

## Notes

# **THE NEGLIGENT ENABLEMENT OF IMPOSTER FRAUD: A COMMON-SENSE COMMON LAW CLAIM**

HEATHER M. HOWARD

### INTRODUCTION

Bridgette Patrick was pulled over during a routine traffic stop by an Alabama police officer who asked to see her driver's license. After checking her license, the officer informed her that she was under arrest; a warrant had been issued against her in Shelby County, Alabama for writing fraudulent checks. Despite Patrick's bewildered protests, the officer escorted her to the county jail, where she was able to demonstrate that her handwriting did not resemble that on the fraudulent checks. Nevertheless, the jail detained her overnight because of outstanding warrants for her arrest in other jurisdictions. The next morning, a police officer from another city picked up Patrick at the county jail in order to then arrest her in his city. Patrick then endured the same humiliating process of arrest, photographing, fingerprinting, and incarceration. Over the course of nearly ten days, she was shuttled from one city or county to the next to undergo the same process in a total of eleven jurisdictions.

Nearly two years before this nightmare began, Patrick had been notified by two other cities that they had warrants out for her arrest for writing fraudulent checks; she was able to prove her innocence of these allegations and the charges were dismissed. Patrick ultimately learned that an imposter had stolen her identity, opened a bank account in her name, and written nearly \$1,500 in bad checks using her identity. The bank had opened a checking account for this imposter, with the imposter providing only Patrick's missing

temporary driver's license as identification. The individual gave no permanent address, the individual's signature differed from that on the temporary driver's license, and the bank teller did not ask the individual for her Social Security number. Patrick was a victim of negligent enablement of imposter fraud, which occurs when a financial institution<sup>1</sup> negligently opens a bank account or extends credit to an identity thief. In *Patrick v. Union State Bank*,<sup>2</sup> the Alabama Supreme Court permitted identity theft victim Bridgette Patrick to recover from the bank that negligently enabled an imposter to steal her identity and subject her to criminal liability.<sup>3</sup>

This Note will review the brief history of the negligent enablement of imposter fraud claim in state courts across the country. This cause of action has received harsh treatment from most courts that have considered it. However, this Note defends the cause of action and shows that it can play a useful and necessary role in protecting victims of identity theft from financial institutions that negligently open bank accounts or extend credit to identity thieves. Part I provides a review of the broader concerns surrounding the issue of identity theft and considers the magnitude of the problems resulting from it. Part II examines the competing views on the issue of negligent enablement of imposter fraud. Part III argues that the negligent enablement of imposter fraud claim deserves further consideration from future plaintiffs and more favorable treatment from courts because current legislative efforts are inadequate and, more importantly, because traditional negligence principles suggest that financial institutions have an affirmative duty not to enable identity theft.

## I. IDENTITY THEFT POSES A SUBSTANTIAL AND GROWING THREAT

Identity theft has become an increasingly devastating nationwide concern in recent years.<sup>4</sup> As Professor Sabol defines it, "Identity theft

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1. Throughout this Note, the term "financial institution" refers to any organization that may be potentially responsible for enabling identity theft, typically including banks and credit issuers.

2. 681 So. 2d 1364 (Ala. 1996).

3. *Id.* at 1372; see *infra* notes 49–54 and accompanying text.

4. See generally Michael Higgins, *Identity Thieves: Stealing Someone's Identity to Buy Everything from Cars to Toys and Leaving the Real Person's Credit Rating in Ruins May Be the Perfect Crime Because There is Little That Can Be Done to Prosecute It. Until Now.*, 84 A.B.A. J., Oct. 1998, at 42, 42 (discussing "what in an increasingly cashless society ha[s] become almost the perfect crime: identity theft"). "By posing as someone else, thieves found, they could steal in

occurs when a person steals another person's name, address, social security number, or other identifying information in order to commit fraud."<sup>5</sup> It arises most commonly in four contexts: credit card fraud, communications services fraud, bank fraud, and fraudulent loans.<sup>6</sup>

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a way that left victims powerless and police uninterested." *Id.* In the mid-1990s, public awareness of identity theft began to rise with the burgeoning number of complaints made to government officials, as well as business and consumer groups. *See id.* at 43.

Identity theft poses a serious problem to the American public: the FBI has deemed it among the fastest-growing white-collar crimes in the United States, and the FTC announced that it was 2002's most frequent consumer complaint. Timothy C. Barmann, *Laptop Theft Has Bank Rhode Island Issuing Alert*, PROVIDENCE JOURNAL-BULLETIN, Dec. 19, 2003, at G1. Some commentators have gone so far as to call identity theft an "epidemic." *See, e.g.,* Lynn M. LoPucki, *Did Privacy Cause Identity Theft?*, 54 HASTINGS L.J. 1277, 1278 (2003) ("Credit-based identity theft emerged as a significant problem in the 1980s, hitting epidemic proportions . . . in the 1990s.") (footnote omitted); Jeff Sovern, *The Jewel of Their Souls: Preventing Identity Theft Through Loss Allocation Rules*, 64 U. PITT. L. REV. 343, 364 n.75 (2003) (discussing responses taken by lenders and merchants to the "identity theft epidemic"). Even members of the United States Senate have used this dramatic language: "The epidemic of identity theft jeopardizes the financial well being of tens of millions of consumers[;] if left unchecked, it threatens the basis of our credit economy." Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?*, 29 MCGEORGE L. REV. 483, 488 (1998) (citing the Senate Committee on Public Safety, Committee Analysis of A.B. 156, at 4 (July 15, 1997)).

The results of a random nationwide survey conducted in March and April of 2003 show that identity theft does indeed appear to have reached such epidemic proportions. *See* Federal Trade Commission—Identity Theft Survey Report (Sept. 2003), at 4, at <http://www.ftc.gov/os/2003/09/synovatereport.pdf> (last visited June 30, 2005) (on file with the *Duke Law Journal*). A reported 4.6 percent of Americans ages 18 and over were victimized by some form of identity theft in the past year. *Id.* From these results, the FTC calculates that approximately 10 million Americans were victims of identity theft in the past year alone. *Id.* Additionally, 12.7 percent of survey respondents indicated that they had been victimized by identity theft in the past five years. *Id.*

5. 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). Identity thieves operate in myriad capacities:

The range of identity fraud is stunning. Identity thieves have used the names of their victims to rent apartments, obtain employment, subscribe to online pornographic services, purchase guns, file fraudulent tax returns, obtain government documents or benefits—such as a driver's license or Social Security card, open up telephone or utility services, open bank accounts, have surgery performed, file for bankruptcy (to obtain the benefits of the automatic stay), and even have children.

Sovern, *supra* note 4, at 349–50 (footnotes omitted).

6. John B. Kennedy & Mary Wong, *Recent Developments in U.S. Privacy Law, Including Post-September 11, 2001*, in THIRD ANNUAL INSTITUTE ON PRIVACY LAW: NEW DEVELOPMENTS & ISSUES IN A SECURITY-CONSCIOUS WORLD 13, 22 (Francoise Gilbert, John B. Kennedy & Paul M. Schwartz eds., 2002). Credit card fraud occurs when an imposter opens a credit card account using another's name. *Id.* With communications services fraud, an imposter opens a utility service account, such as a cellular phone or telephone account, in another's name. *Id.* Bank fraud occurs when an imposter opens a bank account—checking or savings—in another's name; the imposter may then draw funds from that account by writing fraudulent

Although much identity theft involves the Internet, it is not exclusively an Internet-based crime. Further, identity theft may occur with or without assistance from Internet resources.<sup>7</sup> Regardless of the form identity theft takes, the victimized individual suffers through a traumatic experience.<sup>8</sup>

The identity theft at issue in negligent enablement claims should not be confused with “account theft,” which occurs when stolen credit cards, debit cards, or financial records enable the thief to steal from the victim’s already-existing accounts.<sup>9</sup> Although these related crimes are often discussed interchangeably, “true name fraud”—which occurs when a thief “us[es] a victim’s identifying information to open new accounts in the victim’s name”<sup>10</sup>—takes a greater toll on its victims than does account theft: their financial losses are more substantial, more difficult to discover, and take considerably longer to resolve.<sup>11</sup>

Unlike crimes that involve a clear perpetrator and an obvious victim, identity theft harms both the individual whose identity has been stolen and the financial institution that issued the fraudulent account.<sup>12</sup> Typically, the financial institution involved in the

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checks. *Id.* Finally, fraudulent loans are made when an imposter acquires a loan for a car, home, or other purchase in another’s name. *Id.*

7. Low-tech, old-fashioned acquisition methods, such as using lost or stolen personal information, “dumpster diving,” and searching through personnel files, result in a substantial portion of identity theft. Holly K. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 RUTGERS COMPUTER & TECH. L.J. 237, 247–50 (2004); Stephen Mihm, *Dumpster-Diving for Your Identity*, N.Y. TIMES, Dec. 21, 2003 (Magazine), at 42. However, use of sophisticated resources on the Internet facilitates some imposters by enabling them to access information both quickly and discreetly. See Timothy L. O’Brien, *Officials Worried over a Sharp Rise in Identity Theft*, N.Y. TIMES, April 3, 2000, at A1 (“[T]he Internet is making identity theft one of the signature crimes of the digital era.”). Additionally, the Internet may facilitate theft by enabling the thief to use a newly acquired phony identity in committing fraud. See Govern, *supra* note 4, at 357.

8. See *infra* notes 19–29 and accompanying text.

9. Jennifer 8. Lee, *Identity Theft Victimizes Millions, Costs Billions*, N.Y. TIMES, Sept. 4, 2003, at A20.

10. Towle, *supra* note 7, at 242. Throughout the remainder of this Note, the generic term “identity theft” is used to denote both identity fraud generally and true name fraud specifically. However, when the distinction between the two categories is particularly important for purposes of comparison, this Note refers to true name fraud.

11. Lee, *supra* note 9. Not all victims of identity theft—even those in whose identity new accounts were opened—suffer out-of-pocket financial losses. Towle, *supra* note 7, at 255.

