Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft [*Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550 (Minn. 2003)]

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I. Introduction

Armed with internet access, stolen credit card numbers, and social security numbers, identity thieves committed over 9.9 million cases of identity theft in 2003.[1] "Identity theft is one of the fastest growing crimes" in the country today.[2] Businesses and financial institutions lost over forty-eight billion dollars while consumers lost five billion dollars in out-of-pocket expenses due to identity thefts.[3]

Generally, an identity thief obtains another person's identifying information, usually a social security number, and then uses this information to open a bank account, obtain a credit card, obtain a loan, or even commit crimes in another person's name.[4] Identity thieves are resourceful, obtaining social security numbers by digging through trash, stealing a wallet or purse, stealing a driver's license, stealing mail, or simply purchasing a social security number over the internet.[5] Yet, the largest source of identity theft is committed by individuals with access to personnel files within a business or organization.[6]

Victims of identity theft, while not liable for the expenses incurred in their names, bear the burden of proving their innocence and good name.[7] Victims must often spend hundreds of dollars and count-

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1. Press Release, Fed. Trade Comm'n, FTC Releases Survey of Identity Theft in the U.S. 27.3 Million Victims in Past 5 Years, Billions in Losses for Businesses and Consumers (Sept. 3, 2003), http://www.ftc.gov/opa/2003/09/idtheft.htm [hereinafter FTC Press Release]. In the past five years, 27.3 million Americans were victims of identity theft. *Id.*
2. Stephen F. Miller, *Someone Out There Is Using Your Name: A Basic Primer on Federal Identity Theft Law*, 50 Fed. Law. 11 (2003).
3. FTC Press Release, *supra* note 1.
4. *See Identity Theft: How to Protect and Restore Your Good Name: Hearing Before the Subcomm. on Tech., Terrorism, and Gov't Info. of the Comm. on the Judiciary*, 106th Cong. 32 (2000) [hereinafter *Identity Theft*]. A portion of the statements including Beth Givens' statement is available at http://www.privacyrights.org/ar/id_theft.htm. *See also* FTC Press Release, *supra* note 1.
5. *Identity Theft, supra* note 4, at 33.
6. *Stop Identity Thieves from Stealing You*, Consumer Rep., Oct. 2003, at 16; *see also Identity Theft*, *supra* note 4, at 32 (stating that "dishonest employees can obtain SSN's in the workplace by obtaining access to personnel files").
7. *See* Miller, *supra* note 2; *see also* 15 U.S.C. § 1643 (2000) (limiting credit card holder's liability for unauthorized use); Brandon McKelvey, *Financial Institutions' Duty of Confidentiality*

less hours resolving the identity theft, a process that takes an average of two years.[8] Most concerning, however, is the fact that victims are left with a bad credit history because of the identity theft.[9] As a result, victims are often denied loans, credit, and even mortgages due to their bad credit history.[10] Therefore, the general goal is to prevent social security numbers from ever reaching identity thieves.[11]

When Sandra Bodah and other employees at Lakeville Motor Express, Inc. (LME) learned that their employer had faxed a list containing their names and social security numbers to sixteen different terminal managers within the company, they expressed concern about identity theft.[12] The employees later sued their employer, alleging that the dissemination of their social security numbers to those sixteen managers qualified as an invasion of their right to privacy.[13] The LME employees specifically alleged that their employer's conduct constituted the tort of publication of private facts.[14] LME responded that the employees' claim must fail because the fax did not reach the public at large as required by the *Restatement (Second) of Torts*' definition of "publicity."[15] In *Bodah v. Lakeville Motor Express, Inc.*,[16] the Minnesota Supreme Court held that the employees failed to allege sufficient publicity, as defined by the *Restatement*, to support their claim of publication of private facts and, therefore, dismissed the claim.[17] In so ruling, the Minnesota Supreme Court ignored the inherent privacy interest an individual maintains in his or her social security number and the risk of identity theft that accompanies the disclosure of social security numbers.

In light of current information technology and widespread use of social security numbers as personal identifiers, the dissemination of a social security number poses a significant risk of harm.[18] Individuals whose social security numbers have been disseminated arguably experience emotional distress and potential pecuniary losses. For these reasons, the publicity requirement under the tort of publication of private facts must be redefined to control the dissemination of social se-

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to Keep Customer's Personal Information Secure from the Threat of Identity Theft, 34 U.C. Davis L. Rev. 1077, 1086-87 (2001).

