Identity Theft Insurance – Miserly Upon Misery

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Executive Summary

This report examines the nascent identity theft insurance market and related consumer service of “credit monitoring”. The report concludes that the present product offerings of both identity theft insurance and credit monitoring are flawed in that a major component of each is already provided free to consumers who are aware of it. Identity theft insurance coverage of credit or debit card losses is superfluous in most cases given the existence of zero liability policies of major credit card issuers and because debit card losses in most cases are reimbursed under a voluntary bank debit card code. Credit monitoring has as its core feature the delivery of a credit report from a major credit reporting agency, however, consumers in all provinces have a right to access these reports upon request at least once a year at no cost. The report calls for provincial insurance regulators to ensure that companies offering identity theft insurance are required to disclose that there are these free services that overlap with the intended coverage or service.

Identity theft coverage as it now stands is also of questionable value, given that its major potential claims items, that is, payment for time off work to resolve identity theft issues, as well as legal assistance, are capped at low recovery levels. Uncertainty over the extent of “legal assistance” under these agreements abounds, and it is noted that most identity theft victims do not actually need full legal defence services to recover from identity theft.

Both credit monitoring and identity theft insurance may have a dampening effect upon efforts by consumers to directly attack the problem of identity theft. Both products shift costs of identity theft to consumers from business. Credit monitoring also has been used as an inadequate form of recompense to consumers after a corporate data breach. Instead, governments should consider the effectiveness of data breach disclosure laws and consumer credit freezes. The report notes that corporations may be the real parties in need of identity theft insurance, in the form of data breach insurance, and that such insurance might encourage corporations to institute best practices for information handling.

Concerns also emerge with credit monitoring and identity theft being another service provider that collects and relies upon sensitive consumer information. Therefore these services could be themselves targets of identity theft attempts. Providers of these services must provide an extremely high standard of data security to safeguard the vulnerable consumers who do seek their services.

The report closes with a recommendation that identity theft insurance increase coverage of actual fraud losses and the consumers think carefully before purchasing these services in their present state.

Introduction

This report was written to examine the growing industry that is providing products and services that claim to assist consumers with identity theft ("ID theft") and related problems.

In both Canada and the US there have recently been a number of products introduced that are designed to combat identity theft in the comsumer market. Chief amongst these is identity theft insurance. While this product is offered alone, it is quite often paired with the other major identity theft product, credit monitoring. While some consumers may benefit from greater protection against identity theft via identity theft insurance and credit monitoring, there are a number of concerns that have arisen from these industry led initiatives.

This report investigates the following questions to arrive at a consumer-view of identity theft products:

1) What is covered by identity theft insurance?

2) What is credit monitoring and how does it work?

3) What is the level of disclosure of the services being offered, will consumers know exactly what they are buying?

4) What is the relative cost of ID theft services for consumers and are consumers receiving good value for their money? In short, is ID theft insurance and credit monitoring worth it?

5) Will this cost limit the ability of lower income consumers to be able to properly protect themselves should they be victims of ID theft?

6) What effect will the availability of credit monitoring and ID theft insurance have on other efforts to combat identity theft? In particular, will it encourage companies that have data leaks to report such leaks?

7) Could ID theft insurance and credit monitoring themselves lead to identity theft?

This paper describes the growing ID theft industry and its various services, subsequently each of the above-mentioned concerns will be reviewed and recommendations will be made.

Defining Identity Theft

Identity theft does not have one common definition accepted in Canadian law,[1] nor is one definition used by government, corporations or the media. In a previous report by PIAC identity theft was described as:

> Identity theft ("ID theft") is the unauthorized collection and fraudulent use of someone else's personal information. Victims of ID theft suffer financial loss, damage to their reputation, and emotional distress, and are left with the complicated and sometimes arduous task of clearing their names.[2]

The fraudulent use of personal information is, however, only an element of the potential definition of identity theft. The Department of Justice is actively considering revisions to the Criminal Code to add offences in relation to identity collection and transfer.[3] However, for the purpose of this report, identity theft will be used in the sense both of unauthorized collection and fraudulent or potentially fraudulent use of personal information.

Nonetheless, for consumers' sake, a clear, well-defined legal definition of ID theft should be attempted in the criminal law as well as other areas where such a definition matters, such as insurance coverage. Otherwise consumers run the risk of varying definitions of this key term and run the risk of not knowing what is covered as losses for "identity theft" and what is being monitored by companies claiming to provide identity scans or credit monitoring services.

Identity Theft in Canada

Identity theft has become a significant problem in Canada.[5] There is no official number of how many victims of ID theft there are annually in Canada but PhoneBusters National Call Centre which acts as national anti fraud call centre received 11,231 complaints by victims of ID theft in 2005 representing a reported loss of $8,575,593.98.[6] There has been an gradual leveling out of the number of victims and a marked reduction in the amount of losses reported to

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[1] Department of Justice, "Consultation Paper on Identity Theft" (June 2006) at p.; 1. This report, prepared by the Criminal Law Policy Section of the Department of Justice is on file at PIAC and is marked 'Do Not Distribute', however, we have quoted from it as it provides the only authoritative reference. [hereafter "DOJ paper"]

[2] Philippa Lawson & John Lawford, Identity Theft: The Need for Better Consumer Protection (Ottawa: Public Interest Advocacy Centre, 2003)

[3] DOJ paper, p. 2.

[4] Philippa Lawson & John Lawford, "Identity Theft: The Need for Better Consumer Protection" (Ottawa: Public Interest Advocacy Centre, 2003) [hereafter "PIAC ID Theft Report"]

[5] Not just consumers, but now marketers, are stating that identity theft is 'keeping them up at night'. See 'Marketers confront three big issues – Gustavson" Direct Marketing News, Vol. 18, No. 9, June 2006 at p. 1. John Gustavson is quoted in this article as saying ID theft is the number one concern of marketers. Mr. Gustavson is the President and CEO of the Canadian Marketing Association.

[6] http://www.phonebusters.com/english/statistics_E05.html

PhoneBusters from 2003 to 2005,[7] but these number show that ID theft is still very much a problem in Canada.