12. See Brandon McKelvey, *Financial Institutions’ Duty of Confidentiality to Keep Customer’s Personal Information Secure from the Threat of Identity Theft*, 34 U.C. DAVIS L. REV. 1077, 1086 (2001) (“Current law, financial institutions, and law enforcement do not consider defrauded individuals as victims of identity theft because the individuals are not

transaction absorbs the greatest part of the financial loss, so traditional perspectives on identity theft regard the institution as the victim and only occasionally recognize that the individual whose identity has been stolen is also a victim.<sup>13</sup>

Although they are harmed by identity theft, financial institutions may also be implicated as facilitators of identity theft, even if they act responsibly, because they have the power to extend credit and possess a vast array of personal information about their customers. More focus has been placed on financial institutions' responsibility to protect customers' personal information than on their responsibility to take care in opening bank or credit card accounts.<sup>14</sup> However, this latter role deserves greater scrutiny, because a "financial institution's inadequate screening or verification often makes identity theft an easy crime."<sup>15</sup>

Victims of true name identity theft lack a satisfactory remedy. Although customers have recourse—in the form of both statutory<sup>16</sup> and common law claims<sup>17</sup>—individuals who never intended to become the institutions' customers lack similar recourse because institutions generally do not owe noncustomers a duty of care.<sup>18</sup>

As evidenced by Bridgette Patrick's ordeal,<sup>19</sup> the losses identity theft causes are not exclusively financial, and identity theft takes an immeasurable toll on its victims.<sup>20</sup> One consumer advocate deemed

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responsible for the resulting debt." (footnote omitted)); Sabol, *supra* note 5, at 167 ("Financial institutions are viewed by law as the primary victims of identity fraud and their direct financial loss tended to be viewed as the only loss involved. Federal laws that criminalize the conduct integral to identity theft did not recognize consumers as victims." (footnotes omitted)).

13. See Higgins, *supra* note 4, at 43 ("The law enforcement logic was this: [the consumer] wasn't legally obligated to pay any of the bills the impostor had run up. Therefore, [the consumer] wasn't out any money. If anyone was a victim, it was the bank that issued the credit card."); see also O'Brien, *supra* note 7 ("Consumers rarely face monetary losses related to identity theft because merchants or banks are typically the ones stuck with bogus credit card charges.").

14. See, e.g., Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422 (2000) (forbidding financial institutions from disclosing customers' financial information to the federal government).

15. McKelvey, *supra* note 12, at 1084.

16. See, e.g., *infra* notes 30–31 and accompanying text.

17. See *infra* notes 42–46 for a discussion of common law claims employed by identity theft victims.

18. See *infra* notes 139–43 and accompanying text.

19. See *supra* notes 2–3 and accompanying text.

20. See, e.g., Christopher P. Couch, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 ALA. L. REV. 583, 585–86 (2002) ("[I]dentity theft

the ordeal of regaining one's identity an "Orwellian nightmare"<sup>21</sup> and an identity theft victim called it a "Kafkaesque maze."<sup>22</sup> Individual victims are often not taken seriously by courts—or society generally—and their experiences are viewed as merely unfortunate inconveniences because financial institutions shoulder the burden of the actual monetary losses resulting from identity theft.<sup>23</sup> Identity theft victims suffer, however, in at least two quantifiable ways: they lose time and spend money in defending their cases.<sup>24</sup> For example, victims devote an average of 600 hours to clearing their names.<sup>25</sup> When victims' lost income was considered in the efforts taken to clear their records, the average amount lost was a staggering \$16,971.<sup>26</sup> In addition to these losses, some victims also suffer severe emotional effects from both their victimization and from the frustrating process that they must endure to clear their names.<sup>27</sup> Further frustrating their ability to clear their records is the fact that identity theft victims

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is not a victimless crime in which only institutions realize loss; the individual victims suffer real damage ranging from wasted time to hospitalization."); Erin M. Shoudt, *Identity Theft: Victims "Cry Out" for Reform*, 52 AM. U. L. REV. 339, 356 (2002) (discussing the "human costs" identity theft victims suffer as they "bear the burden of regaining their financial health and restoring their credit history"); see *infra* notes 24–28. For a personal account of a particular identity theft victim's struggle with regaining her identity, see Stacy Sullivan, *How I Lost My Good Name*, N.Y. TIMES, Apr. 17, 2000, at A19.

21. Higgins, *supra* note 4, at 47.

22. Sullivan, *supra* note 20.

23. E.g., Sabol, *supra* note 5, at 165 (discussing the frustrations of a California man in whose identity hundreds of thousands of dollars of debt were amassed from the purchase of a Mercedes Benz, expensive sports merchandise, and other extravagant items).

24. DALE PLETCHER, IDENTITY THEFT RES. CTR., IDENTITY THEFT: THE AFTERMATH 2003, at 22 (2003), available at <http://www.idtheftcenter.org/idaftermath.pdf> [hereinafter "Identity Theft Study"].

25. *Id.* at 4.

26. *Id.* at 24. Victims' out-of-pocket expenses in attempting to resolve their situations range from \$4 to \$29,996, with an average of \$1,495 per victim. *Id.* at 25.

27. See *id.* at 35–39 (providing both a quantitative and a qualitative review of the emotional toll that identity theft takes on an individual victim). Many identity theft victims must forego opportunities as a result of their victimization:

It's little wonder that victims feel violated, helpless and angry. They are unable to rent an apartment, get a job, qualify for a mortgage, buy a car, all because someone else's bad credit history is recorded on their credit report. Essentially the entire burden of this crime is placed on the shoulders of the victims.

Beth Givens, *Identity Theft: How it Happens, Its Impact on Victims, and Legislative Solutions*, Presentation at the National Organization for Victim Assistance, at [http://www.privacyrights.org/AR/id\\_theft.htm](http://www.privacyrights.org/AR/id_theft.htm) (July 12, 2000) (on file with the *Duke Law Journal*); see also Govern, *supra* note 4, at 384 (detailing how identity theft victims suffer "lost opportunities—such as the loss of a home because a damaged credit record made it impossible to qualify for a mortgage").

typically do not learn of their victimization for several months after the theft has occurred, at which point they must begin the lengthy and harrowing process of attempting to regain their identities.<sup>28</sup> True name fraud victims suffer losses more often than other identity theft victims: although only one quarter of victims whose existing accounts were stolen were forced to pay out-of-pocket expenses, half of the victims in whose names new accounts were opened incurred out-of-pocket expenses.<sup>29</sup>

In an attempt to ameliorate the effects of identity theft, Congress has enacted several statutes,<sup>30</sup> the most prominent and widely used being the Fair Credit Reporting Act.<sup>31</sup> The FCRA provides consumers with a private right of action for a credit reporting agency's willful or negligent noncompliance with any of the duties imposed by the FCRA.<sup>32</sup> Under this FCRA provision, consumers may

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28. See PLETCHER, *supra* note 24, at 8. In the past few years, victims have discovered the theft of their identities more quickly; whereas the average victim in 2000 did not discover the victimization for 12 to 18 months, the average victim in 2003 learned of the theft within one to six months. *Id.*

29. Towle, *supra* note 7, at 255.

30. In addition to the Fair Credit Reporting Act, discussed *infra* note 31, statutes include the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2000) [hereinafter "FDCPA"]. "The FDCPA seeks to 'eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'" Baker v. Citibank, 13 F. Supp. 2d 1037, 1040 (S.D. Cal. 1998) (quoting Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988)). Other statutes attempting to protect against fraud include the Truth in Lending Act, 15 U.S.C. § 1642 (2000), and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles and sections of the U.S.C.).

Commentators are skeptical of the efficacy of both state and federal legislation. "[E]ven the staunchest advocates of the proposed reforms admit that they will not solve the [identity theft] problem. Identity theft is out of control." Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 TEX. L. REV. 89, 90 (2001) (footnotes omitted).

31. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (2000), amended by Pub. L. No. 108-159, 117 Stat. 1952 (2003) [hereinafter "FCRA"]. In enacting the FCRA, "Congress sought to protect the needs of commerce and facilitate the dispersion of credit information while, at the same time, requiring accuracy and confidentiality." Stafford v. Cross Country Bank, 262 F. Supp. 2d 776, 781 (W.D. Ky. 2003) (citation omitted). The FCRA imposes obligations on three types of entities pertaining to consumer credit: consumer reporting agencies, consumer report users, and those who furnish information to consumer reporting agencies. Carney v. Experian Info. Solutions, Inc., 57 F. Supp. 2d 496, 500 (W.D. Tenn. 1999). See generally Couch, *supra* note 20 (discussing the FCRA's applicability to identity theft).

32. 15 U.S.C. § 1681n (2000), amended by Pub. L. No. 108-159, 117 Stat. 1952 (2003) (discussing civil liability for willful noncompliance); *id.* § 1681o (addressing civil liability for negligent noncompliance).

recover their actual damages,<sup>33</sup> attorney fees, and costs; when the credit reporting agency has acted willfully, the consumer may also recover punitive damages.<sup>34</sup> Another statutory enactment, the Identity Theft and Assumption Deterrence Act,<sup>35</sup> “makes identity theft a federal offense and gives victims rights and means to be compensated for their losses.”<sup>36</sup>

In addition to federal legislation, state statutes provide limited recourse for victims of various forms of financial institution fraud.<sup>37</sup> The statutes employ a number of different remedies, such as providing identity theft victims with a cause of action against the identity thief,<sup>38</sup> clearing the records of identity theft victims exposed to criminal proceedings,<sup>39</sup> and requiring consumer reporting agencies to block from a victim’s file the false information placed in the file as a result of identity theft.<sup>40</sup> Many of these “reactionary statutes” have

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33. These damages are outlined in the statute as “actual damages sustained by the consumer as a result of” the willful failure to comply with FCRA requirements. *Id.* § 1681n(a)(1)(A) (amended 2003).

34. *Id.* § 1681n, o (amended 2003). The text of the FCRA provides no definition of “willful,” but courts typically interpret this term to require a demonstration that the defendant “knowingly and intentionally committed an act in conscious disregard for the rights of others.” *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986).

35. The Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified as amended at 18 U.S.C. § 1028(a)(7), (b)(1) (2000)).

36. Sabol, *supra* note 5, at 165 (discussing the impact of this statute). Unfortunately, the Identity Theft and Assumption Deterrence Act has proven to be an inadequate remedy for victims of true name fraud because it does not permit them to sue the financial institutions that caused their losses. *See infra* notes 103–06 and accompanying text.