8. *Identity Theft*, *supra* note 4, at 42.
9. *Id.*
10. *See id.* at 34.
11. *See generally* Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. Marshall J. Computer & Info. L. 529 (1998).
12. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 552 (Minn. 2003).
13. *Id.* at 553.
14. *Id.*; *see* Restatement (Second) of Torts § 652D (1977).
15. *Bodah*, 663 N.W.2d at 554-55.
16. 663 N.W.2d 550 (Minn. 2003).
17. *Id.* at 557-58.
18. *See* Daniel Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 Hastings L.J. 1227, 1228, 1242-60 (2003).

curity numbers. The *Restatement*'s publicity test should consider not only the breadth of the disclosure but also the nature of the recipient and the nature of the information disclosed.

II. Case Description

Lakeville Motor Express, Inc., a trucking company based out of Minnesota, transports shipments throughout several states in the upper Midwest.[19] To distribute its freight, LME maintains trucking terminals owned either by LME, LME's agents, or independent trucking companies.[20] On January 4, 2001, LME's Safety Director, William Lowell Frame, sent a fax to sixteen freight terminal managers.[21] The fax cover sheet was not addressed to any particular individuals but instead was directed to "Terminal Managers."[22] The cover sheet stated that "in order for the safety department to keep computer records for terminal accidents, injuries, etc. we need to have social security numbers, names, hire date, and termination date."[23] The fax contained a list of over two hundred LME employees' names and social security numbers and instructed the terminal managers to review the list, add or delete any names or information as necessary, and then fax the updated list back to Frame.[24] The cover sheet contained no confidentiality statement or warning.[25]

John Tonsager, the head Union Steward, approached Frame and LME's president, Peter Martin, to discuss the dissemination of the employees' information in the fax.[26] Tonsager expressed concern over the possibility of identity theft resulting from the dissemination of the employees' sensitive information.[27] On May 1, 2001, Martin sent a letter to the employees whose information was contained in the fax, notifying them about the dissemination of their information.[28] Martin apologized in his letter for sending the fax and informed the employees that the terminal managers had been instructed to "destroy or return the list immediately."[29] Martin's letter further indicated that these instructions had been followed and that, to the best of his knowledge, "the terminal managers had not shared the employees' information with anyone."[30]

19. Bodah v. Lakeville Motor Express, Inc., 649 N.W.2d 859, 860 (Minn. Ct. App. 2002), *rev'd*, 663 N.W.2d 550.
20. *Id.*
21. *Bodah*, 663 N.W.2d at 552.
22. *Id.*
23. *Lakeville Motor Express, Inc.*, 649 N.W.2d at 860-61.
24. *See Bodah*, 663 N.W.2d at 552.
25. *Lakeville Motor Express, Inc.*, 649 N.W.2d at 861.
26. *Bodah*, 663 N.W.2d at 552.
27. *Id.*
28. *Id.*
29. *Id.* at 552-53.
30. *Id.* at 553.

On September 6, 2001, several LME employees, Sandra Bodah, Wayne Senne, John Tonsager, and Mark Urick, filed a class action lawsuit on their behalf, and on behalf of all class members, against LME in Minnesota state court.[31] The suit alleged that LME's dissemination of the employees' social security numbers to the terminal managers constituted an invasion of the employees' right to privacy.[32] Specifically, the employees alleged that they maintained "an inherent privacy interest in their social security numbers, and the harm that can be inflicted on [the employees] from the disclosure of their social security numbers to an unscrupulous individual is alarming and potentially financially ruinous."[33] In their complaint, the employees sought declaratory judgment for liability against LME for violating the employees' privacy, general and special damages in excess of $50,000, and punitive damages.[34] In response, LME filed a Minnesota Rule 12.02(e) motion to dismiss for failure to state a claim upon which relief may be granted.[35] The court granted LME's motion to dismiss, holding that the dissemination of the employees' social security numbers did not constitute the publicity required to sustain a claim for publication of private facts.[36] The employees appealed the trial court's decision to the Minnesota Court of Appeals.[37]

The Minnesota Court of Appeals reversed the trial court's holding and remanded the case.[38] The court of appeals considered the issue of whether the employees sufficiently alleged a claim for invasion of privacy when LME faxed the employees' social security numbers to sixteen terminal managers.[39] According to the court of appeals, two

31. *See id.*
32. *Id.*
33. Appellant Lakeville Motor Express, Inc.'s Brief and Appendix app. at A-5, *Bodah* (C5-02-276). The appellant attached a copy of the employees' class action complaint to its brief. The employees specifically alleged,