Complaints of ID theft Nationally to PhoneBusters from 2002-2005[8]

Year	Victims	Loss
2002	8209	$11,825,602.58
2003	14599	$21,845,358.40
2004	11,938	$18,961,576.50
2005	11,231	$8,575,593.98
2006*	1137	$1,876,683.58

*As of February 27, 2006

Canadians now appear very aware of, and concerned with, identity theft. An Ipsos-Reid poll conducted in November 2005 indicated over three quarters (77%) of Canadians are very or somewhat concerned about becoming a victim of identity theft in the future.[9] Nevertheless, only about 50% of respondents claimed to ever have checked their credit report. This is consistent with PIAC's report, Credit Reporting: How Are Consumers Faring? (January 2006) which found that only 17% of Canadian adults (18 and over) have checked their credit report in last 3 years (approx. 4.2 million Canadian adults). A MasterCard survey cited in the PIAC report found less than a third of Canadians ever had checked their credit report. This may indicate a general ignorance in the Canadian population as to even the existence of a credit report on most every individual Canadian, or an lack of understanding of the credit report contents or its utility.

The level of ID theft in Canada, as well as the level of consumer concern, has spurred the financial services and insurance market to respond to consumer concerns by providing services that both claim to assist in detecting identity theft and to assist consumers after they have been victims of ID theft. Currently the main services being provided to consumers are identity theft insurance and credit report monitoring services.

ID theft Insurance

ID theft is now the fastest growing insurance product in the US, and it is beginning to make its way into the Canadian market.[10] The growth in ID theft insurance can be attributed to the market responding to a growing fear by the public that they are vulnerable to ID theft.

[7] Det. Sgt. Barry Elliott of PhoneBusters notes that much of the decrease in numbers of victims and especially in dollar losses is probably due to increasing awareness of ID theft, and better practices in relation to ID theft, on the part of credit grantors. Source; Interview with Det. Sgt. Elliott, 06/26/06. [hereafter, "Elliott Interview"]

[8] http://www.phonebusters.com/english/statistics.html

[9] See Ipsos-Reid Press Release, "Identity Theft A Major Concern For Most Canadians: Most Canadians Feel Information Available To Guard Against Identity Theft Is Not Fully Adequate" November 22, 2005 (Online: http://www.ipsos-na.com/news/pressrelease.cfm?id=2871). Statistical accuracy: +/- 2.2 percentage points, 19 times out of 20. Full details of the survey and questions are linked from this web page.

[10] See Dave Simons, "Forbes ID theft Insurance isn't insurance" .May 29, 2003 Online: http://www.forbes.com/2003/05/29/cx_ds_0529simons.html

What is ID Theft Insurance?

ID Theft insurance is personal insurance that is offered to consumers, usually without any assessment of insurability, to cover losses associated with identity theft. Generally speaking, it is intended not to insure against losses caused by fraud from identity theft, but rather is intended to assist the victim with incidental costs in responding to the crisis of identity theft and the efforts required in repairing credit and maintaining access to credit.[11] This bears repeating, as some consumers might guess that ID theft insurance would cover the actual losses attributable to the fraud. Rather ID theft insurance covers such items as income lost from time away from employment to sort out ID theft, fees related to filing documents, and possibly some limited legal advice of a general nature.

The limitation of identity theft to consequential losses and not the actual fraud losses makes sense, as consumers should never be liable legally for the losses caused by fraud. The companies that are defrauded by the use of personal information are generally the parties that must bear the loss if the thief is successful. This has been the common law rule for some time in relation to the somewhat analogous situation of passing fraudulent cheques, or personating the drawer of a cheque, and is known as the 'cheque acceptance rule' (see *Price* v. *Neal*.[12] The rationale for the rule is explained on many bases. One, simple "negligence": credit grantors and others who do business with the public accept a certain risk and responsibility in knowing who their customers are and protecting against imposters. Two, public policy: only such a rule can allow millions of consumer transactions to function; the opposite might discourage customers from buying and would ease the already easy route for the fraudster. Companies also are better placed to anticipate fraud and to absorb the losses than any single fraud victim.[13] Three: legal title in the money defrauded is in the victim, and a court will not, on either legal or equitable grounds of the mistake of the credit grantor, deprive the victim of this legal advantage, which tips the scales in the consumer's favour between the two innocent fraud victims (bank and consumer).[14]

Since the victim theoretically bears no responsibility for the loss, it might be difficult to insure that 'loss', and it appears insurers are not lining up to offer such coverage. However, some limited loss coverage in relation to credit and debit card fraud is offered (described below). Still the most costly fraud, new credit account set-up fraud, is not covered.

[11] An exception is identity theft insurance offered as part of a home (property) insurance policy, that may or may not include actual fraud losses attributable to theft of credit cards or debit cards.
[12] (1762), 3 Burr. 1354, 97 ER 871.
[13] See James S. Rogers, "The Basic Principle of Loss Allocation for Unauthorized Checks" 2004 39 Wake Forest Law Review 453. Online: http://lsr.nellco.org/bc/bclsfp/papers/10 At p. 455: ". . . payment systems, specifically the law of bank credit cards, consumer electronic funds transfer, and wholesale wire transfer [. . .] shows that all such systems adopt the fundamental principle that the risk of unavoidable loss is borne by the providers of the payments system."
[14] See J.B. Ames, 'The Doctrine of Price v. Neal' in Lectures on Legal History (Cambridge, Mass.: Harvard University Press, 1913) 270 at 272.

When consumers find out or suspect that they may be an ID theft victim, there are several steps that they must attend to immediately.[15] Only some of these, however, may be performed by another party. The victim himself or herself must perform most of these steps.

First, victims must seek a police report to have some evidence for creditors that their accounts were misused. This of course must be done personally. Second, victims must inform the major credit bureaus of the potential of ID theft, in order that the credit bureaus place a 'fraud alert' on their file. They also must order a copy of their credit report(s) to check for unauthorized credit accounts. These steps also generally are done by the consumer himself or herself, although there is some scope in dealing with the credit bureaus to perform such alerting via an agent such as an ID theft insurer, since in some cases it can be undertaken via an interactive voice response service and without speaking to an actual agent.[16] Third, the victim himself or herself must write or contact creditors to explain the situation and provide copies of credit reports and police reports. Again, while some out-of-pocket expenses of this can be covered by insurance, the actual legwork in restoring and protecting credit is, by necessity, largely the responsibility of the victim. Insurers can offer the service of canceling credit cards and applying for new ones. This is generally accepted between banks and card issuers, and appears to be accepted between insurers and card issuers for the time being. However, the credit card issuers may or may not accept the agency of an insurer to do this in the future or for all insurers. This may leave insurers only paying for lost victim time and incidental expenses, potential legal defence fees if the victim is sued for the fraudulent credits on his or her account and offering optional services such as general advice via a help line.