37. Arizona was the first state to pass legislation deeming identity theft a felony. *Id.* at 168. This statute requires the identity thief to compensate the victim for both actual losses and the cost of restoring the victim’s credit. *Id.* However, this form of compensation has no value to an identity theft victim unless the thief is apprehended.

If true name fraud victims wish to clear their records, they typically must take a proactive position. “Victims often have to play detective, coming up with clues, leads, and even the basic evidence that a fraud has been committed.” Margaret Mannix, *Stolen Identity: It Can Ruin Your Credit, and That’s Just the Beginning*, U.S. NEWS & WORLD REP., June 1, 1998, at 48.

38. *E.g.*, ALA. CODE § 13A-8-199 (2001); GA. CODE ANN. § 16-9-130 (2003); TENN. CODE ANN. §§ 47-18-2104 to 2106 (1999); WIS. STAT. ANN. § 895.80 (2003); *see also* Consumer Rights Litigation Conference Report: Litigating Identity Theft Cases 20–21 (Oct. 26, 2003) (on file with the *Duke Law Journal*) [hereinafter “Conference Report”]. However, when the thief is unidentified or insolvent, this category of statutes provides the victim with no recourse.

39. *See, e.g.*, ALA. CODE §§ 13A-8-197 to 198 (2001); GA. CODE ANN. § 16-9-126(d) (2003); *see also* Conference Report, *supra* note 38, at 21.

40. *See, e.g.*, ALA. CODE § 13A-8-200 (2001); CAL. CIV. CODE § 1785.16.1 (2003); IND. CODE ANN. § 35-38-1-2.5(c) (2003); *see also* Conference Report, *supra* note 38, at 21.

been hastily drafted as attempts to counteract particular forms of identity theft only after they occur.<sup>41</sup>

Statutory claims do not provide the only potential remedy for victims of identity theft.<sup>42</sup> Plaintiffs have pled, and enjoyed varying degrees of success using, common law causes of action. These claims include defamation, invasion of privacy,<sup>43</sup> malicious prosecution,<sup>44</sup> the negligent or intentional infliction of emotional distress,<sup>45</sup> breach of the tort duty of confidentiality,<sup>46</sup> and the negligent enablement of imposter fraud, which is discussed in detail in Part II.

## II. USE OF THE NEGLIGENT ENABLEMENT OF IMPOSTER FRAUD CLAIM

Negligent enablement of imposter fraud is a narrowly framed cause of action that applies when the victim's identity theft losses result from a financial institution's negligence in assisting or furthering an identity thief's efforts at stealing the victim's identity.<sup>47</sup> Because this tort's factual predicate arises only occasionally, this Part reviews the history of the use of negligent enablement of imposter

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41. See McKelvey, *supra* note 12, at 1091–92.

42. The Uniform Commercial Code may also provide remedies to some categories of identity theft victims. A discussion of the UCC is, however, beyond the scope of this Note.

43. Defamation, invasion of privacy, and negligence are specifically covered by the FCRA's qualified immunity provision. 15 U.S.C. § 1681h(e) (amended 2003). Thus, in claims within the FCRA's scope involving consumer reporting, identity theft victims must show malice. See *Yutesler v. Sears Roebuck & Co.*, 263 F. Supp. 2d 1209, 1212 (D. Minn. 2003) (“1681h(e) [of the FCRA] allows for common law claims that are based on allegations that rise to the level of malice or willful intent to injure the consumer.”). For a sample of decisions permitting defamation claims, see *id.* (holding that the plaintiff's “common law claim for defamation of credit is not preempted by the FCRA”); *Carlson v. Trans Union, LLC*, 259 F. Supp. 2d 517, 521–22 (N.D. Tex. 2003) (explaining that a defamation claim is distinct from claims under the FCRA and establishing the elements of a common law defamation claim); *Kronstedt v. Equifax*, No. 01-C-0052-C, 2001 WL 34124783, at \*19–23 (W.D. Wis. Dec. 14, 2001) (denying defendant's summary judgment motion and permitting plaintiff to proceed with her defamation claim).

44. *Sovern*, *supra* note 4, at 402 & n.251; see also *Nicholl v. Great Atl. & Pac. Tea Co.*, 517 S.E.2d 561, 564 (Ga. Ct. App. 1999) (allowing a victim of identity theft to claim malicious prosecution after a bad check warrant was sworn out against him by a vendor who failed to take the necessary steps to find that the signature was a forgery).

45. See *Polzer v. TRW, Inc.*, 256 A.D.2d 248, 248 (N.Y. App. Div. 1998) (affirming summary judgment for defendants on this and other claims).

46. See McKelvey, *supra* note 12, at 1102–10 (advocating the use of this common law claim in identity theft cases).

47. See *Patrick v. Union State Bank*, 681 So. 2d 1364, 1371–72 (Ala. 1996) (holding “that a bank owes a duty of reasonable care to the person in whose name . . . an account is opened to ensure that the person opening the account . . . is not an imposter”).

fraud and carefully addresses the South Carolina Supreme Court's recent judicial treatment of the negligent enablement of imposter fraud claim in *Huggins v. Citibank*.<sup>48</sup>

Prior to *Huggins*, where the South Carolina Supreme Court refused to recognize the tort of negligent enablement of imposter fraud, only a handful of plaintiffs have attempted to use negligent enablement of imposter fraud as a means of recovery for identity theft. Of these cases, only one decision permitted the injured victim to recover.<sup>49</sup> In *Patrick v. Union State Bank*,<sup>50</sup> victim Bridgette Patrick suffered substantial damage as a result of the identity thief's actions, as detailed in the Introduction.<sup>51</sup> She sued the bank that had opened an account for an imposter in her name without demanding proper identification.<sup>52</sup> The Alabama Supreme Court explained that one person has "no duty to protect another from criminal acts of a third person" without "a special relationship or special circumstances."<sup>53</sup> The court, however, found a special relationship between the bank and Ms. Patrick because it possessed an account in her name and held that the bank should be liable for negligently allowing the imposter to steal her identity.<sup>54</sup>

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48. 585 S.E.2d 275 (S.C. 2003).

49. See *Patrick*, 681 So. 2d at 1372. In *Patrick*, the imposter wrote nearly \$1,500 worth of bad checks after opening a bank account in the victim's name with only a temporary driver's license as identification; the bank made no attempt to notify the account holder at the address provided on her temporary driver's license. *Id.* at 1365–66. The Alabama Supreme Court held that a bank owed a duty of reasonable care to each individual for whom it opened an account. *Id.* at 1371. For a detailed account of the facts of the Patrick case, see *supra* note 1 and accompanying text.

50. 681 So. 2d 1364 (Ala. 1996).

51. Warrants for Patrick's arrest were issued in eleven jurisdictions. *Id.* at 1366. Following a traffic stop, a review of Patrick's unearned criminal record led to a string of arrests; Patrick spent a total of ten consecutive days incarcerated at a series of city and county jails. *Id.*

52. *Id.*

53. *Id.* at 1367.

54. See *id.* at 1371 ("[W]e hold that a bank owes a duty of reasonable care to the person in whose name, and upon whose identification, an account is opened to ensure that the person opening the account and to whom checks are given is not an imposter."). In a case prior to the epidemic of identity theft crimes, a state court of appeals affirmed a denial for summary judgment on a negligent enablement of imposter fraud claim, stating that a credit issuer could be liable for its negligent issuance of a credit card. See *Bradshaw v. Mich. Nat'l Bank*, 197 N.W.2d 531, 532 (Mich. Ct. App. 1972) ("Issuing an unsolicited credit card and sending it to an incorrect address could be considered negligence.").

Most other courts that have considered this cause of action have been much less hospitable to it.<sup>55</sup> New York courts slammed the door on a plaintiff's negligent enablement of imposter fraud claim with a blanket statement that New York does not recognize this cause of action.<sup>56</sup> In *Polzer v. TRW, Inc.*,<sup>57</sup> another negligent enablement of imposter fraud suit brought by an identity theft victim, the court disposed of the case summarily, briefly discussing the tort claim but not even mentioning the plaintiff's particular allegations.<sup>58</sup> In addition to its broad holding rejecting the negligent enablement of imposter fraud tort, *Polzer* also held that the plaintiffs had no negligence cause of action<sup>59</sup> because the defendant bank had no special relationship with either the plaintiffs or the imposter and thus no duty to the victim.<sup>60</sup>

A federal district court in Missouri denied a negligence claim on similar grounds.<sup>61</sup> In *Smith v. Citibank*,<sup>62</sup> the plaintiff alleged that defendant Citibank issued a credit card to his former employer in his name and, after an investigation, wrongfully determined that charges made to the account were authorized and thus appropriate.<sup>63</sup> The *Smith* plaintiff had repeatedly asserted that he was not the bank's customer, but he could not establish sufficient facts to impose a duty

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55. The discussion and holding of the *Patrick* decision have been noticeably absent from the opinions of the few courts that have encountered—and refused to recognize—the negligent enablement of imposter fraud tort. See *Polzer*, 256 A.D.2d at 248 (failing to mention the *Patrick* decision in its rejection of the negligent enablement of imposter fraud tort).

56. See *id.* (holding that New York “does not recognize a cause of action” for the negligent enablement of imposter fraud).

57. 256 A.D.2d 248 (N.Y. App. Div. 1998).

58. *Id.* at 248–49.

59. Some plaintiffs have attempted to assert negligent enablement of imposter fraud and negligence claims as alternative causes of action, further adding to the confusion.

60. See *id.* at 248 (explaining that the plaintiffs failed to state a negligence claim “because [the defendants] had no special relationship either with the impostor who stole the plaintiffs’ credit information and fraudulently obtained credit cards, or with plaintiffs, with whom they stood simply in a creditor/debtor relationship”). Some courts, rather than using the “negligent enablement of imposter fraud” framework, analyze these claims under the rubric of “negligence” claims.

61. See *Smith v. Citibank*, No. 00-0587-CV-W-1-ECF, 2001 WL 34079057, at \*2–4 (W.D. Mo. Oct. 3, 2001) (finding that the plaintiff failed to show that the defendant bank owed a duty to the plaintiff as a noncustomer). This case did not specifically use negligent enablement of imposter fraud language but followed the same basic principles and was cited by the *Huggins* court in its negligent enablement of imposter fraud ruling. *Huggins v. Citibank*, 585 S.E.2d 275, 277 (S.C. 2003).

62. *Smith v. Citibank*, 2001 WL 34079057.