> 18. That LME violated the privacy rights of each of the Class members by disseminating their social security numbers to 16 different trucking terminals throughout the upper Midwest. That these Class members have an inherent privacy interest in their social security numbers, and the harm that can be inflicted on [the employees] from the disclosure of their social security numbers to an unscrupulous individual is alarming and potentially financially ruinous.
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> 19. That as a direct and proximate result of this violation of the privacy rights of the Class members, each member has experienced and will continue to experience emotional distress knowing that their social security numbers have been disseminated publicly and they are now at greater risk for identity theft, and each member has incurred costs and will in the future incur costs to monitor their credit ratings and take preventative measures against identity theft.
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> 20. That Defendant's actions were highly offensive to a reasonable person.

Id. at A-5 to -6.
34. *Id.* at A-6.
35. *Bodah*, 663 N.W.2d at 553.
36. *Id.*
37. Bodah v. Lakeville Motor Express, Inc., 649 N.W.2d 859, 861 (Minn. Ct. App. 2002), *rev'd*, 663 N.W.2d 550.
38. *Id.* at 867.
39. *Id.* at 861.

"key determinations" had to be made regarding the employees' claim of publication of private facts: first, "whether a person's social security number is indeed a private fact" and second, whether sufficient publicity had occurred.[40] Noting that social security numbers are widely recognized as confidential information, the court of appeals concluded that social security numbers are indeed private facts.[41] The court held that under a claim of publication of private facts, the publicity requirement should determine whether the dissemination "unreasonably exposed [the employees] to a significant risk that their social security numbers would be misused."[42] The court then concluded that the publicity determination must consider the "breadth of disclosure" and the "nature of private data and the damage."[43] As a result, the court of appeals reversed the trial court's dismissal and remanded the case.[44]

LME then appealed to the Minnesota Supreme Court, seeking review of the court of appeals' denial of its motion to dismiss.[45] The Minnesota Supreme Court, considering an issue of first impression, determined whether the employees' allegations "constituted the requisite 'publicity' under Minnesota law to support a claim for publication of private facts."[46] The court adopted the definition of publicity as stated in the *Restatement (Second) of Torts* and held that the complaint did not sufficiently allege the "requisite 'publicity' to support a claim for publication of private facts."[47] As a result, the Minnesota Supreme Court reversed the court of appeals' decision, finding that the employees' claim could not survive LME's motion to dismiss.[48]

III. Background

A. *Evolution of the Invasion of Privacy Tort*

The common law tort of invasion of privacy began in a law review article written in 1890 by Samuel Warren and Louis Brandeis.[49] In their now famous article, *The Right to Privacy*, the authors considered whether the law afforded a principle that would protect an individual's right to privacy, and if so, to what extent an individual was pro-

40. *Id.* at 862.
41. *Id.* The court of appeals found persuasive the employees' argument that in today's society, social security numbers function as a "key to identity," providing access to a person's welfare benefits, social security benefits, checking account, and paycheck. *Id.*
42. *Id.* at 867.
43. *Id.* at 865-66.
44. *Id.* at 867.
45. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 551-52 (Minn. 2003).
46. *Id.* at 552.
47. *Id.*
48. *Id.* at 558-59.
49. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

tected.[50] The authors found that beyond the familiar contract and property rights, the law had begun to recognize "the legal value of sensations."[51] Calling attention to the technology of the time, namely "[i]nstantaneous photographs and newspaper enterprise," Warren and Brandeis believed that the law must afford some protection against the "evil of the invasion of privacy" committed by the newspapers.[52] According to Warren and Brandeis, the common law secured an individual's right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others."[53] The authors concluded that this right was indeed the right to privacy.[54] The article gained the attention of the legal community and sparked a long debate over whether the right to privacy actually existed.[55]

The first case to recognize and provide recovery based on the right to privacy was *Manola v. Stevens*[56] in 1890.[57] *Manola* was an unreported case in which a New York judge enjoined the publication of a photograph taken of a "scandalously" dressed actress while she was performing on stage.[58] But in 1902, the Court of Appeals of New York refused to recognize the right to privacy in *Roberson v. Rochester Folding Box Co*.[59] Only three years later, however, the Georgia Supreme Court rejected *Roberson* and expressly recognized the right to privacy in *Pavesich v. New England Life Insurance Co*.[60] The debate over the existence of the right to privacy continued until 1939 when the *Restatement of Torts* recognized the right to privacy, leading to widespread acceptance of the tort.[61] Section 867 of the *Restatement of Torts* provided that a person who "unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[62]

50. *Id.* at 197.