Canadian Market

Despite it's growing popularity in the U.S., identity theft insurance still is fairly limited in its availability in Canada. Currently, none of the big 5 banks offer any kind of ID theft insurance through their insurance divisions. Banks in Canada are limited in what types of insurance they are able to sell by s. 416 of the *Bank Act*. This section and its associated regulations prescribe what insurance products banks may sell. At present the regulations under the Bank Act do not include any category that appears broad enough to capture ID theft insurance. Presumably the banks will ask the federal government to amend the regulations to allow sales of such insurance.

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[15] See Daniel Engber, "Has Your Identity Been Stolen?" SLATE.com (February 18, 2005). Online;

[16] In a call to a TUC CSR, they stated that in order to place a fraud alert with TUC you must send a letter explaining why you want the alert and provide two pieces of ID to prove it's for you. I went through the automated system with Exquifax, they let you place an alert by phone but you need your SIN number. In order to place an alert by mail or fax you need to provide your name current address and two pieces of ID that include your current address. They say your SIN number is helpful to prove that it's for you but not necessary.

[17] http://www.ingcanada.com/en/ON_tenants.html

[18] http://www.belairdirect.com/english/ontario/home/products_priority.htm

Two Canadian companies are currently offering full ID theft insurance policies. Allstate offers ID theft insurance for $35 per year as an add-on to a homeowner's insurance policy. Their insurance covers expenses for ordering credit reports, long distance calls and lost wages for time off work to deal with the ID theft. The policy also provides for legal assistance through telephone consultation with a lawyer.[21] The extent of the legal assistance, however, is quite vaguely described in advertising and web literature. Calls to Allstate revealed that Allstate will indeed cover a victim's legal expenses in defence of lawsuits brought in relation to the ID theft and will allow the customer to hire their own choice of lawyer. However, the lawyer telephone service was urged by the customer service representative as a first and possibly only necessary legal expense. Aviva's coverage, however, does not appear to cover the actual defence of the ID theft victim in, for example, a lawsuit for a fraudulent debt. Instead, the policy appears to provide a legal consultation with a lawyer of a general nature.[22]

Aviva has a similar ID theft insurance product. The insurance costs $45 per year and provides "Enhanced Credit Card and Automated Teller" coverage, lost wages as a result of taking time off from work to get help (up to $500 per week for 4 weeks), legal fees, mail costs, long distance phone charges and notary costs for affidavits and documents. Like Allstate's ID theft insurance, the product also provides a similar general legal help through a legal assistance line.

Company	Cost	Deductible	Coverage
Allstate[23]	$35 per year	None	$2,000 per loss, $15,000 per term • Cost of credit reports, affidavit authorizations, and long distance calls • Lost income for time off work required to rectify the situation • Fees required to reapply for a loan denied as a result of identity theft • Legal disputes associated with default judgments and defending actions against credit collectors

[19] See the Financial Consumer Agency of Canada's webpage on the major credit card companies' public commitments to a zero liability policy for fraudulent credit card transactions. American Express, MasterCard and Amex's zero liability policies are all linked from this page.
[20] http://www.fcac-acfc.gc.ca/eng/compliance/DebitCardCode/DebitCardCode_e.asp
[21] http://www.allstate.ca/en/about+insurance/home/identity+theft.htm
[22] Note that the legal assistance offered under the policy is limited to "Telephone consultation with a lawyer to help identify the nature of the fraud, provide information on what to expect, the process and the responsibilities of the customer". However, while the policy does include "Financial assistance for expenses and fees incurred to resolve identity theft fraud including: [. . .] Legal disputes associated with default judgements and defending actions against credit collectors". However, it appears the word "fees" here appears to include only court filing fees and similar fixed fees and not he fees of a lawyer in relation to defending actual actions for debt based on fraudulent credit. PIAC calls to brokers selling the insurance did not clarify this point.
[23] http://www.allstate.ca/en/about+insurance/home/identity+theft.htm

			• Telephone consultation with a lawyer • Expenses to resolve legal disputes
Aviva[24]	$ 45 per year	Same as home/tenant /condo insurance* *Coverage under home/tenant/condo insurance required to get ID Theft insurance rider	Up to $30,000 (max $500 per week for time off work, for 4 weeks) Enhanced Credit Card and Automated Teller coverage Lost wages as a result of taking time off from work to get help Legal fees Registered mail costs Long distance telephone charges Notary costs for affidavits and documents 24-hour access to Aviva's: Credit Card Registry Hotline Legal Assistance Helpline

It is not apparent how a claim on either policy could easily approach the limits of the policies. The credit and debit card coverage as noted is largely duplicating a zero loss policy of credit card issuers and the debit code for the banks for debit card fraud losses.[25] The "time off" wages coverage is capped at a low level (Aviva is only $2000). Allstate's coverage is subject to a $2000 limit per incident. This means one would have to be an ID theft victim 8 times in one year to exceed the promised coverage, which is a very unlikely scenario, given that ID theft victims almost invariably contact credit bureaux to place fraud alerts on their files and are more vigilant in reviewing their credit after an incident. The coverage for fees associated with re-applying for loans is likely to be very limited; many loan applications require no such fees and it is unlikely that those that demand a fee for reapplication after an ID theft experience would be very high. Incidental mailing and phone call costs are likely to be negligible. This leaves only the coverage for legal services as providing any substantial coverage. However, customer service personnel may be tempted to steer policyholders to the more general legal helpline. More importantly, however, it is unknown what value this coverage may have; creditors should absorb losses when presented with a police report and an affidavit verifying that the consumer did not set up the account. A lawyer would generally not be needed then, as most creditors would not commence formal legal action in these circumstances.

[24] https://www.avivacanada.com/product.php?content=PERSONAL_PRODUCTS_IDTHEFT&language=ENGLISH
[25] See discussion below regarding Credit and Debit Card coverage products.

