud is a material element of unlawfully using the personal information of another.⁷¹ Thus, section 115 and section 530.5 may have been subject to the tolling benefits of section 803(c) without the passage of Chapters 73 and 468.⁷² Nevertheless, the Legislature determined it was important to eliminate any ambiguity.⁷³ The passage of Chapters 73 and 468 are meant to ensure the statute of limitations will be tolled for identity theft crimes.⁷⁴

66. *Id.*

67. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 5 (June 17, 2003) (explaining the bill's purpose).

68. See *id.* (suggesting that by tolling the statute of limitations until the victim has a chance to discover the crime will result in the prosecution of crimes that would otherwise have been barred by the statute of limitations).

69. See *id.* at 10 (citing the California Supreme Court in *People v. Garfield* 40 Cal. 3d 192, 199 n.7 (1985)).

70. See *id.* (reasoning that the language used by the California Supreme Court could lead a future court to rule that section 803(c) is broad enough to cover violations of section 115).

71. See *id.* (noting that the statute lists the intent to defraud as an element for the violating section 530.5).

72. *Id.*

73. See Maltbie Memo, *supra* note 16 (indicating support for the passage of Chapter 73 because it will make it clear that the tolling of the statute of limitations would apply to identity theft).

74. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1105, at 6-7 (June 17, 2003) (indicating that thieves control most of the information in an identity theft crime, putting victims in a distinct disadvantage when it comes to prosecuting such crimes); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 851, at 1-2 (Sept. 9, 2003).

IV. CONCLUSION

Statutes of limitation serve an important societal function.⁷⁵ However, because of the nature of the crime, identity theft can go undetected for several years, allowing criminals to escape prosecution when the statute of limitations expires before their criminal acts are discovered.⁷⁶ Tolling the statute of limitations until victims have a chance to discover the crime helps prevent criminals from escaping prosecution despite the unique nature of identity theft crimes.⁷⁷ Although existing law may have already tolled the statute of limitations for identity theft crimes, the Legislature passed Chapters 73 and 468 to eliminate any ambiguity.⁷⁸ As identity theft has become an increasing problem in the United States,⁷⁹ it has become desirable to make sure identity theft criminals do not escape punishment. By allowing the prosecution of identity theft crimes even if they are not discovered until years after the crime occurs, Chapters 73 and 468 attempt to stem the growing tide of identity theft.

75. See *supra* Part III.A (discussing the purposes of the statute of limitations).

76. See *supra* Part III.B (identifying the problem created by identity theft crimes when the statute of limitations begins to run at the time the offense occurred).

77. See *supra* Part III.B.

78. See *supra* Part III.C (identifying that Penal Code sections 115 and 530.5 may already have been subject to tolling under section 803(c)).

79. Hawkins, *supra* note 7.