51. *Id.* at 193.

52. *Id.* at 195. The authors expressed disgust with the emerging practices of the newspapers of the time, stating that the press was "overstepping in every direction the obvious bounds of propriety and of decency" and filling "column upon column . . . with idle gossip, which [could] be procured only by intrusion upon the domestic circle." *Id.* at 196.

53. *Id.* at 198.

54. *Id.* at 213. Finding that the law recognized intellectual property rights, the authors argued that these rights were merely "instances and applications of a general right to privacy," which could be used to combat the evils of the newspapers and technology of the time. *Id.* at 198.

55. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384-89 (1960) (discussing court decisions debating the existence of the right to privacy).

56. Manola v. Stevens (N.Y. Sup. Ct. 1890), *cited in* Prosser, *supra* note 55, at 385.

57. *See* Prosser, *supra* note 55, at 385.

58. *Id.*

59. 64 N.E. 442 (N.Y. 1902) (refusing to recognize the right to privacy due to, among other things, a lack of precedent and a fear of restricting the freedom of the press).

60. 50 S.E. 68 (Ga. 1905) (stating that the "right to privacy has its foundation in the instincts in nature"); *see* Prosser, *supra* note 55, at 386.

61. *See* Prosser, *supra* note 55, at 386.

62. RESTATEMENT OF TORTS § 867 (1939).

The next influential article to address the right to privacy was written in 1960 by William L. Prosser.[63] In his law review article, *Privacy*, Prosser examined the scattered case law discussing the right to privacy.[64] Prosser concluded that the "right to privacy" was not one tort, but rather four distinct torts arising under the broader, general right to privacy.[65] Citing Prosser's article, the American Law Institute later defined the four privacy torts as "(a) unreasonable intrusion upon the seclusion of another," "(b) appropriation of the other's name or likeness," "(c) unreasonable publicity given to the other's private life," and "(d) publicity that unreasonably places the other in a false light before the public."[66] Currently, the *Restatement (Second) of Torts* lists these four separate torts under the general right of privacy, which provides that "one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other."[67]

B. *The Publication of Private Facts Tort*

In his 1960 law review article, Prosser examined the existing case law on the right to privacy and concluded that the law of privacy had been applied to protect four distinct privacy interests.[68] Included among these four privacy interests was what Prosser described as the "public disclosure of embarrassing private facts about the plaintiff," which is commonly known as the private facts tort.[69] Prosser traced a brief line of cases that, he argued, applied and developed the private facts tort, even though the cases themselves were decided upon general right to privacy principles.[70]

Prosser found that the private facts tort was first applied in a Kentucky case in 1927.[71] In *Brents v. Morgan*,[72] the defendant placed a notice in his garage window stating that the plaintiff owed him a certain amount of money and that the plaintiff had not paid back the debt.[73] The court held that the plaintiff had stated a valid cause of

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63. Prosser, *supra* note 55, at 36.
64. *Id.* at 388-89.
65. *Id.* at 389. Prosser described the four distinct torts as "1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, 2) public disclosure of embarrassing private facts about the plaintiff, 3) publicity which places the plaintiff in a false light in the public, and 4) appropriation, for the defendant's advantage, of the plaintiff's likeness." *Id.*
66. RESTATEMENT (SECOND) OF TORTS § 652A (1977).
67. *Id.* § 652A(1).
68. Prosser, *supra* note 55, at 389.
69. *Id.*; *see* RESTATEMENT, *supra* note 66, § 652D.
70. Prosser, *supra* note 55, at 392-98.
71. Brents v. Morgan, 299 S.W. 967 (Ky. Ct. App. 1927); Prosser, *supra* note 55, at 392-98.
72. 299 S.W. 967 (Ky. 1927).
73. *Id.* at 968. The defendant's notice stated, "Dr. W.R. Morgan owes an account here of $49.67. And if promises would pay an account[,] this account would have been settled long ago. This account will be advertised as long as it remains unpaid." *Id.*

action against the defendant for an invasion of privacy and remanded the case for trial.[74]