U.S. Market

U.S. Insurance companies seem to have gone further than their Canadian counterparts in offering ID theft insurance packages. It is likely that the increase in ID theft coverage by American insurers will move into Canada in the near future asmany of the major American insurance companies have Canadian affiliates As in Canada, most US insurance companies are tying ID theft insurance to homeowners insurance, often as a free addition as a way to attract new costumers. Examples of U.S. insurance companies offering ID theft insurance include:

Company	Product	Cost	Deductible	Coverage
AIG	AIG Fraud SafeGuard	Starts at $70 annually		Up to $200,000
Amica[26]	Identity Fraud Expense Coverage	Approx $28 per year	$250	Up to $15,000, including a max of $200 per day for time off work up to $5,000
Farmers Insurance	Identity Fraud Expense Coverage		$100	Up to $15,000
Fireman's Fund[27]	Identity Fraud Expense Coverage	Free with Prestige® or Added Measure® home insurance		up to $15,000 with Prestige® Home Premier or up to $25,000 with Added Measure® (max $500 per week for time off work for 4 weeks)
Nationwide[28]	Nationwide Identity Theft coverage	Free with existing home coverage	No deductible	Up to $25,000
Wells Fargo[29]	Wells Fargo Select Identity Theft Protection	$12.99 per month	$100	Up to $10,000

One point to note is that while many US insurance agencies are providing full-service ID theft insurance packages, many others are relying on outside companies to provide a portion of ID theft insurance services.

"Identity theft 911" is the most popular company which insurance companies have teamed up with to offer ID theft packages to their consumers. U.S. insurance companies who use Identity Theft 911 services include: Chubb

[26] http://www.amica.com/aboutUs/magazine/summer_2003/identityFraudCoverage.htm
[27] http://www.firemansfund.com/servlet/dcms?c=personal&rkey=27
[28] http://www.nationwide.com/nw/property/identity-theft/index.htm?WT.svl=2
[29] https://www.wellsfargo.com/wf/per/insurance/idtheft/

Insurance group, MetLife, Enumclaw Insurance Group, Grinnell Mutual Reinsurance, Co-operative Insurance, Mutual Insurance, Integrity Insurance and One Beacon Insurance. The services that are offered by ID theft 911 provide a 'personal advocate' to work one on one with victims of identity theft, services provided include:[30]

- Placing credit file fraud alerts with all three major credit bureaus
- Completing the Federal Trade Commission Fraud Victim Affidavit
- Notifying police departments, creditors, collection agencies and credit rating agencies
- Access to proactive educational materials at www.mutualofenumclaw-idtheft.com
- A full year of credit monitoring and fraud monitoring
- Resolution of account takeover and policyholder inquiries as well as true name identity theft for policyholders and their immediate family members

U.S. experience with 'contracting out' of some identity theft insurance benefits to one or a limited number of third-party providers suggests consumers should compare pricing of competing insurance products carefully on more substantive elements such as coverage and deductible, since many of the extras in the package like legal assistance may be effectively the same. In Canada, as more policies appear offering these benefits, consumers should be aware that such peripheral services could be offered through one or two third party operators.

Some U.S. insurers offer legal advice coverage that includes defence work in trials by creditors attempting to enforce fraudulently set-up credit accounts.[31] Again, it is not clear to what extent a lawyer's involvement will be necessary if a victim obtains a police report and files affidavits with creditors.

Another point to note is that in some cases U.S. coverage is much higher ($25,000 and in one case up to $200,000) than Canadian coverage. It is not clear that this difference is solely attributable to the risk of loss experienced by U.S. as opposed to Canadian customers. It may in fact reflect the nascent Canadian market that at present has few competitors.

In both the U.S. and Canada, ID theft insurance is marketed as "protection" from ID theft. However, ID theft insurance cannot protect consumers from ID theft itself, only offer some recompense for its effects, short of offering coverage for actual fraud dollar losses, which are usually not covered. The issue of disclosure is therefore dealt with in a separate section, below.

[30] http://www.identitytheft911.com/company/press/release.ext?sp=444
[31] See Allstate's ID theft info page at http://www.allstate.com/landingpages/home/idtheft.aspx

Credit and Debit Cards Coverage Products

A subspecies of identity theft insurance is coverage for credit card and debit card losses that is offered without other ID theft protection (i.e. new account fraud).

Although banks are not currently selling credit card or debit card insurance,[32] some insurance companies are starting to offer coverage of credit and debit card losses as a separate coverage, often tied to their homeowner's insurance. For example, ING's home insurance includes $10,000 worth of protection for illegal use of credit or debit cards[33] and Belair Direct's home insurance includes protection for credit card or debit theft up to $5,000.[34] The utility of this credit and debit card coverage is questionable since credit card companies generally offer zero liability policies cover much of the loss insured against.[35] In addition, provided the consumer has not revealed a PIN or carelessly chosen one, many fraudulent debit card losses should be covered by the financial institution under the *Canadian Code of Practice for Consumer Debit Card Services*.[36]

Likewise, in the U.S., the federal government has legislated to protect consumers who are victims of credit card fraud through the *Truth-in-Lending Act*, which caps a consumer's credit card liability in cases of fraud at $50. The three major credit card companies in the US, Visa, MasterCard and American Express have extended this protection and now all provide zero liability for fraudulent use.

Where coverage for credit and debit cards losses is offered as part of a larger ID theft insurance policy, it is therefore not always clear what is being insured against.

For example, Aviva's promise of "Enhanced Credit Card and Automated Teller coverage" is described in a FAQ on Aviva's website:

> Doesn't my credit card issuer already provide this type of protection?
>
> Your credit card issuer provides some protection, but it is not as comprehensive as the new Aviva insurance coverage for Identity Theft. It is important to note that not all individuals who are victims of Identity Theft have sustained losses through their credit cards,

[32] Such insurance is not yet authorized under the regulations made pursuant to s. 416 of the *Bank Act*. See above.
[33] http://www.ingcanada.com/en/ON_tenants.html
[34] http://www.belairdirect.com/english/ontario/home/products_priority.htm
[35] See the Financial Consumer Agency of Canada's webpage on the major credit card companies' public commitments to a zero liability policy for fraudulent credit card transactions. American Express, MasterCard and Amex's zero liability policies are all linked from this page.
[36] http://www.fcac-acfc.gc.ca/eng/compliance/DebitCardCode/DebitCardCode_e.asp

> given the fact that there are now frauds using a variety of approaches and targets.[37]

This statement appears to say only that credit card loss policies are not identical to the coverage of Aviva's ID theft insurance. Of more interest would be answers to questions such as, "does this enhanced credit card and debit card coverage cover situations where I have not been reimbursed by the credit card company or bank (for debit) in situations where the credit card company/bank alleges I was negligent in handling my personal information (e.g. telling a spouse a PIN number)?" This is a common situation faced by consumers when dealing with fraud losses in situations like debit card losses, where consumer actions may disqualify them from coverage by the financial institutions. Also interesting would be an answer to the question, "Does this cover Internet banking losses due to me revealing my account information in response to a 'phishing' e-mail?" Aviva's website does mention phishing as a reason for the customer to take the coverage, but it is unclear that actual fraud losses attributable to "phishing" would be covered under the "Automated Teller coverage".