63. *Id.* at \*1.

on other grounds.<sup>64</sup> *Smith* decisively rejected the plaintiff's claim of lender negligence,<sup>65</sup> asserting that banks owe no duty to noncustomers.<sup>66</sup> Additionally, the district court explained that the plaintiff was attempting to base his claim on the FCRA, even though his negligence claim was outside its parameters.<sup>67</sup> When Kenneth Huggins asserted his claim before the South Carolina Supreme Court, the climate for the negligent enablement of imposter fraud tort was indeed grim.

In *Huggins v. Citibank*,<sup>68</sup> the South Carolina Supreme Court answered a certified question it had received from the United States District Court for the District of South Carolina: "Does South Carolina recognize the tort of negligent enablement of imposter fraud and, if so, what are the elements of the tort and does plaintiff's complaint state an actionable claim for the tort?"<sup>69</sup> The court answered this question in the negative, holding that South Carolina does not recognize a cause of action for the negligent enablement of imposter fraud.<sup>70</sup> For negligence liability to attach, "the parties must have a relationship recognized by law as the foundation of a duty of care."<sup>71</sup> The court refused to extend the duty concept beyond "reasonable limits" and deemed the relationship between credit card issuers and potential identity theft victims as "far too attenuated" to create a duty between them.<sup>72</sup> Although injury from credit card issuers' negligence is foreseeable, "foreseeability alone does not give rise to a duty."<sup>73</sup> Thus, the court announced its agreement with New York's *Polzer* court and decided not to impose "a legal duty of care

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64. *Id.* at \*2. By emphasizing that he was not a customer of the bank, the plaintiff denied himself an opportunity to assert a claim based on his status as a customer. *See infra* Part III.B (developing the importance of this distinction).

65. *Smith v. Citibank*, 2001 WL 34079057, at \*2.

66. *See id.* at \*2-3 (granting summary judgment on Smith's negligence claim and noting the earlier dismissal of Smith's defamation and invasion of privacy claims).

67. *Id.* at \*3.

68. 585 S.E.2d 275 (S.C. 2003).

69. *Id.* at 276.

70. *Id.* at 278. Finding that no duty exists between a financial institution and a noncustomer, the court did not reach the latter questions. *Id.* at 276-77. The court nonetheless went on to state the elements of common law negligence. *Id.* at 276.

71. *Id.* at 277.

72. *Id.*

73. *Id.*

between credit card issuers and those individuals whose identities may be stolen.”<sup>74</sup>

Shortly before the *Huggins* decision, however, South Carolina courts had seemed to pave the way for claims of the type asserted by Kenneth Huggins. In *Murray v. Bank of America*,<sup>75</sup> an identity theft victim sued the bank that opened an account for an imposter in her name.<sup>76</sup> The court determined that a relationship giving rise to a duty of care was created when the victim went to the bank and asked it to close the account opened by an imposter in her name.<sup>77</sup> The court took a unique position by concluding that, as one commentator explained it, the victim’s “demand for a remedy created the duty that gave rise to the remedy.”<sup>78</sup> Oddly enough, however, the court did not cite or mention its earlier decision in *Murray* when it rejected the similar claim in *Huggins*.

In the decisions refusing to permit recovery under the negligent enablement of imposter fraud tort, the courts reached three overarching conclusions: recovery for identity theft should be determined by the legislature, not the courts;<sup>79</sup> no duty exists between banks and the general public;<sup>80</sup> and more particularly, no special relationship arises between banks and individuals in whose names they open accounts.<sup>81</sup> Each of these conclusions is addressed and challenged in the following Part of this Note.

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74. *Id.*

75. 580 S.E.2d 194 (S.C. Ct. App. 2003).

76. *Id.* at 341.

77. *See id.* at 198 (“We find a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of the account.”).

78. Lawrence A. Young, *The FACT Act: Fair and Accurate Credit Transactions Act of 2003 (H.R. 2622) and Related Developments*, 58 CONSUMER FIN. L.Q. REP. 36, 43 (2004).

79. *See, e.g.*, *Huggins*, 585 S.E.2d at 277–78 (deeming recovery for identity theft a matter that should be left to the state and federal legislatures). *See also infra* Part III.A.

80. *See, e.g.*, *Software Design and Application, Ltd. v. Hoefer & Arnett, Inc.*, 56 Cal. Rptr. 2d 756, 760–61 (Cal. Ct. App. 1996) (“Recent cases have held that absent extraordinary and specific facts, a bank does not owe a duty of care to a noncustomer.”) (citations omitted). *See also infra* Part III.B.

81. *E.g.*, *Polzer v. TRW, Inc.*, 256 A.D.2d 248, 248 (N.Y. App. Div. 1998). *See also infra* Part III.B.

### III. THE FUTURE OF THE NEGLIGENT ENABLEMENT OF IMPOSTER FRAUD CLAIM

Although the fledgling tort of negligent enablement of imposter fraud has been dealt a blow by recent court decisions, it remains a potentially useful claim that merits further consideration. Notwithstanding the best efforts of state and federal legislators, current statutory provisions fail to provide plaintiffs with recourse for the losses that have resulted from the theft of their identities. This Part contends that negligent enablement of imposter fraud remains a viable, and necessary, common law remedy for victims of identity theft caused by financial institutions' negligence. Section A discusses the inadequacies of current statutes, such as the Fair Credit Reporting Act,<sup>82</sup> as they apply to the factual scenarios alleged by an identity theft victim wishing to use the negligent enablement of imposter fraud tort. This Section concludes that plaintiffs seeking redress from a financial institution that negligently facilitated an imposter's fraud currently lack sufficient legal recourse without the negligent enablement of imposter fraud tort, and that their plight will continue to be excluded from future statutory enactments. Section B emphasizes the need for courts to acknowledge the special relationship between financial institutions and individuals in whose identities they extend credit. This Section then addresses how a victim can overcome the conceptual barriers often associated with this tort and successfully allege each of its elements. Finally, this Section argues that permitting a negligent enablement of imposter fraud cause of action would have several beneficial public policy outcomes.

#### A. *Legislation Does Not Sufficiently Protect All Identity Theft Victims*

Current federal and state statutes are inadequate because they are designed to protect credit providers and promote consumer confidence rather than to compensate victims of true name fraud.<sup>83</sup> Unless or until the federal government or individual states enact

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82. FCRA, 15 U.S.C. §§ 1681–1681t (amended 2003). *See also supra* Part I.

83. *See Couch, supra* note 20, at 596; *see also supra* Part I. However, few plaintiffs have dared stray from statutory remedies to plead a cause of action for the negligent enablement of imposter fraud. Perhaps due to the perceived inefficacy of this claim and its meager success rate, identity theft victims have generally resorted to more well-defined statutory approaches. Identity theft victims are forced to pursue ill-fitting statutory remedies when their common law claims are denied. *See generally Huggins v. Citibank*, 585 S.E.2d 275 (S.C. 2003).

statutes that satisfactorily protect individuals against financial institution negligence, courts should permit victims to plead negligent enablement of imposter fraud when the claim is appropriate for their particular factual situations.<sup>84</sup> Because so few individuals will likely be able to benefit from the negligent enablement of imposter fraud tort, there is unlikely to be sufficient political will to aid the victims of this fact-specific claim.

In rejecting the negligent enablement of imposter fraud tort, the South Carolina Supreme Court in *Huggins* concluded by citing both state and federal legislation aimed at helping credit card fraud victims.<sup>85</sup> The court asserted that despite the limitations on these remedies, “the legislative arena is better equipped to assess and address the impact of credit card fraud on victims and financial institutions alike.”<sup>86</sup> The legislative arena, however, is not currently prepared to handle the claims of all identity theft victims, particularly those asserting that negligence in opening a bank account or issuing a credit card provided the source of their difficulties. By forcing identity theft victims to pursue statutory remedies exclusively, courts will in effect deny some of these victims recovery.

Many claims of identity theft victims fall outside the scope of the FCRA’s coverage.<sup>87</sup> Many financial institutions do not fit within the purview of the FCRA because it governs only those claims involving “consumer reporting agencies.”<sup>88</sup> Because victims attempting to use negligent enablement of imposter fraud allege that negligent conduct occurred in the *formation* of a bank or credit card account, their claims arise at an earlier stage and do not implicate any actions of a credit reporting agency.

The FCRA not only fails to reach many instances of identity theft, but it also provides little, if any, assistance for fraud within its

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84. California led the way in this regard by enacting a law that provides consumers with the right to bring suit against negligent banks. See Michelle Heller, Barbara A. Rehm & John Reosti, *Fighting Theft on Three Fronts*, AM. BANKER, Nov. 18, 2003, at 20A (internal quotation omitted). If other states follow suit, identity theft victims will not need to use negligent enablement of imposter fraud. However, until such legislative solutions are introduced, this common law remedy can play an important role in protecting identity theft victims.

85. See *Huggins*, 585 S.E.2d at 277 (discussing several statutes, including the FCRA and South Carolina identity theft legislation).

86. *Id.* at 277–78.

87. See 15 U.S.C. § 1681a(d)(2) (amended 2003) (providing exclusions to the “consumer reports” covered by the FCRA); see also *supra* notes 32–34 and accompanying text.

88. See 15 U.S.C. § 1681a(f) (amended 2003) (defining the term “consumer reporting agency”).

reach. The FCRA includes two potentially overlapping provisions that preempt common law causes of action; in many cases, these provisions prevent identity theft victims from recovering.<sup>89</sup> Credit furnishers receive absolute immunity when acting to fulfill their obligations under the FCRA.<sup>90</sup> Additionally, offending credit reporters enjoy “qualified immunity” protection from state law claims encompassed within the FCRA unless their willful or negligent actions caused the victim’s harm.<sup>91</sup> This qualified immunity provision “creates a defense a consumer must overcome to succeed on a state law claim against someone acting in a capacity that is regulated by the Act.”<sup>92</sup>

The FCRA was not designed with identity theft concerns as a primary, or even a secondary, goal.<sup>93</sup> The FCRA strives to “facilitate credit-based commerce while ensuring consumer confidence in such a credit-based system”—but identity theft undermines these efforts.<sup>94</sup> Congress has recently attempted to update the FCRA to respond to the pressing needs presented by identity theft. Although these recent amendments emphasize the need to protect against identity theft,<sup>95</sup> their improvements will be of little comfort to individuals victimized by a financial institution’s role in facilitating an imposter’s fraudulent acts. Even the banking industry acknowledges that although changes

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89. For a discussion of competing views on the interaction between the FCRA’s absolute immunity and qualified immunity provisions, see *Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776, 784–88 (W.D. Ky. 2003).