Then in 1931, the California Supreme Court decided what became the leading case to apply the private facts tort.[75] In *Melvin v. Reid*,[76] the appellant, Gabrielle Melvin, had been a prostitute and tried for murder.[77] Melvin was acquitted, "abandoned her life of shame," and began a new life upon her marriage.[78] Seven years after Melvin began a "virtuous" life in "respectable society," the defendants released a motion picture based on Melvin's previous life, using her maiden name.[79] Melvin alleged that as a result, her friends learned of her "unsavory" past and scorned and abandoned her, causing her mental and physical suffering.[80] The court concluded that the defendants' publication of Melvin's past life after she had chosen to start a new life, coupled with the publication of Melvin's maiden name, violated her right "to pursue and obtain happiness."[81] Although the *Melvin* court declined to decide the case expressly upon a general right to privacy,[82] Prosser later classified this decision as applying the private facts tort.[83]

Prosser concluded that the private facts tort concerned the interest in reputation, "with the same overtones of mental distress that are present in libel and slander."[84] He further noted that the private facts tort reached beyond the law of defamation, holding the defendant liable for publicizing truthful statements of fact without any malicious intent.[85] Ultimately, the American Law Institute listed the tort of publication of private facts among the four invasion of privacy torts.[86] The *Restatement* provides that "one who gives publicity to a matter concerning the private life of another" is liable when the matter publicized is "highly offensive to a reasonable person, and is not of legitimate concern to the public."[87] The vast majority of jurisdictions now

74. *Id.* at 971-72.
75. Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931); *see* Prosser, *supra* note 55, at 392.
76. 297 P. 91 (Cal. Ct. App. 1931).
77. *Id.* at 91.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 93 (stating that the right to "pursue and obtain happiness" was an "inalienable right guaranteed" by the Constitution).
82. *Id.* Referring to Melvin's "right to pursue and obtain happiness," the court stated, "[W]hether we call this right of privacy or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others." *Id.* at 93-94.
83. Prosser, *supra* note 55, at 392 (discussing several similar decisions following *Melvin*, which he also classified under the publication of private facts tort).
84. *Id.* at 398.
85. *Id.*
86. RESTATEMENT, *supra* note 66, § 652A(2)(c).
87. *Id.* § 652D.

recognize the private facts tort.[88] Minnesota is the most recent jurisdiction to recognize the private facts tort.[89] In 1998, finding that the right to privacy is an "integral part of our humanity," the Minnesota Supreme Court adopted the tort of publication of private facts in *Lake v. Wal-Mart Stores, Inc.*[90]

C. *Definition of "Publicity"*

Under the private facts tort, the plaintiff may recover only when *publicity* is given to a private matter.[91] The crux of the private facts tort is very often the publicity requirement and exactly how many people constitute "the public."[92] According to the *Restatement (Second) of Torts*, publicity means that a private matter is made public when it is communicated "to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[93] This publicity requirement is distinguished from the "publication" requirement, which establishes liability for defamation.[94] Publication for defamation requires only that a matter be communicated to a third person.[95] In sum, the publicity standard under the private facts torts is a high threshold, requiring that the private matter reach, or is certain to reach, the public at large.[96]

Many courts apply the publicity requirement exactingly.[97] In *Vogel v. W.T. Grant Co.*,[98] the Pennsylvania Supreme Court rejected the

88. *See, e.g.*, Shulman v. Group W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998); Doe v. Univision Television Group, Inc., 717 So. 2d 63, 64 (Fla. Dist. Ct. App. 1998); Baker v. Burlington, 587 P.2d 829, 832 (Idaho 1978); Rawlins v. Hutchinson Publ'g Co., 543 P.2d 988, 991 (Kan. 1975); Nelson v. Times, 373 A.2d 1221, 1223 (Me. 1977); Winstead v. Sweeney, 517 N.W.2d 874, 875 (Mich. Ct. App. 1994); Y.G. v. Jewish Hosp., 795 S.W.2d 488, 498 (Mo. Ct. App. 1990); Flowers v. Bank of Am. Nat'l Trust & Sav. Ass'n, 679 P.2d 1385, 1389 (Or. 1983).

89. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

90. *Id.* at 235 (adopting the private facts tort as defined by the *Restatement (Second) of Torts*). The *Lake* court stated that a person has both a public and private persona and that "[t]he heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." *Id.* Without considering the merits of the case, the *Lake* court adopted the tort of publication of private fact as well as the torts of intrusion upon seclusion and appropriation of another's likeness. *Id.* The dissent in *Lake* stated a reluctance to recognize a new tort in part because society had become "much more litigious" since the court last declined to adopt the tort of invasion of privacy in 1975. *Id.* at 236.

91. RESTATEMENT, *supra* note 66, § 652D.

92. *See id.* cmt. a.