Card Registry Services

One service that is being offered by most of the big banks is a card registry service. CIBC, TD Canada Trust, RBC and PC Financial all offer a card registry service for $24.95 a year. The service is more or less the same at each company, you can register a number of cards with the bank and if you're wallet is lost or stolen you can call them 24 hours a day and they will cancel all of you cards for you and order replacement cards. While this may be a convenience product, its pricing appears anomalous in relation to full identity theft coverage, which itself is priced between $35 and $45 a year. The relatively high cost of card registry services may reflect the inability of the banks to enter the ID theft insurance market. It may also be a statement on the value of the actual coverage of ID theft insurance policies.

Credit Report Monitoring

Monitoring credit is an important way for people keep track of their credit and to see if any fraudulent activity is happening in their name. In both Canada and the US consumers can receive free copies of their credit reports from each of the major credit bureaus. However, as noted above, Canadians generally are not obtaining their credit report in a routine fashion. In the United States the federal government recently passed the *Fair Credit Reporting Act*, which requires each

[37] See Aviva Identity Theft Program Frequently Asked Questions (undated). Online: https://www.avivacanada.com/file_download.php?document_id=1978&file=Identity_Theft_FAQ.pdf

[38] http://www.fcac-acfc.gc.ca/eng/consumers/codes/default.asp

[39] http://www.pcmastercard.pcfinancial.ca/rocen/index.htm

[40] https://www124.americanexpress.com/cards/loyalty.do?page=creditsecure

of their three nationwide credit-reporting companies (Equifax, TransUnion, and Experian) to provide individuals with their credit report once every 12 months.[41]

In Canada the Financial Consumer Agency of Canada recommends that consumers request a copy of their credit at least once a year from the three major Canadian credit bureaus (Equifax, TransUnion and Northern Credit Bureaus Inc.) to make sure all of their personal and financial information is up to date and that they have not been a victim of identity fraud.[42] Since credit bureaus are provincially-regulated, consumer (credit) reporting legislation in each province governs access to personal credit reports. In Ontario, section 12(1) of the *Consumer Reporting Act* ensures that consumers are able to access their personal credit reports free of charge. Though laws may vary slightly from province to province the major credit bureaus have set their policies on a nationwide basis. Both Equifax and TransUnion allow consumers to request free copies of their credit reports as often as the wish while Northern Credit Bureau will supply one free copy of their credit report a year on request. The reports can be received by submitting a written request to the bureaus. To receive instant access online to their credit reports consumers can buy their reports for a fee from the two major credit bureaus in Canada TransUnion and Equifax for around $15.

Of the two major national credit bureaus in Canada TransUnion is the only one that offers a credit monitoring service to guard against identity theft. The service which costs $22.95 per quarter provides a credit profile four times a year, weekly “fraud watch emails” to inform you if there have been any changes in your profile that might indicate fraud, and access to credit specialists. TransUnion also lets you purchase a credit profile for $14.95.[43]

Equifax Canada does not have any credit monitoring services (although it has many types of monitoring service in the U.S.). Equifax lets you buy your personal credit report for $15.50 or you can purchase your credit score which includes your report with an analysis for $23.95.[44]

The prospect of credit bureaus selling credit monitoring services naturally brings up a conflict of interest with their duty to provide free credit reports upon request under provincial credit monitoring legislation. Indeed, TransUnion Canada’s website’s featuring of its credit monitoring products is far more prominent than its information on ordering a free copy of the report in accordance with legislation. At the least, it seems consumers are entitled to see the free credit report obligation displayed as prominently as products that repackage this statutory right for a fee. This may require modification of provincial consumer reporting legislation. However, it is consistent with the disclosure requirement suggested

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[41] http://www.ftc.gov/bcp/conline/pubs/credit/freereports.htm
[42] http://www.fcac-acfc.gc.ca/eng/publications/CreditReportScore/CCreditReportScore_e.asp
[43] http://www.tuc.ca/TUCorp/home.asp
[44] https://www.econsumer.equifax.ca/ca/main?forward=/view/common/template.jsp&body=/view/home/home.jsp

above with insurance companies being required to outline credit and debit card zero loss policies and codes.

Canadian banks have been slow on getting involved in credit monitoring services, none of the major banks are offering this service as of yet. One bank that has moved into this field is President's Choice Financial with their MasterCard that offers a Credit Alert service to "help protect yourself from identity theft and credit fraud". The service which costs $14.99 a month, offers a copy of your credit report and credit score, monitors your credit daily at Equifax and TransUnion, notifies you via email when changes occur that could indicate fraud, provides quarterly credit updates and provides access to credit education and fraud specialists.[45] None of the other major banks are currently offering a similar service. HBC does offer a very similar service through its credit card, also at a cost of $14.99 a month.

Hybrid Credit Monitoring and Insurance Products

As noted, many credit reporting services are paired with ID theft insurance products, making it difficult to separate the coverages for comparison sake. These services attempt to offer a more complete ID Theft package than the ID Theft insurance products described above. Indeed, they are a bundle of services, including credit monitoring, insurance, card registration and convenience credit services, such as the addition of credit scores. They often have a lower insurance coverage than the ID Theft packages and are offered not by insurers but rather credit card companies or other third party financial service providers.