90. See 15 U.S.C. § 1681t(b)(1)(F) (amended 2003) (exempting “persons who furnish information to consumer reporting agencies”). The FCRA’s preemption provisions were set to expire on January 1, 2004, but they were permanently adopted by Congress in 2003. *Id.*

91. See 15 U.S.C. § 1681h(e) (amended 2003) (listing the limitations on liability for consumer reporting agencies and those who provide information to consumer reporting agencies); see generally *supra* note 43.

92. *Stafford*, 262 F. Supp. 2d at 782; see also *Shaner v. Fleet Bank*, 132 F. Supp. 2d 953, 957 (M.D. Ala. 2001) (noting that under the FCRA “common law claims cannot be brought against entities . . . except as to false information furnished with malice or willful intent to injure”).

93. Commentators have noted the FCRA’s inefficacy for individual victims:

[T]he reporting and reinvestigation scheme outlined in the FCRA does not contemplate an unrelated third-party opening accounts in a victim’s name, and tying those accounts to a victim’s established credit history. As a result, under the FCRA the victim, the reporting agency, users and furnishers all may reasonably comply with the Act and yet the victim receives no relief.

Couch, *supra* note 20, at 592–93 (footnote omitted).

94. See *id.* at 596 (discussing the respective burdens on consumers and commerce to facilitate the credit-based system by guarding against identity theft).

95. See Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003).

to the FCRA may strengthen a plaintiff's private right of action against credit agencies, they will not improve the status quo for those identity theft victims wishing to bring claims for the negligent enablement of imposter fraud.<sup>96</sup>

Because the FCRA does not encompass "problems relating to the solicitation and issuing of credit cards,"<sup>97</sup> it follows that its immunity provisions would not bar state recognition of an imposter fraud claim. The FCRA's absolute immunity provision "clearly does not apply to those tort claims that only involve the Bank's actions independent of its function as a furnisher of credit information."<sup>98</sup> Similarly, the qualified immunity provision only protects credit furnishers from state law claims involving information disclosure.<sup>99</sup> Thus, neither form of FCRA immunity governs the typical negligent enablement of imposter fraud plaintiff's claim that a financial institution negligently issued a credit card to an imposter.<sup>100</sup>

Identity theft victims should not be penalized by the FCRA's existence when it provides them no assistance in reclaiming their identities and property. The *Huggins* court emphasized that without this common law tort, plaintiffs retain recourse through statutory channels.<sup>101</sup> Such an approach may provide some protection for those identity theft victims with viable FCRA claims, but it is inadequate for those unable to pursue FCRA claims. Thus, given that negligent enablement of imposter fraud claims are not barred by the FCRA's preemption provisions, courts should not deny all such claims on the basis that some victims might also have a statutory remedy.<sup>102</sup>

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96. See Oscar Marquis, *Who Can be Held Liable for Identity Theft?*, AM. BANKER, Nov. 18, 2003, at 18A ("[T]he FCRA amendment[s] focus is on helping consumers who are already victims—helping with the 'credit history restoration.'"). Further, "none of these procedures are likely to do anything to prevent identity theft from occurring . . . Congress imposed no new obligations on credit card issuers and created no liability or cause of action similar to 'negligent enablement of imposter fraud.'" *Id.*

97. *Yelder v. Credit Bureau of Montgomery*, 131 F. Supp. 2d 1275, 1284 (M.D. Ala. 2001).

98. *Stafford*, 262 F. Supp. 2d at 787; see also Young, *supra* note 78, at 176 ("Claims against a creditor for the negligent opening of an account . . . are not preempted.").

99. *Stafford*, 262 F. Supp. 2d at 788.

100. See *Yelder*, 131 F. Supp. 2d at 1284 ("[T]he FCRA does not deal with problems relating to the solicitation and issuing of credit cards.").

101. See *supra* note 86 and accompanying text.

102. As a general rule, when a claimant's common law claim is neither expressly nor impliedly preempted by a statute and does not rely upon that statute, the claimant may typically assert the common law claim. See, e.g., *Poncy v. Shearson Lehman Bros., Inc.*, 548 So. 2d 1196, 1197 (Fla. Dist. Ct. App. 1989) (per curiam) (interpreting a federal statute and holding that plaintiffs "are not preempted from asserting their common law claims"); see generally Cipollone

Another statutory outlet for victims of identity theft, the Identity Theft and Assumption Deterrence Act,<sup>103</sup> also fails to help victims of negligently enabled imposter fraud. This Act criminalizes “knowingly transfer[ing], possess[ing] or us[ing], without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, . . . any unlawful activity.”<sup>104</sup> Although this statute is helpful in permitting victims to recover against identity thieves,<sup>105</sup> it does not permit recovery against the financial institution that enabled the theft. Further, Congress’ intention in enacting this law was to investigate only those incidents of identity theft carrying large price tags.<sup>106</sup> Ultimately, although well-intentioned, the Act is inapplicable to the circumstances of individual plaintiffs alleging negligent enablement of imposter fraud claims.

Most states have enacted legislation to provide relief for individual victims of identity theft.<sup>107</sup> Although states have taken steps to benefit identity theft victims,<sup>108</sup> their incentive to provide pro-victim identity theft legislation was strictly curtailed after the enactment of the Fair and Accurate Credit Transactions Act (FACT).<sup>109</sup> FACT, an amendment to the FCRA, extends FCRA preemption of state law by “preempt[ing] any more-stringent state identity theft laws after

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v. Liggett Group, Inc., 505 U.S. 504 (1992) (providing an explication of the law on preemption and permitting common law claims after concluding that they were not preempted).

103. The Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified as amended at 18 U.S.C. § 1028 (2000)).

104. 18 U.S.C. § 1028(a)(7) (2000).

105. Although recovery against the identity thief may sometimes be personally validating to the victim, it will do nothing to help victims when the thieves from whom they seek reparations are judgment-proof.

106. See Sabol, *supra* note 5, at 169 (explaining that because no federal money was allocated for this new law, “federal investigators will primarily focus on identity theft cases involving \$200,000 or more and will have to ignore the small crimes”). To actually protect victimized individuals, then, “states must adopt their own identity theft laws to give local law enforcement agencies more authority to investigate crimes and prosecute criminals.” *Id.*

107. See Towle, *supra* note 7, at 301 (noting that “44 states have specific laws . . . and 5 other states have laws that cover activities included within the definition of identity theft” (quoting U.S. Gen. Accounting Office, Identity Theft: Greater Awareness and Use of Existing Data Are Needed 3 (June 2002), at <http://www.gao.gov/new.items/d02766.pdf> (last visited Apr. 9, 2005)); see also Sabol, *supra* note 5, at 168 (observing that Arizona took the lead in 1996 by becoming the first state to criminalize identity theft).

108. For example, Tennessee created an Identity Theft Victims’ Rights Act. Identity Theft Victims’ Rights Act of 2004, TENN. CODE ANN. § 39-14-150 (2004). See generally Kristin E. Solomon, *Facing Identity Theft*, TENN. BAR J., Dec. 2004, at 12 (discussing the new legislation and its implications).

109. Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified at 15 U.S.C. § 1681 et seq.).

January 1, 2004.”<sup>110</sup> Although FACT’s primary purpose is to *prevent* identity theft,<sup>111</sup> its provisions instead appear to provide a remedy by “respond[ing] to consumer claims of identity theft.”<sup>112</sup>

Under the current statute-based regime, financial institutions themselves lack the incentive to do more to protect individuals in whose names they negligently extend credit. Financial institutions will invest in avoiding negligence only to the point at which it is financially advantageous.<sup>113</sup> A financial institution is negligent if it fails to take precautions when the burden of taking adequate, reasonable precautions is lower than the probability that identity theft would occur as a result of the institution’s failure to verify an imposter’s identity, multiplied by the magnitude of injury that could result from this failure.<sup>114</sup> Only when financial institutions factor in the true costs of injury associated with their negligence will they invest sufficiently in avoiding negligence.

It would not be overly burdensome to require financial institutions to make reasonable efforts to prevent identity theft when opening bank accounts or extending credit; under the current statute-only scheme, however, institutions lack the incentives needed to exercise reasonable care.<sup>115</sup> Individuals victimized by identity theft are

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110. Young, *supra* note 78, at 37; *see id.* (noting that a major complaint regarding FACT is that it “reduces the states’ authority to enact tougher laws”).

111. FACT’s full title states its goals: “An Act [t]o amend the Fair Credit Reporting Act, to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in the use of, and consumer access to, credit information, and for other purposes.” Pub. L. No. 108-159, 117 Stat. 1952. This language suggests that prevention is FACT’s main goal, yet the statute’s practical effect is to respond to identity theft *after* it occurs.

112. Towle, *supra* note 7, at 269. Much of the Act focuses on amending the FCRA, “which primarily applies to persons who make consumer reports (such as credit reports) or persons who use the reports or credit scores.” *Id.* at 272. Towle goes on to explain that “[i]n short, FACT seems truly designed to prevent identity theft, i.e., to allow businesses to provide needed information without becoming targets for actions brought other than by regulators.” *Id.* at 286. Although it is true that the Act does improve access to information, this does nothing to help individuals victimized when financial institutions negligently extend credit to identity thieves.

113. Following traditional negligence principles advanced by Judge Learned Hand, the breach of duty determination can be reduced to an algebraic formulation. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (reducing the liability determination to three variables: burden (B), probability (P), and injury (L)).

114. *See id.* (“[L]iability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .”)

115. Unlike the FCRA, the negligent enablement of imposter fraud tort would place some of the burden of preventing identity theft upon a negligent financial institution. The FCRA “effectively shifts the burden of identity theft away from parties in position to avoid the damage

often astounded to learn that the offending financial institution provided services to an imposter without taking the simple steps needed to adequately confirm the individual's identity.<sup>116</sup> If financial institutions took reasonable precautions, they could curtail some of the identity fraud that occurs in the opening of bank accounts and the extension of credit.<sup>117</sup> However, financial institutions currently lack incentives to adequately check an individual's identity before opening a bank account or extending credit. In a competitive market, these institutions fear that a more rigorous screening process might scare consumers away to competitors who do not take such measures.<sup>118</sup> Employment of the negligent enablement of imposter fraud tort would provide a much-needed incentive to encourage financial institutions to undertake sufficient precautions before extending credit or opening bank accounts.<sup>119</sup> Without it, they will continue to employ suboptimal deterrence systems.