93. *Id.*

94. *See id.* § 577 cmt. a (defining publication as any "act by which the defamatory matter is intentionally or negligently communicated to a third person").

95. *Id.* § 652D cmt. a.

96. *Id.* Comment a of section 652D emphasizes that the difference between publicity and publication does not depend on the *means* of the communication, but rather, on whether the communication reaches the public. *Id.*

97. *See, e.g.*, Dancy v. Fina Oil & Chem. Co., 3 F. Supp. 2d 737 (E.D. Tex. 1997); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994); Vogel v. W.T. Grant Co., 327 A.2d 133 (Pa. 1974).

98. 327 A.2d 133 (Pa. 1974).

plaintiffs' invasion of privacy claim against their creditor.[99] The court concluded that there was insufficient publication because the creditor had discussed the plaintiffs' debts with only four people.[100] In a similar debt-collection case, *Kuhn v. Account Control Technology, Inc.*,[101] the plaintiff alleged that her creditor committed public disclosure by disseminating to the plaintiff's co-workers information regarding the plaintiff's indebtedness.[102] The court dismissed the plaintiff's action, finding that any dissemination of such private facts had reached only a "small group" of the plaintiff's co-workers and, therefore, failed to meet the publicity requirement.[103] Similarly, the plaintiffs in *Dancy v. Fina Oil & Chemical Co*.[104] claimed that their employer had violated their right to privacy by disclosing the plaintiffs' absences from work.[105] The court dismissed the plaintiffs' claim, finding that the disclosure had reached only "some" co-workers and not the general public.[106]

However, a minority of jurisdictions have found that the *Restatement*'s publicity requirement is too high of a threshold.[107] These courts have moved away from the *Restatement*'s publicity test and have instead applied a "particular public" or "special relationship" test.[108] For example, in *Beaumont v. Brown*,[109] the plaintiff sued his employer for invasion of privacy, alleging that his employer sent a letter containing private facts to the plaintiff's superior officer in the United States Army Reserve.[110] The Michigan Supreme Court reviewed whether the plaintiff had sufficiently alleged an invasion of privacy claim based on a cause of action for publication of "embarrassing private facts."[111] The court reasoned that "communication of embarrassing facts about an individual to a public not concerned with that individual and with whom the individual is not concerned" does not interfere with the plaintiff's right to privacy.[112] Thus, the court

99. *Id.* at 138.
100. *Id.* at 137.
101. 865 F. Supp. 1443 (D. Nev. 1994).
102. *Id.* at 1448.
103. *Id.* (applying the *Restatement (Second) of Torts*' definition of publicity under a claim for public disclosure of private facts). The *Kuhn* court did not indicate the exact number of co-workers who received the disclosed information.
104. 3 F. Supp. 2d 737 (E.D. Tex. 1997).
105. *Id.* at 738.
106. *Id.* at 740 (finding that the employees' private facts had not been "made known to the general public" nor made known "to so many people that the matter must be considered substantially certain to become one of public knowledge"). The *Dancy* court did not indicate specifically how many co-workers received the disclosed information.
107. *See* McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985); Miller v. Motorola; 560 N.E.2d 900 (Ill. App. Ct. 1990); Beaumont v. Brown, 257 N.W.2d 522 (Mich. 1977).
108. *See McSurely*, 753 F.2d at 112; *Miller*, 560 N.E.2d at 903; *Beaumont*, 257 N.W.2d at 531.
109. 257 N.W.2d 522 (Mich. 1977).
110. *Id.* at 527.
111. *Id.*
112. *Id.* at 531.

stated that an actionable situation arose if the private facts reached a "particular public" whose knowledge of the private facts would be embarrassing to the plaintiff.[113] The plaintiff asserted that the defendant wrote the letter to the Army seeking to have the plaintiff investigated and that the letter would necessarily "pass through many hands."[114] The court held that the plaintiff had sufficiently alleged "unnecessary publicity" and "unreasonable and serious interference with the plaintiff's right to privacy" to constitute a question of fact for the jury.[115]

