

What is Aggravated Identity Theft?

Have you been charged with a violation of “Identity Theft” or “Aggravated Identity Theft”? Is so, it is essential that you engage experienced legal counsel to represent your interests and help safeguard your liberty. The highly-ranked attorneys at Liles Parker can assist you in mounting an aggressive defense to these Federal criminal charges. An overview of these statutes is set out below.

I. What is Aggravated Identity Theft?

On July 15, 2004, President Bush signed into law the “Identity Theft Penalty Enhancement Act,” Public Law 108-275. The law is codified at 18 U.S.C. §1028A. Under this statute it is a crime to **knowingly transfer, possess, or use, without lawful authority, a means of identification of another person, during and in relation to any felony violation of certain enumerated Federal felony offenses.**

While there are cases where the government’s primary focus in identity theft and it is completely reasonable for these violations to be pursued, that isn’t always the situation. Charges of Aggravated Identity Theft are now routinely included in health care fraud related indictments, where one or more of the allegations is that the defendant has knowingly, and without a lawful purpose, used the insurance identification information of a beneficiary when committing fraud against a Medicare, Medicaid or private insurance benefit program.

II. What is the Difference Between “Identity Theft” and “Aggravated Identity Theft”?

Simply stated, “Identity Theft” occurs when an individual knowingly steals or uses the identification of another person with the intent of later committing a crime.^[1] In comparison, “Aggravated Identity Theft” involves the theft of another person’s identity “during and in relation” to the commission of an enumerated Federal felony offense.

III. Aggravated Identity Theft Charges Fall Into Two Categories:

Aggravated Identity Theft can only occur when the identity theft takes place “during and in relation” to one of a number of specified other Federal crimes. What are these specified Federal crimes? The predicate Federal felony offenses that may give rise to a charge of Aggravated Identity Theft fall into two categories.

Category #1: Approximately 60 Federal felony white collar predicate offenses.

The first category of Aggravated Identity Theft involves situations where identity theft allegedly

takes place during and in relation to one of approximately 60 Federal felony white collar offenses, a violation of which is punishable by a mandatory minimum of two years imprisonment. Examples of the 60 predicate offenses^[2] include:

18 U.S.C. § 1001 (relating to false statements or entries generally),

18 U.S.C. § 1035 (relating to false statements relating to health care matters),

18 U.S.C. § 1347 (relating to health care fraud)

18 U.S.C. § 1343 (relating to wire fraud)

18 U.S.C. § 1341 (relating to mail fraud)

Category #2: Approximately 50 Federal felony terrorism-related predicate offenses.

The second category of Aggravated Identity Theft involves situations where identity theft allegedly takes place during and in relation to one of approximately 50 Federal felony terrorism-related offenses, ^[3] a violation of which will result in a mandatory minimum of five years imprisonment. To date, the government has not been very aggressive in pursuing these charges in terrorism-related prosecutions

The story is quite different when the underlying predicate offense is an enumerated white collar offense. In recent years, we have seen a significant increase in the number of “Aggravated Identity Theft” charges included in indictments for health care fraud, mail fraud, wire fraud, and violations of the Anti-Kickback Statute.

III. Why Would a Prosecutor Include an Aggravated Identity Theft Charge in a Health Care Fraud Prosecution?

Why would a prosecutor bother to include an Aggravated Identity Theft in a health care fraud related indictment? **Leverage.**

By including this charge in the indictment, should the case go to trial and a defendant be found guilty of violating 18 U.S.C. §1028A(1), the defendant will be sentenced to a mandatory minimum of two years in jail. In fact, by statute, a Court is not permitted to place anyone convicted of a violation of 18 U.S.C. §1028A on probation.^[4] Even more troubling is the fact that in cases where multiple violations of identity theft have been charge, if found guilty, these additional two-year terms of imprisonment must run consecutively, not concurrently.^[5] As a final point, a sentencing judge may not reduce a defendant’s term of imprisonment for the underlying predicate offense in order to account for the mandatory two-year minimum terms that must be imposed for each Aggravated Identity Theft violation.^[6]

Collectively, these factors effectively place an enormous amount of pressure on health care fraud defendants to plea bargain in exchange for the dismissal of identity theft charges.

IV. Defending Charges of Aggravated Identity Theft:

When representing a client in an Aggravated Identity Theft case, there are a number of elements to the statute that should be analyzed and may present opportunities to mount an effective defensive strategy. For example:

Has a proper defendant been named? Under 18 U.S.C. §1028A, only an individual may be charged. Additionally, a conviction under this statute can only result in imprisonment, not in a fine. Since corporate entities and organizations cannot be imprisoned and no fine may be imposed, this provision is only able to punish individuals.

Did the Aggravated Identity Theft violation occur “*during and in relation to*” the commission of a predicate offense? You may ask, “What does this mean”? The U.S. Supreme Court has carefully examined this requirement and held that the phrase “during and in relation to” describes the connection, necessary for a violation under the section, between the predicate offense and the other identity theft elements. [7]

Has a proper predicate offense been cited? Remember, in order to bring an Aggravated Identity Theft charge, the government has to show that one of the 60 white collar qualifying predicate offense was committed.

Can the government show that the conduct was committed “*knowingly*”? Knowledge is an essential element of the statute. In order to prove a violation of the Aggravated Identity Theft statute, the government must show that the defendant had knowledge that he or she transferred, possessed or used, without legal authority, the identity of another person. If the government cannot show that the knowledge element is met, the charge cannot be sustained.

Can the government show that the defendant transferred, possessed or used the identity of another person? Unfortunately, it is often difficult to successfully dispute this element of the statute due to the broad scope of the terms “transfer,” “possess” and “use.” Nevertheless, you should examine this argument carefully to determine whether you have a basis to challenge this element.

Can the government show that a defendant’s use of another individual’s identification “*without legal authority*”? This element of the statute does not turn on whether the defendant has the permission of an individual to use his or her identification.

Rather, it depends on whether or not the defendant's use of someone else's identification was for an unlawful purpose.

Was the unlawful use of identification information related to a real person? You can't violate the Aggravated Identity Theft statute if you used the identification of a fictitious person.

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A number of our experienced attorneys served as Federal prosecutors and held significant positions at the U.S. Department of Justice. Our team of former Federal prosecutors and white collar defense attorneys will aggressively work to protect your financial interests and, most importantly, help safeguard your liberty. Do you need help? Give us a call for a complimentary consultation. We can be reached at: 1 (800) 475-1906.

[1] In 1998, Congress passed the "Identify Theft and Assumption Deterrence Act," Public Law 105-318. The Identity Theft statute is codified at: 18 U.S. Code § 1028 - Fraud and related activity in connection with identification documents, authentication features, and information.

[2] A listing of the broad categories of felony violations that may serve as a predicate offense are outlined in [18 U.S.C. § 1028A\(c\)\(1\) through \(11\)](#).

[3] A listing of the types of terrorism-related crimes that may serve as a predicate offense are outlined in [18 U.S.C. § 2332b\(g\)\(5\)\(B\)](#).

[4] 18 U.S.C. §1028A(b)(1).

[5] 18 U.S.C. §1028A(b).

[6] 18 U.S.C. §1028A(b)(3).

[7] Smith v. United States, 508 U.S. 223 (1993).