Unlike many of the complicated legislative proposals offered to curb identity theft, courts are presently equipped to handle the

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through heightened controls . . . onto unsuspecting and relatively defenseless consumers." Couch, *supra* note 20, at 593. Although the negligent enablement of imposter fraud tort emphasizes the burden on negligent financial institutions, it does not create a new obligation; instead, it acknowledges and enforces an obligation that institutions should already owe to individuals in whose names they have opened accounts.

116. As one frustrated victim explained, "The most maddening aspect . . . is that it could have been prevented had the phone companies simply checked the identity of the person who established phone service in my name. Is it too much to ask that companies that issue credit cards, sell merchandise or provide services take simple precautions to identify their customers?" Sullivan, *supra* note 22, at A19.

117. See Sovern, *supra* note 4, at 358–59 ("Greater vigilance on the part of the [financial institutions] involved would have prevented many identity frauds.").

118. As Beth Givens noted in her congressional testimony:

[I]dentity theft . . . is rampant because of credit industry practices. Credit grantors make it all too easy to obtain credit. Many credit issuers do not adequately check the identities of applicants before granting credit. Instant credit opportunities are especially popular with identity thieves for this reason. Credit grantors are all too eager, in their competitive zeal, to obtain new customers.

Givens, *supra* note 27.

Victimized consumers are also frustrated by the ease with which an identity thief can obtain a credit card in another's name. One consumer complains that her lender promotes one of its credit cards with the following teaser: "Why wait? Receive a response in 60 seconds." O'Brien, *supra* note 7, at A1 (internal quotation omitted).

119. An attorney who unsuccessfully represented an identity theft claimant in New York voiced his support for the negligent enablement of imposter fraud claim in a letter to the Editor of the New York Times: "When the courts accept 'negligent enablement of identity theft' as a viable civil claim and juries begin assessing substantial punitive damages against banks and credit reporting agencies, this problem will be reduced." James B. Fishman, *Letter to the Editor: Hot on the Trail of the ID Thief*, N.Y. TIMES, Apr. 10, 2000, at A18.

common law premise of the negligent enablement of imposter fraud tort.<sup>120</sup> By its plain language, the negligent enablement of imposter fraud tort does not seek to impose blanket liability on all financial institutions when fraud occurs. Instead, it aims simply to place the burden of acting with reasonable care upon those in the best position to prevent it, and to provide an incentive for financial institutions to act with reasonable care when opening bank accounts and extending credit.<sup>121</sup> The inherent difficulty in proving a claim for negligent enablement of imposter fraud serves as an internal protection mechanism: courts permitting such a claim can be reassured that they will not be opening the floodgates for new litigation, because in the current legal climate “it is very hard legally to prove negligence.”<sup>122</sup> Thus, courts are currently equipped to handle the claims of victims of a financial institution’s negligence in enabling an imposter to commit fraud.

*B. A Duty of Care Should be Imposed Upon Financial Institutions that Negligently Enable Imposters’ Fraudulent Acts*

When financial institutions act negligently, they jeopardize the financial well-being of the individuals whose information they manage. Because a quasi-relationship arises between a financial institution and an individual in whose identity it opens an account, the institution should be responsible in tort for the consequences of its negligent actions or failures. This Section will demonstrate how a duty can be imposed on financial institutions that negligently enable identity thieves. Although the remaining elements of proving a negligence action provide additional obstacles, this Section also

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120. Identity theft reformers propose various intricate, complicated solutions designed either to prevent victimization or to assist victims once identity theft occurs. Although they offer potentially beneficial approaches to particular aspects of the identity theft epidemic, many of these proposals require substantial changes to the legal climate or impose massive administrative burdens. *See, e.g.*, LoPucki, *supra* note 30, at 94–100 (proposing the creation of a “physical system that would make it possible for consumers to control the process of their own identification” (footnote omitted)). In contrast to this and other untested approaches that might require lengthy studies and congressional approval, state courts already possess the resources and ability to employ the negligent enablement of imposter fraud tort.

121. If financial institutions are encouraged to act responsibly at the outset of their interactions with a potential imposter, this will prevent some instances of identity theft from ever occurring and render the process that ensues irrelevant. The goal of this tort is not exclusively to provide a remedy for identity theft victims; although this is its evident purpose, it also performs the important function of impeding would-be identity thieves.

122. Heller, Rehm & Reosti, *supra* note 84, at 20A (internal quotation omitted).

outlines how a plaintiff asserting appropriate facts can overcome each of them. Thus, courts addressing this tort claim should employ the four basic elements of a negligence claim—duty, breach, causation, and damages<sup>123</sup>—while sensibly considering the duties imposed upon financial institutions and their relationships with identity theft victims.<sup>124</sup>

Because this cause of action is premised on negligence, a court must evaluate the four elements of a plaintiff's prima facie case: duty, breach of that duty, causation, and damages.<sup>125</sup> The first and likely most difficult hurdle an identity theft victim faces in employing the negligent enablement of imposter fraud tort is establishing the existence of a duty that requires a financial institution to protect against identity theft. A plaintiff must convince the court to impose a duty upon a financial institution to act reasonably when opening a bank account or extending credit to a new customer. Factors to consider in evaluating a negligence-based duty include “public policy; social considerations; foreseeability; the nature of the defendant's activity; the relationship between the parties; and the type of possible injury or harm.”<sup>126</sup> These factors favor the imposition of a duty upon financial institutions. Various policy considerations, such as loss-allocation principles, indicate that these institutions are better able to protect against identity theft.<sup>127</sup> Because they are engaged in business duties when they undertake responsibilities toward their customers, these institutions can reasonably expect that liability may ensue if they are negligent in fulfilling their responsibilities. Similarly, these institutions have sufficient awareness of their industry to recognize that their careless mistakes can ruin individuals' financial lives.

Different states place varying emphasis on the foreseeability factor as it relates to claims of negligent enablement of imposter fraud. Although Alabama courts call foreseeability the “key factor” in both the preliminary determination of whether a duty exists and whether a victim's injury could have been foreseen by the financial

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123. 57A AM. JUR. 20 *Contracts* § 71 (2005).

124. See *Patrick v. Union State Bank*, 681 So. 2d 1364, 1369–70 (Ala. 1996) (providing a practical application of negligence law to a victim's negligent enablement of imposter fraud claim).

125. See, e.g., *Huggins*, 585 S.E.2d at 276 (enumerating the elements of a common law negligence claim).

126. See *Key v. Compass Bank*, 826 So. 2d 159, 170 (Ala. Civ. App. 2001).

127. See *infra* notes 160–63 and accompanying text.

institution,<sup>128</sup> South Carolina courts assert that foreseeability alone does not establish a duty of care.<sup>129</sup> Whether foreseeability is examined as a stand-alone factor or as part of a broader determination of duty, it favors the recognition of a duty on the part of financial institutions.<sup>130</sup>

Courts eschewing the negligent enablement of imposter fraud tort have likened it to a situation in which a plaintiff sues a bank as a result of a soured relationship with one of the bank's customers.<sup>131</sup> The conceptual difficulties presented by a negligent enablement of imposter fraud claim, however, are much less challenging than in this scenario. Financial institutions cannot reasonably be expected to foresee that any individual in the world might have legal difficulties with one of their customers, because this would potentially place them in a responsible relation toward any individual or business entity who has any interaction with their customers. In contrast, it requires no intuitive leap to suggest that financial institutions should take some degree of responsibility toward those they *presume* to be their customers, and in whose names they have opened accounts. In rejecting the negligent enablement of imposter fraud tort, the South Carolina Supreme Court in *Huggins* framed the foreseeability requirement too broadly.<sup>132</sup> Even employing its broad formulation of foreseeability, however, the *Huggins* court conceded that financial institutions' lack of care could foreseeably result in identity theft.<sup>133</sup>

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128. *Patrick*, 681 So.2d at 1368.

129. *Huggins*, 585 S.E.2d at 277 (“Even though it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty.”).

130. It is foreseeable that when a financial institution opens a bank account or extends credit to an individual without properly verifying the person's identity, the person may be an imposter with devious intentions. Financial institutions cannot claim that they are unaware of the prevalence of identity theft.

131. Known as the *McCallum* rule, this situation arises when a plaintiff sues a bank for failing to adequately monitor a customer's account. *See Eisenberg v. Wachovia Bank*, 301 F.3d 220, 225–26 (4th Cir. 2002) (citing *McCallum v. Rizzo*, No. 942878, 1995 WL 1146812, at \*2 (Mass. Super. Ct. Oct. 13, 1995)) (asserting that “a bank's failure to investigate a customer's suspicious activity . . . does not give rise to liability to the third party who is injured by the customer's fraud” (internal quotation omitted)).

132. *See Huggins*, 585 S.E.2d at 277 (declining “to recognize a legal duty of care between credit card issuers and those individuals whose identities may be stolen”). The *Huggins* court failed to acknowledge that each financial institution should owe a duty not only to those individuals who seek services from that particular institution, but also individuals in whose names services are sought.

133. *See id.* (“Even though it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty.” (citation omitted)).

Thus, the negligent enablement of imposter fraud claim would make it possible for a plaintiff to establish the foreseeability factor, whether it is considered a dispositive factor or merely part of a multifactor analysis to establish a duty.

In suggesting the imposition of broader responsibility on financial institutions, one author explained that “because banks occupy a position of trust and integrity in society the obligation should be greater than an ordinary tort duty of reasonable care.”<sup>134</sup> The negligent enablement of imposter fraud claim would not impose this higher standard but would only enforce the already-existing negligence standard for victims of financial institution negligence. Instead of continuing to permit a “see no evil, hear no evil” mentality among financial institutions, courts should require them to take responsibility for their negligent actions.