The District of Columbia Circuit Court of Appeals deviated substantially from the traditional publicity requirement in *McSurely v. McClellan*.[116] The *McSurely* court held that the publicity requirement was met when embarrassing information about the plaintiff reached only one person.[117] The defendant in *McSurely* had given private papers, written by Margaret McSurely, to McSurely's husband that contained facts about her life and affairs prior to her marriage.[118] Construing Kentucky law, the court found that while Kentucky had adopted the privacy torts as defined by the *Restatement (Second) of Torts*, Kentucky had nonetheless applied these principles flexibly.[119] While the private facts tort ordinarily applies only to communications reaching the public at large, the *McSurely* court stated that the publication requirement could be satisfied by a disclosure to a small number of people when a "special relationship" exists between the plaintiff and the people receiving the information.[120] The court held that "[i]n light of the content of the papers" and the marital relationship, the publicity requirement was met; therefore, the defendant's conduct would be actionable.[121]

Moreover, in *Miller v. Motorola*,[122] the plaintiff sued her employer for publication of private facts, alleging that the employer had disclosed to the plaintiff's co-workers that the plaintiff had undergone

113. *Id.* (stating that the "particular public" could be the general public if the plaintiff was a public figure, or fellow employees, church members, neighbors, and family if the plaintiff was not a public figure). The *Beaumont* court noted that in *Hawley v. Professional Credit Bureau, Inc.*, 76 N.W.2d 835 (Mich. 1956), two dissenting Justices opined that a publication of private facts to one person was sufficient to state a claim for unlawful publication. *Id.* at 529.

114. *Id.* at 531-32.

115. *Id*. at 532.

116. 753 F.2d 88 (D.C. Cir. 1985).

117. *Id.* at 113.

118. *Id.* at 94.

119. *Id.* at 112 (stating that "egregious conduct" could be actionable even when the conduct did not meet exactly the law's requirements). The *McSurely* court noted precedent indicating that "the size of the public is irrelevant." *Id.*

120. *Id.*

121. *Id.* at 113. Concluding that a rational jury could find that the defendant's conduct was highly offensive and served no legitimate public purpose, the court found that the defendant's actions constituted tortious publication of private facts. *Id.*

122. 560 N.E.2d 900 (Ill. App. Ct. 1990).

a mastectomy and reconstructive surgeries.[123] The plaintiff claimed she suffered severe mental, physical, and emotional distress as a result of the disclosure.[124] The *Miller* court agreed with the *Restatement*'s publicity requirement that "the communication must be made to the public at large."[125] But relying on both *Beaumont* and *McSurely*, the *Miller* court adopted the position that publicity may be established when the plaintiff shares a special relationship with the public to whom the communication is made.[126] Therefore, the court held that the plaintiff's allegations satisfied the publicity requirement.[127]

Ultimately, these courts have moved away from the traditional, stringent application of the *Restatement*'s publicity requirement in favor of a more flexible approach to defining an appropriate level of publicity. In sum, the majority of courts apply the *Restatement*'s publicity test stringently, while a minority of courts have adopted the particular public or special relationship test to determine publicity under a claim of publication of private facts.[128]

D. *Social Security Numbers and Identity Theft*

Recently, courts have increasingly addressed various public disclosures and disseminations of social security numbers.[129] Social security numbers were first introduced into use in 1936 as part of the Social Security System.[130] Originally, social security numbers were not intended for use as a general identifier, and indeed, the social security cards themselves contained the statement, "NOT FOR IDENTIFICATION."[131] Yet in the 1970s, various government agencies and private entities began to use social security numbers for identification purposes.[132] Congress recognized this increased use[133] and later passed the Privacy Act of 1974, which included a provision to control

123. *Id.* at 902. The plaintiff alleged that she first learned of a disclosure when a co-worker told the plaintiff that the co-worker had been told about the plaintiff's mastectomy. *Id*. The plaintiff further alleged her belief that "numerous other employees" knew of the plaintiff's condition. *Id.*

124. *Id.*

125. *Id.* at 903.

126. *Id*.

127. *Id.* In finding sufficient publicity, the *Miller* court did not indicate the specific number of co-workers who had received information about the plaintiff.

128. *See* McSurely v. McClellan, 753 F.2d 88, 112 (D.C. Cir. 1985); *Miller*, 560 N.E.2d at 903; Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977).

129. *See, e.g.*, Sherman v. United States Dep't of the Army, 244 F.3d 357 (5th Cir. 2001); *In re* Crawford, 194 F.3d 954 (9th Cir. 1999); Greidinger v. Davis, 988 F.3d 1344 (4th Cir. 1993); Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994).

130. Solove, *supra* note 18, at 1252.

131. *Id.*; *see* 93 CONG. REC. H27,976 (daily ed. Aug. 12, 1974) (statement of Rep. Philip Crane).