For example, in the U.S., American Express offers its American customers "CreditSecure" a service that offers unlimited access to credit files with the three national credit bureaus, daily monitoring of credit reports, card registration services and ID theft insurance of up to $5,000 per occurrence, toll-free assistance and monthly monitoring of credit scores for a monthly fee of $11.99.[46]

In Canada, "Identity Guard", a division of the leading American company in this market, offers a similar blended product, its product "CreditProtect" being offered at a cost of $24.95 for the first 3 months then $12.99 per month thereafter.[47] The service provides credit reports 4 times a year,[48] daily credit monitoring, identity theft insurance of up to $2,500 per year for certain expenses after a $250 deductible, and access to their ID theft resource center.[49]

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[45] http://www.pcmastercard.pcfinancial.ca/rocen/index.htm
[46] https://www124.americanexpress.com/cards/loyalty.do?page=creditsecure
[47] See http://www.identityguard.ca/ Note that a quote from a the PIAC report on ID theft is referenced without notice to PIAC and is misquoted.
[48] Note that this credit monitoring is limited since it only checks Equifax, not TransUnion nor Northern Credit Bureaus. (American consumers, due to legislation, get a three-in-one credit report from all three major credit bureaus, Experian, Equifax and TransUnion)
[49] http://www.identityguard.ca/gs/English/index.asp

Noticeable in this coverage is the stress on the product being an ongoing expense required for surviving and thriving in the modern world. Also rather noticeable is the high price in relation to ID theft insurance alone, with monthly fees approaching 1/3 of the price of an ID theft policy for an entire year. Given that the services by Identity Guard and similar hybrid products offered are largely comparable to ID theft insurance coverage, such costs appear to be based on the optional credit scores and frequent polling of credit reports from the credit agency. Given that credit reports are available free upon written request in most provinces it is difficult to see the justification for the pricing difference.

Disclosure

Insurance in Canada is provincially regulated, except where offered by federally chartered banks or insurance companies, in which case provincial regulation applies in addition to federal regulations.

In Ontario, for example, the *Insurance Act* has specific disclosure rules for various categories of insurance as defined by the Act, for example, fire, life and auto.[50] Where a type of insurance is offered to consumers that does not fall within these categories it is subject to a catchall category of "Insurance Contracts in Ontario". This section has only minimal disclosure requirements, basically requiring the insurer to deliver a copy of the policy to the insured, and that the policy set out;

> . . .the name of the insurer, the name of the insured, the name of the person or persons to whom the insurance money is payable, the amount, or the method of determining the amount, of the premium for the insurance, the subject-matter of the insurance, the indemnity for which the insurer may become liable, the event on the happening of which the liability is to accrue, the date upon which the insurance takes effect and the date it terminates or the method by which the latter is fixed or to be fixed.

Insurance contracts are, however, one of the few areas where the common law requires good faith on the part of the contracting parties. However, the insurance companies' duties in this regard are set out in the *Unfair and Deceptive Practices Regulation* made under section 438 of the *Insurance Act*. Of these regulations, only two clauses potentially cover the disclosure required of vendors of ID Theft insurance:

> 1. For the purposes of the definition of "unfair or deceptive act or practice" in section 438 of the Act, each of the following actions is prescribed as an unfair or deceptive act or practice:
>
> [. . .]

[50] See R.S.O. 1990, CHAPTER I.8. Online: http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90i08_e.htm

4. Any illustration, circular, memorandum or statement that misrepresents, or by omission is so incomplete that it misrepresents, terms, benefits or advantages of any policy or contract of insurance issued or to be issued.

5. Any false or misleading statement as to the terms, benefits or advantages of any contract or policy of insurance issued or to be issued.

It is at least arguable that any statement extolling the virtues of a policy that included a credit reporting aspect but that failed to state that consumers have a right to a free credit report (for example in Ontario under the *Consumer Reporting Act*,[51] s. 12) would be either a material omission or a misleading statement. However, since this may not be crystal clear, provincial insurance regulators should consider a new requirement under the *Insurance Act* regulations to notify the customer of his or her right to a free credit report upon request.

Regarding further disclosure, guidance could also be had from the Canadian Bankers' Association "CBA Code of Conduct for Authorized Insurance Activities" which provides guidance to banks regarding fair selling of authorized insurance products in branch. The section on "disclosure" reads:

> *Disclosure*
>
> Banks are committed to providing clear and understandable disclosure in the documentation related to authorized insurance products. This helps consumers to make informed decisions about the insurance products promoted by banks.
>
> Banks will provide each eligible customer who is accepted for insurance coverage with disclosure documentation that sets out:
>
> - that the product being applied for is an insurance product;
> - key terms and definitions related to the insurance;
> - all customer fees and charges associated with the insurance product and how they would be payable;
> - that insurance coverage from a specific company is optional if a separate charge is levied for the coverage (an example of insurance for which a separate charge is not applied would be coverage through a specific credit card);
> - name of the primary insurance company underwriting the insurance product ;

[51] R.S.O. 1990, CHAPTER C.33

- how and when the customer will be notified of acceptance or rejection of the insurance coverage;
- when insurance coverage would come into effect and when it would terminate;
- the duration of any "free look" period during which, should the customer elect to cancel the insurance coverage, all premiums charged would be refunded;
- the customer's responsibilities and the right to cancel insurance coverage at any time;
- terms and conditions that might limit or exclude coverage;
- claims procedures; and
- how to obtain additional information about the insurance coverage.

Presently it is not clear that consumers are being provided anywhere near this level of disclosure with ID theft insurance, which, given the newness of the product, would seem to indicate that more, not less disclosure is required.[52]

Cost of ID Theft Services and Lower-income Consumers

By allowing the market to provide identity theft products at a cost to consumers there is the risk that only those consumers who can afford the products will be able to be adequately protected from ID theft and the poor will be left vulnerable. Presently depending on the type of service being offered there is a great range in prices making some much more accessible than others.

The value of the coverage given by ID theft insurance is very debatable, while coverage ranges from $10,000 to up to $200,000 the cost associate with being a victim of ID theft rarely reaches anything close to these levels. The U.S. Federal Trade Commission has estimated that the average out-of-pocket cost for individuals affected by ID theft is $1000.[53] As noted above, direct dollar losses have dropped substantially in Canada in the last two years. The costs that are covered by ID theft insurance are generally not that substantial, including as they do incidental costs for notarizing affidavits and other documents attesting to fraud, the costs of certified mail and long distance telephone calls and loan application fees for reapplying for loans that were rejected because of ID fraud. The more significant expense of time off work is general cut off at about $2,000 for most ID theft insurance packages. The balance of the coverage is normally allocated for legal fees but the Federal Trade Commission has found that ID theft victims rarely suffer problems that require any significant legal expenses.[54]

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[52] In addition, consumer protection legislation in Ontario recently was updated so that contracts formed electronically [Internet contracts] are subject to special provisions of the *Consumer Protection Act, 2002*, including prescribed disclosure requirements, as well as internet delivery requirements. However, most ID theft insurance policies appear to be for a lesser amount than $50..