Identity theft victims lack enforceable, contractual relationships with negligent financial institutions, but this does not automatically preclude them from having a “special relationship” with the financial institution as required for tort liability. Under traditional negligence law, no duty of reasonable care exists to protect a third person without “a special relationship or special circumstances.”<sup>135</sup> It is disingenuous, however, to suggest that no relationship of any kind exists between a financial institution and the individual in whose name that institution extends credit or opens a bank account. Although the victimized individual is not a bank “customer” in the traditional sense, the financial institution acts under the presumption that the named individual is the “customer” when the imposter presents the named individual’s identifying information and the

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134. McKelvey, *supra* note 12, at 1125.

135. *Patrick*, 681 So. 2d at 1367; *see also id.* (articulating Alabama’s approach to finding a special relationship); *Zappone v. Cavallo*, 2004 WL 2896513, at \*2 (Conn. Super. Ct. Nov. 19, 2004) (“A duty of care can be established by a contract, a special relationship, or through a two-pronged foreseeability and public policy analysis . . . .”); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1089 (Ill. 2004) (recognizing the rule in Illinois that no one has a duty to control another’s conduct to prevent him from harming a third party without a special relationship with either the person causing harm or the injured party); *Stein v. Asheville City Bd. of Educ.*, 608 S.E.2d 80, 89–90 (N.C. App. 2005) (Tyson, J., concurring in part and dissenting in part) (listing examples of special relationships recognized by North Carolina courts); *Zambrana v. N.Y.C. Transit Auth.*, 786 N.Y.S.2d 488, 489 (App. Div. 2004) (“[F]inding proximate cause in any of defendant’s acts or omissions would be too ‘speculative’ . . . where there is no ‘special relationship’ between the defendant and the injured party.”). Various state formulations of the duty requirement suggest the need for some relationship or special circumstances as a predicate to recovery. *See, e.g., Volpe v. Fleet Nat’l Bank*, 710 A.2d 661, 664 (R.I. 1998) (“[T]he bank owes no duty of care to a noncustomer with whom it has no relationship.”).

institution opens an account for the individual possessing that information. This misunderstanding continues until the institution learns of the identity theft.<sup>136</sup> An identity theft victim is not a “noncustomer” of a financial institution in the same sense that a complete stranger is a “noncustomer.”

The Restatement (Second) of Torts also suggests that a duty should be imposed when a special relationship exists. “There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the other which gives to the other a right to protection.”<sup>137</sup> Although this section is traditionally applied in the context of physical harm resulting from dangers such as negligently driving an automobile,<sup>138</sup> it requires only a small intuitive step to extend its principle to the relationship between the financial institution “actor” and identity theft victim “other.” In this way, the Restatement may place a duty upon financial institutions to protect individuals from victimization by an imposter.

In determining who should recover for financial institutions’ negligence, most courts distinguish between customers and noncustomers.<sup>139</sup> Although in a traditional sense they are noncustomers, identity theft victims are more like customers than they are like strangers. The relationship between a financial institution and a victim of its negligence is particularly difficult to establish in jurisdictions that hold to stark demarcation lines between the concepts of “customer” and “noncustomer.” Instead of examining the customer/noncustomer distinction in this manner, courts can

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136. This is similar to the approach taken by the *Patrick* court, which discusses the unorthodox relationship between a financial institution and an identity theft victim. “The bank undeniably thought that it had a relationship with Ms. Patrick when it opened the account for, and gave checks to, an imposter; . . . [this] persuades us that there is some relationship between the parties.” *Patrick*, 681 So. 2d at 1369.

137. RESTATEMENT (SECOND) OF TORTS § 315(b) (1965). Using language similar to that of state courts addressing this issue, the Restatement acknowledges that a duty can be imposed on a financial institution to protect an “other” as a result of their “special” relationship. *See id.*

138. *Id.* cmt. b.

139. *See, e.g., Eisenberg v. Wachovia Bank*, 301 F.3d 220, 225 (4th Cir. 2002) (“Courts in numerous jurisdictions have held that a bank does not owe a duty of care to a noncustomer with whom the bank has no direct relationship.” (citations omitted)).

overcome this conceptual barrier by viewing these concepts in a continuum.<sup>140</sup>

Courts have acknowledged that the relationship between identity theft victim and financial institution is not as tenuous as the financial institution's relationship with the typical noncustomer. In *Eisenberg v. Wachovia Bank*,<sup>141</sup> the Fourth Circuit distinguished the stranger-status of its victim from the status of the victim in *Patrick*.<sup>142</sup> By emphasizing that the plaintiff had no cognizable relationship with the bank he sued, the *Eisenberg* court left open the possibility that a financial institution could owe a duty to an individual victimized by identity theft.<sup>143</sup>

A financial institution acts in a responsible position toward individuals whose Social Security numbers and other private information are kept in its customer files.<sup>144</sup> The responsibility imposed upon a financial institution in transacting business responsibly is both greater than and distinguishable from the institution's broader obligations as a public facility. Unlike the need, for example, to provide security in its parking lot, the need to responsibly transact with customers is an "inherent component" of its daily business.<sup>145</sup> Whereas a defendant bank may fail, by its inaction,

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140. On such a continuum, with customer at one extreme and stranger at the other extreme, the negligent enablement of imposter fraud victim would be more closely aligned to the customer on the basis of this indirect relationship.

141. 301 F.3d 220 (4th Cir. 2002).

142. *Id.* at 226. After discussing the duty imposed by *Patrick*, the court stated, regarding the plaintiff before it: "[The plaintiff] was neither a [bank] customer nor the person in whose name [the bank's customer's] fraudulent bank account was opened . . . [The plaintiff] instead falls into the undefined and unlimited category of strangers who might interact with [the bank's] customer." *Id.*

143. *See id.* The large financial securities firm whose name the perpetrator used in opening an account, and not *Eisenberg*, "would be the beneficiary of any duty of care which Wachovia might owe to a noncustomer. *Eisenberg* instead falls into the undefined and unlimited category of strangers who might interact with Wachovia's bank customer." *Id.* This reasoning implicitly suggests that when a bank account was opened in the plaintiff's name, this relationship may justify the imposition of a duty.

144. Alabama places banks in a fiduciary relationship with their customers. *Patrick*, 681 So. 2d at 1369. Not all states follow this designation. *See, e.g., United Jersey Bank v. Kensey*, 704 A.2d 38, 44 (N.J. Super. Ct. App. Div. 1997) ("[T]here is no presumed fiduciary relationship between a bank and its customer."). Irrespective of the technical relationship between banks and their customers, banks may be reasonably expected to act responsibly when opening accounts for new and unfamiliar customers.

145. *See Patrick*, 681 So. 2d at 1368 ("The security company may attempt to *prevent* crime, within limits; here, the bank, through its negligence or wantonness, actually *facilitated* the crime."). In past cases trying to invoke a duty, plaintiffs alleged that defendants owed a duty in a

to prevent a crime if it provides inadequate physical security for its customers, that same bank actually facilitates a crime by negligently opening an account for an imposter.<sup>146</sup>

Thus, banks owe a greater duty of care to individuals in whose names fraudulent accounts have been opened than it owes to strangers. In its multifactor analysis, the *Patrick* court employed a pragmatic, rational approach to imposing a duty of reasonable care upon financial institutions. Defining a relationship between a bank and an individual who has never had any direct contact with the institution proves challenging, but the *Patrick* court broke through conceptual barriers by explaining that the bank possessed a faulty impression that it *had* entered a relationship with Patrick when it opened an account in her name.<sup>147</sup> Finding a sufficient relationship on these facts, the court stated that “[t]he fact that the relationship defies common categorization does not mean that there is no relationship.”<sup>148</sup> Thus, the *Patrick* court avoided the label-based trap that ensnares courts bound to the customer/noncustomer distinction.

In a later decision distinguishing *Patrick*, the Alabama Supreme Court held in *Smith v. AmSouth Bank, Inc.*<sup>149</sup> that a bank did not owe a duty to a victimized noncustomer with whom it had no relationship.<sup>150</sup> Unlike the misappropriation in *Smith*, where Smith’s employee used his job-related check-writing authority to wrongfully deposit Smith’s company’s checks into his own account with a different bank, Union State Bank subjectively “*thought* that it had a

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context unrelated to the defendant’s business. One such use was by plaintiffs who asserted premises liability claims against financial institutions when harmed by third parties on the institutions’ premises; these plaintiffs sought to impose liability based on their status as business invitees. *See id.* at 1367 (citing several such cases). This distinction was compelling for the Alabama Supreme Court. *See id.* at 1368 (distinguishing the identity theft victim’s case as involving “whether the bank owes a legal duty to protect the plaintiff in the execution of an inherent component of the bank’s business, whereas the previous cases applying the rule involve whether the defendant owed a duty to protect the plaintiff in a matter essentially unrelated . . . to the defendant’s business”).

146. *Id.* at 1368.

147. *See id.* at 1369 (“The bank undeniably *thought* it had a relationship with Ms. Patrick . . .” (emphasis added)).

148. *Id.* The lack of privity between an individual and the financial institution is not dispositive of the issue because privity is typically not at issue in negligence claims. *See, e.g., E. Steel Contractors, Inc. v. City of Salem*, 549 S.E.2d 266, 274 (W. Va. 2001) (stating that privity is “not required to maintain an action in tort”).

149. 892 So. 2d 905 (Ala. 2004).

150. *Id.* at 909.

relationship with Patrick.”<sup>151</sup> Critics of this cause of action fear that “[i]mposing a general duty for private parties [i.e., financial institutions] to protect the public at large from financial loss could open the door for a quantum leap in litigation to redistribute private resources.”<sup>152</sup> However, courts considering this issue need not go so far as to conclude that banks owe a duty to the public generally; instead, they need only acknowledge a responsibility to those few noncustomers with whom the financial institution believed it had an ongoing relationship due to its creation of an account. Because this category requires plaintiffs to allege a special relationship to overcome the noncustomer hurdle, it will not open the floodgates as opponents of the negligent enablement of imposter fraud tort fear.<sup>153</sup>

Once it is recognized that a financial institution owes a duty, an identity theft victim must still prove the remaining elements of a negligence claim. In establishing that the institution breached its duty, a plaintiff must prove that the defendant financial institution failed to meet a standard of reasonable care without employing *res ipsa loquitur*.<sup>154</sup> After establishing duty and breach, an identity theft victim must then prove that the financial institution’s actions proximately caused the imposter’s identity theft. Victims must demonstrate that these events were part of a chain of conduct in the commission of the crime; reasonably foreseeable conduct does not break the chain of causation.<sup>155</sup> Instead of simply furnishing appropriate conditions in

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151. *Id.* (quoting *Patrick*, 681 So. 2d at 1368 (internal quotations omitted)).

152. Alvin C. Harrell, Case Note, *Supreme Court of South Carolina Rejects Tort of Negligent Enablement*, 57 CONSUMER FIN. L.Q. REP. 96, 99 (2003).

153. This fear stems from a misperception that by creating a cause of action that encompasses victims of true name fraud, a broad spectrum of individuals could suddenly sue financial institutions. This fear is misplaced, however, because a limiting principle exists with this cause of action; only individuals in whose names banks actually open accounts could employ this tort action, a point that is not well understood by the financial community.

154. *See, e.g., Yelder v. Credit Bureau of Montgomery*, 131 F. Supp. 2d 1275, 1285 (M.D. Ala. 2001) (finding that “the doctrine of *res ipsa loquitur* does not apply” in a situation in which fraud could have occurred despite no lender negligence). Circumstantial evidence cannot be used to prove negligence when the same event could have occurred irrespective of the defendant’s negligence. *See id.* (“As with a bank, a credit card provider who strictly adheres to a verification policy will not stop all credit card fraud. Thus, one could reasonably conclude that the fraud could have occurred without any negligence.”); *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 201 (D.C. 1991) (“[T]his is not a situation in which it is obvious, without expert assistance, that a merchant must have been negligent if he approved a fraudulent credit card application. . . . [S]uch a rule would in effect impose liability without fault.”).

155. *See Shepard v. S.C. Dept. of Corr.*, 385 S.E.2d 35, 37 (S.C. Ct. App. 1989) (“A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred.” (citation omitted)).

which the imposter can act independently, a financial institution must instead facilitate the imposter's conduct.<sup>156</sup> As discussed in regard to the imposition of a duty, identity theft by imposter fraud is a foreseeable result of financial institution negligence.<sup>157</sup> Thus, in the paradigmatic negligent enablement of imposter fraud case, the acts of an imposter will not provide an intervening cause and are instead part of a continuous chain of events resulting in identity theft.

Finally, a negligent enablement of imposter fraud claimant must establish damages resulting from the institution's negligence. The financial losses endured by identity theft victims are easily ascertainable, but the intangible losses suffered by identity theft victims are more difficult to quantify.<sup>158</sup> However, the tort system regularly attempts to calculate numerical values for similar losses,<sup>159</sup> and both tangible and intangible damages result from the negligent enablement of imposter fraud, so both should be compensable under state law.

Policy considerations such as loss-allocation and risk-spreading provide significant justification for this tort claim's vitality. The loss-

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156. *See id.* ("An act or omission that does no more than furnish the condition or give rise to the occasion by which the injury is made possible is not the proximate cause of the injury."). Additionally, for the financial institution's negligence to be considered a proximate cause of the identity theft, the imposter's activity cannot be deemed an independent intervening cause of the theft. *See Palay v. United States*, 349 F.3d 418, 433 (7th Cir. 2003) ("[I]ntervening causes do not relieve a defendant of liability for its own negligence if the intervening cause itself was foreseeable.").

In establishing proximate causation for the tort of negligent enablement of imposter fraud, the financial institution's negligence does more than merely furnish conditions suitable for the crime, because its negligence actively facilitates the imposter's theft. A financial institution might furnish ripe conditions for a potential criminal by improperly guarding a vault, but it actively facilitates the imposter's theft by opening a bank account or issuing a credit card to an imposter without properly verifying the individual's identity.

The *Patrick* court discussed the integral role that the institution's negligence plays in the imposter's scheme and compared it to the role a private security force might play in preventing crime. *See Patrick*, 681 So. 2d at 1368 ("[T]he success of the imposter's scheme in this case was directly related to the bank teller's failure to properly verify the identification presented. The security company may attempt to *prevent* crime, within limits; here, the bank, through its negligence or wantonness, actually *facilitated* the crime.").

157. *See supra* notes 128–34 and accompanying text.

158. This latter category of losses includes expenses resulting from regaining one's identity, such as out-of-pocket expenses and lost wages. *See supra* note 24 and accompanying text.

159. *See Norton v. Macfarlane*, 818 P.2d 8, 14 (Utah 1991) ("[S]uch losses are difficult to quantify and impossible to fit into a mathematical formula which translates them in any precise fashion into monetary values. [However, to] say that the law recognizes no loss for intangible injuries . . . is repugnant to basic human values and flouts basic principles of justice." (citation omitted)).

allocation rationale provides a primary basis under which victimized individuals should recover for the negligent enablement of imposter fraud. Under loss-allocation principles, the party in the best position to prevent a loss should bear the burden of the loss if it is negligent.<sup>160</sup> When individuals are victimized in a manner that they cannot predict or protect against, and financial institutions can, by taking reasonable measures, prevent some identity theft, the financial institution stands in a far superior position—and in fact may be the only party in any position—to prevent a loss to both itself and the individual victim.<sup>161</sup> The negligent enablement of imposter fraud claim does not purport to hold financial institutions to an elevated standard of care, only to encourage them to adhere to reasonable practices.

Attempts at risk spreading appear prominently in many loss-allocation schemes and provide further rationale for the negligent enablement of imposter fraud tort. Although financial institutions insure against identity theft losses and pass these costs on to customers,<sup>162</sup> the true costs of identity theft are not spread, because they do not include the losses incurred by individual identity theft victims.<sup>163</sup> If costs were spread according to the true amount of risk, these additional fees could be used to compensate identity theft victims.

Identity theft victims deserve an opportunity to prove that under the particular facts of their individual cases, a financial institution's negligence enabled an imposter in the commission of a fraud.<sup>164</sup> Cases

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160. See Couch, *supra* note 20, at 584 (arguing that in the case of identity theft, the “burden of restitution should be placed on those in the best position to avoid the loss”).

161. For example, loss-allocation concepts were frequently cited in *Patrick*, which emphasized both that the bank stood in the best position to prevent this crime, and that it could have done so with minimal effort. 681 So. 2d at 1369–70. “[T]he bank was in the best position to prevent the fraud that injured Ms. Patrick.” *Id.*

162. Financial institutions generally have insurance to cover the losses they accrue as a result of identity theft. See Higgins, *supra* note 4, at 45 (noting that the prevalence of insurance and the unlikelihood of restitution provide disincentives for banks to prosecute identity theft cases).

163. Unlike financial institutions, individuals are unprepared for and unable to cope with the consequences of identity theft. See Marquis, *supra* note 96, at 18A (“Lenders expect losses from consumers who do not repay or are not who they claim to be. But consumers do not anticipate identity theft, which also inflicts emotional harm and condemns them to the frustrating process of reclaiming their identity.”). For a discussion of the costs identity theft imposes on individual victims, see *supra* notes 20–27 and accompanying text.

164. Summary judgment is typically considered improper when a plaintiff asserts a negligence claim. See, e.g., *Fowler v. Henderson*, No. W2003-02862-COA-R3-CV, 2003 WL 23099686, at \*6 (Tenn. Ct. App. Dec. 31, 2003) (“Tennessee courts generally hold that summary

making blanket proclamations against the negligent enablement of imposter fraud tort have done so in a legal vacuum. They flout multiple public policy concerns and refuse to consider the uniqueness of certain factual scenarios that would make the cause of action appropriate.<sup>165</sup> Instead of cutting off negligent enablement of imposter fraud suits by determining that financial institutions owe identity theft victims no legal duty, courts should permit them to address the entirety of their claims. Thus, courts facing negligent enablement of imposter fraud claims should acknowledge the special relationship between financial institutions and the victims of their negligence. Only when this relationship is accepted will this category of identity theft victims be compensated for their actual losses.

### CONCLUSION

The negligent enablement of imposter fraud tort offers a viable, common-sense approach to recovery for a particular class of identity theft victims. Because of the specific factual predicate required before courts can recognize a negligent enablement of imposter fraud claim, broad recognition of this tort will not present unreasonable burdens on either financial institutions or on the judicial system. Similarly, because of its limited scope, this claim does not threaten to undermine existing legislation that combats identity theft. Instead, it offers a considerable degree of protection for those identity theft victims who deserve, but otherwise lack, an attractive remedy. The continued viability of this claim will both protect individual victims of identity theft and impose an incentive for financial institutions to act with reasonable care in opening bank accounts or extending credit. In

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judgment is inappropriate in negligence cases.”). Particularly in negligence claims, courts should evaluate the individual facts and circumstances of each case, rather than making conclusive determinations of law. *See, e.g.,* *Hebert v. Veterans Veterinary Hosp., Inc.*, 694 So. 2d 993, 996 (La. Ct. App. 1997) (articulating that such cases should be evaluated on a case-by-case basis); *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 628 N.W.2d 697, 704-05 (Neb. 2001) (asserting that a finding of negligence requires an examination of the particular facts and circumstances of each case).

165. *E.g.,* *Polzer v. TRW, Inc.*, 682 N.Y.S.2d 194, 195-96 (App. Div. 1998); *Huggins*, 585 S.E.2d at 276-78. In both of these cases, the court’s brief analysis did not include or reflect the injustices that victims endured as a result of the financial institutions’ negligence in enabling imposter activity. *See* David E. Worsley, *Fair Credit Reporting Cases Illustrate Risks for Credit Reporting Agencies, Creditors, and Lawyers*, 56 CONSUMER FIN. L.Q. REP. 68, 72 (2002) (criticizing *Polzer’s* holding that “banks are not liable for such negligence, even when they failed to take any steps whatsoever to confirm the applicant’s identity and where they could have easily and inexpensively done so”).

achieving this two-fold purpose, the negligent enablement of imposter fraud tort will alleviate some of the burden identity theft poses on individual victims.

Courts recognizing this tort must still, however, define its boundaries. There may be reasons to distinguish between banks that open checking accounts and lenders that extend credit, or between situations in which this common law claim is the only remedy available to a particular victim and those in which statutory remedies are available. The few cases applying this tort to permit recovery for identity theft victims demonstrate that it can offer recourse for individuals genuinely harmed by true name fraud. Regardless of the route taken by courts interpreting this claim, the negligent enablement of imposter fraud tort deserves consideration as a sensible approach to a complex, pervasive, and escalating problem.