[53] "ID theft insurance isn't insurance" Forbes

[54] "ID theft insurance isn't insurance" Forbes

While the expenses may not add up to the coverage, insurance companies seem to be selling their products as more of a convenience package to help resolve the problems created by ID theft than an actual insurance product. Nationwide advises consumers not to "spend countless hours trying to restore your credit and good name"[55] and instead let their experts do most of the work for you. "Nationwide employees will assess the situation to see if there was fraud, make the appropriate phone calls assisting in replacing documents and provide legal assistance over the phone." This is typical marketing language for ID theft insurance on both sides of the border. While restoring your name after ID theft can be a troublesome experience, the estimated average time it takes a person to deal with ID theft is 28 hours.[56] ID theft insurance packages offered by insurance companies may help speed up some of the process of resolving the issues that come out of ID theft but much of the work still has to be done by the individual affected.

Finally, whether or not consumers are receiving a good value for their money is perhaps less important than providing those who cannot afford insurance or credit monitoring with information about their rights to free credit reports. As noted in the "Disclosure" portion of this paper, ID theft insurers should be made to reveal the existence of free credit reports being available as part of provincial consumer credit reporting legislation.

Effect of ID Theft Insurance and Credit Monitoring on Efforts to Fight Identify Theft

One area of concern with the growth or potential growth of an ID Theft insurance market is the effect that the availability of such insurance may have on the fight to eradicate ID theft.

Two major problems faced are by consumers when dealing with ID Theft. First, many leaks are out of their hands, that is, there has been a leak of personal data at a credit grantor or some other business that has personal information that is capable of being used for identity theft. This has led to calls for leak disclosure legislation in Canada[57] and actual legislation to this effect in several U.S. states.

However, ID Theft insurance and credit monitoring undermine the effort to enact data leak disclosure legislation in two ways. First, ID theft insurance appears to undercut the rationale for companies to make full disclosure, as the risk of ID theft liability has been shifted to the insurer from the company that leaked the data. Why bother notifying customers if they can purchase insurance to cover any possible loss anyways? However, since consumers are now forced to pay for this insurance protection they are effectively paying to manage a problem that

[55] http://www.nationwide.com/nw/property/identity-theft/index.htm?WT.svl=2
[56] http://www.boston.com/business/articles/2005/02/06/providers_push_insurance_covering_theft_of_identity/
[57] See Canadian Consumer Initiative, "Canadian Consumer Initiative Identity Theft Policy Position" February 1, 2005. Online: http://www.piac.ca/financial/canadian_consumer_initiative_identity_theft_policy_position

is not created by them and which could be prevented. This is not fair, nor, in economic terms, efficient. If companies were required to alert customers of data leaks, customers could take pro-active measures to avoid loss such as ordering a free copy of their credit report or canceling and replacing credit cards which are compromised.

Secondly, credit monitoring can be used as a 'quick fix' to appease customers and deter them from seeking damages in actions for breach of confidence or negligence. Free credit monitoring for one year was offered in this fashion by Equifax Canada after a recent data leak on the information of 2000 individuals,[58] and previously for a leak in British Columbia in 2005.[59] In the U.S., this strategy was recently disapproved by a Federal Court judge in a case where the US. Veterans Administration was facing a class-action lawsuit for the loss of personal information of several thousand U.S. veterans.[60] The judge blocked the publication of the offer of free credit monitoring directly to the veterans, accepting the veterans' counsel's argument that conveying such an offer would distract the veterans from seeking a more substantial (monetary) award. The flaw in the argument that credit monitoring is an adequate compensation for a data leak is that monitoring credit does not stop new accounts being opened in one's name. As such, it may give consumers a false sense of security. This is especially so since thieves may attempt to use the information after the free monitoring period is finished. Consumers therefore may feel obligated to continue with credit monitoring after the free period – meaning they end up paying for the mistake of the credit grantor or credit bureau after all.[61] This leads to the discussion of the second major effect of ID theft insurance and credit monitoring on efforts to control ID theft, consumer control of their credit.

The second major challenge faced by consumers regarding ID theft is that even when they know or suspect ID theft is occurring, they have almost no control over the granting of false credit. To fight this, consumer groups in Canada and the U.S. have called for a 'credit freeze' to be instituted in legislation. This has actually been implemented in California. A credit freeze means a consumer may inform the credit bureau that all credit applications are unauthorized and the bureau reports this 'frozen' status to the credit grantor. The legislation then either forbids the granting of credit to a name that matches a frozen account or makes the credit grantor liable for the loss from any ID theft. If a consumer needs to access credit during the freeze, it can be temporarily lifted, either with a

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[58] See Don MacDonald, "2,000 consumer files stolen from credit reporting agency" Montreal Gazette, June 20, 2006, p. A1.
[59] See "New Equifax Data Breach" p2pnet.net News, June 17, 2005. Online: http://p2pnet.net/story/5252
[60] See . Associated Press, "Judge bars government from publicizing its credit monitoring offer" June 26, 2006. Online: http://www.siliconvalley.com/mld/siliconvalley/news/editorial/14905405.htm
[61] See above, Montreal Gazette, "2,000 consumer files stolen from credit reporting agency". A victim is quoted as complaining about the ongoing cost:

> But Martine objected to the one-year time limit on free access to the service, saying it's unfair that she will have to cough up $15 a month after the year ends.
> "It wasn't my fault," she said. "If I want to keep that security, I will have to pay for the rest of my life."

PIN or some other security system. A fee may be required to free credit temporarily. However, such a system gives back to the consumer a measure of control over his or her credit, which is essential in the face of the identity theft threat.

ID theft insurance and credit monitoring likewise may undermine the effort to win consumers a credit freeze right. The need for a credit freeze has been criticized in the U.S. by counsel for the American Bankers' Association and by the Consumer Data Industry Association, a trade group for U.S. credit-reporting agencies, as an unnecessary incon[62]venience for consumers.[63] Adding insurance for consumers and a credit monitoring service appears to strengthen this attitude that full credit freezes are not necessary and consumers can keep credit convenience, as long as they have "protection".

However, insurance and credit monitoring will not encourage credit grantors and credit bureaus to improve practices, as would a threat of a credit freeze. ID theft insurance and especially credit monitoring will not encourage knowledge of consumers' rights to free credit reports.   Insurance and credit monitoring are after-the-fact remedies that do not help a consumer prevent fraud, as would a freeze put in place upon notification of a data breach. Insurance and credit monitoring do not remove the stress of being an ID Theft victim, nor remove most of the work the victim must undertake to protect and rehabilitate his or her credit. It will not address consumer fear and unease with online transactions or improve confidence in electronic commerce. It will not help consumers who are unable to afford, or who choose not to have, ID Theft insurance or credit monitoring. Instead it will allow companies to continue to do business with identity theft being written off as a cost of business. And it will continue to make identity theft lucrative and relatively risk-free for criminals.[64]

Perhaps most importantly, ID theft insurance and credit monitoring continues the lack of control of the consumer over their credit, by making them a passive recipient of these after the fact services.

What is really needed, according to at least one expert, is to reverse this onus and to provide identity theft (data leak) insurance for *corporations*. Detective Sergeant Barry Elliott of the PhoneBusters National Call Centre notes that there is not, to date in Canada, adequate insurance for corporations seeking to insure <u>themselves</u> against losses for data breach liability.[65] If such coverage were offered, it is possible that corporations that handle data could implement best practices to qualify for such insurance and to keep premiums down. They also

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[63] Leland and Zeller, "Technology and Easy Credit Give Identity Theives an Edge" New York Times, May 30, 2006. Online: http://www.nytimes.com/2006/05/30/us/30identity.html?ex=1151726400&en=fad4c181cb45bd5d&ei=5070 (registration required).

[64] Leland and Zeller, *op. cit.*

[65] Elliott interview, *supra*.

then would be less likely to insist that consumers should be carrying identity theft insurance or closely monitoring their credit reports.

Does ID theft insurance or credit monitoring itself pose a risk of ID theft?

Finally, consumers should be wary in applying for ID theft insurance and credit monitoring. Many of the services are offered primarily through websites. By its nature, ID Theft insurance and credit monitoring services require the consumer to enter sensitive personal information. Most credit monitoring services at least ask for social insurance numbers[66] as well as name, address, former address, phone number and place of employment. This is, however, the very information identity thieves are seeking.

As noted above, credit bureaus such as Equifax have become a particular target of ID thieves.[67] There is little reason to doubt that ID theft insurers and credit monitoring services likewise will become targets.

Consumers should be wary in revealing such information and take efforts to verify the offeror of insurance or credit monitoring before revealing such personal details. Credit monitoring and ID theft insurance services should not only take precautions to protect the personal information they collect that is proportionate to the sensitivity of the personal information,[68] but also given the situation and the state of mind of consumers (that is, the protection of identity in a climate of fear of personal information loss) should act in a manner that reflects more the attitude that they are trustees of the personal information collected and held by them. In the absence of a data breach disclosure law, ID theft insurance and credit monitoring businesses could discharge this higher burden and lead by example in revealing any data breaches publicly and preparing breach plans, as recommended by the Consumer Measures Committee.[69]

Conclusion & Recommendations

Any objective look at identity theft services, including ID theft insurance and credit monitoring must conclude that the product coverages and benefits of both to consumers are miserly, while playing upon, and possibly even worsening, the consumer misery that is identity theft.

Identity theft insurance is in its infancy in Canada but can be expected to grow quickly, as it has in the U.S.. Unfortunately, stand-alone coverage offered is so limited as to be uneconomic for the majority of consumers. Coverage for actual

[66] See for example, the application of Identity Guard:

[67] Equifax has sustained at least 5 serious breaches of data in the last 3 years in Canada. See.

[68] See the Personal Information Protection and Electronic Documents Act, S.C. 2000. c. 5, Sch. 1, para. 4.7

[6969] See the CMC website regarding the “Business Identity Theft Kit”, which recommends a plan for notifying customers in the case of a data breach. See especially “What To Do When A Thief Strikes: Steps to Take When Information is Compromised”. Online: http://cmcweb.ca/epic/internet/incmc-cmc.nsf/en/fe00084e.html fraud losses is nearly always excluded, but may be expected by many consumers, and insurers should take pains to disclose this limitation in a transparent way. In those cases where some direct financial loss is covered, such as for debit and credit card losses, insurers should be required to point out the existence of zero liability policies of credit card issuers and refer potential clients to the existence of the *Canadian Code of Practice for Consumer Debit Card Services*. In like fashion, companies offering credit reporting services are effectively re-selling as a convenience product a document that consumers have a right to access free – their own credit report. These companies should also be required to inform customers of the existence of their right to a free credit report.

Other substantial items of ID theft insurance include time off work coverage and legal assistance coverage. While these coverages could be of value to consumers, time off work claims are either themselves capped and limited to an average of only $2000 or limited by an overall cap that is similar. Legal coverage is not clearly defined by insurers; in some cases this legal assistance may amount to no more than general advice from a lawyer on a phone but no individual assistance with defence work. Even in cases where legal assistance is more substantial, consumers may not obtain much advantage, as creditors will not tend to sue when presented with a police report and identity theft affidavit.

Insurance regulators should keep close eyes on ID theft insurers to insist on adequate disclosure of the limits of this type of insurance. Consideration should be given by legislators to requiring disclosure of free credit reports and adequate description of alternate coverage for ID theft losses such as credit card zero loss policies and the existence debit code.

Identity theft insurance and credit monitoring appear to have the potential to slow efforts at reducing or eradicating identity theft, by shifting the costs of identity theft to the individual. Credit monitoring should not be used as a supposed remedy for data breaches after the fact. Such an approach is inadequate and leaves consumers vulnerable to actual ID theft but with a false impression of security. Emphasis instead should be placed on corporations handling personal information to report breaches, and legislation allowing consumers to place credit freezes on their credit files. Insurance for data leaks <u>for corporations</u> may assist in achieving better corporate policies to reduce the data leaks that lead to the worst identity theft.

Finally, consumers (and government) should be careful to ensure that only legitimate companies collect personal information with the promise of ID theft insurance or credit monitoring. Companies offering these services should reach a “gold standard” of security for the personal information they collect.

Identity theft insurance may be a worthwhile product in the future, especially when linked to home or tenant’s insurance at more modest premiums. However, coverage for items such as time off work and legal fees should be raised and greater coverage for actual fraud losses should be considered as features offered by insurers before consumers have a second look at this product. Credit monitoring services are unnecessary; consumers have a right to this information for free; the existence of such services only underlines the need to better educate consumers about their right to take this basic step to help protect themselves from identity theft.