132. Solove, *supra* note 18, at 1252; *see* S. REP. 93-1183, *reprinted in* 1974 U.S.C.C.A.N. 6916, 6944 (discussing the need to adopt the Privacy Act of 1974 due to increased use of social security numbers by the government and private entities to improve efficiency and management while reducing identification errors).

133. Solove, *supra* note 18, at 1252.

the government's dissemination and collection of social security numbers.[134] Specifically, the Act prohibited any federal, state, or local government agency from denying "any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."[135]

Today, a social security number functions as a "quasi-universal personal identification number" used to identify an individual's financial information, educational information, medical records, employment information, and much more.[136] However, while social security numbers are being used to expedite government and private business administration, social security numbers are also increasingly being used to perpetrate identity theft.[137] The most common form of identity theft occurs when a thief obtains "pieces of information about an individual, usually a social security number" and a name, and then uses this information to represent himself or herself as that individual.[138] An identity thief often uses a stolen identity to fraudulently obtain credit cards and loans and to commit other criminal acts.[139] Victims of identity theft typically learn that their identity has been stolen when they are denied "credit or a loan due to a negative credit report" caused by the identity theft or when a creditor contacts the victim demanding payment.[140] Victims spend an average of 175 hours and substantial monetary resources trying to resolve their identity theft.[141]

The Identity Theft and Assumption Deterrence Act (ITADA)[142] currently imposes federal criminal penalties on an individual who "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law."[143] Yet, one recent survey estimated that an identity thief has approximately a 1-in-700 chance of being apprehended.[144] Additionally, the

134. Privacy Act of 1974, Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1896, 1909 (codified at 5 U.S.C. § 552a (1994)).

135. *Id.* This provision was repealed by Act Oct. 18, 1988, P.L. 100-503, § 6(c), 102 Stat. 2513.

136. Komuves, *supra* note 11, at 531-32, 536-49.

137. *See Identity Theft*, *supra* note 4, at 44.

138. *Id.* at 32.

139. *See id.*

140. *Id.* at 45.

141. *Id.*

142. 18 U.S.C. § 1028 (2000).

143. *Id.* § 1028(a)(7). The ITADA defines "means of identification" to include an individual's "name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number." *Id.* § 1028(d)(7).

144. Avivah Litan, *Reduce Identity Theft by Rectifying Too-Easy Credit Issuance* (Sept. 4, 2003), http://www4.gartner.com/DisplayDocument?id=408359&ref=G_search.

ITADA does not allow victims of identity theft to recover restitution for any costs incurred due to the identity theft.[145] Because federal consumer credit protection laws limit an individual's liability for fraud losses,[146] the ITADA does not consider the individual to be a "victim" for purposes of restitution.[147] Rather, because banks and financial institutions ultimately bear the cost of identity theft, such banks and financial institutions are considered the victims for purposes of restitution.[148] Thus, victims of identity theft cannot recover for expenses associated with their identity theft under current federal legislation.

The Federal Trade Commission (FTC) reported that 9.9 million people had been victims of identity theft in 2003 alone and that, over the last five years, 27.3 million Americans have had their identities stolen.[149] Consumer awareness of identity theft has increased significantly due to media coverage.[150] As a result, consumers are becoming increasingly cautious when disclosing their personal identifying information.[151] Identity theft has become a very real risk of everyday life.

1. Constitutional Challenges to the Disclosure of Social Security Numbers

As identity theft crimes skyrocket, courts have taken notice of the significant role that social security numbers play in the commission of these crimes.[152] More specifically, the disclosure of social security numbers has been challenged on constitutional grounds, as it was in *Greidinger v. Davis.*[153] Mark Alan Greidinger challenged Virginia's constitution, which required all citizens to provide their social security number on their voter registration application in order to be eligible to vote.[154] These voter registration applications were accessible to any

145. *See* Kurt M. Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act*, 8 CORNELL J. L. & PUB. POL'Y 661, 671 (1999) (stating that "federal courts are precluded from awarding restitution to individuals who incur expenses associated with the theft of their identities").

146. *See* McKelvey, *supra* note 7, at 1085-86; *see also* 15 U.S.C. § 1643 (2000) (limiting a credit card holder's liability for unauthorized use of credit card).

147. Saunders & Zucker, *supra* note 145, at 672; Stephen L. Wood & Bradley I. Schecter, *Identity Theft: Developments in Third Party Liability*, 8 Consumer. & Pers. Rts. Litig. Newsl., Summer 2002, at 3 (stating that a "consumer is not legally obligated to pay any of the bills the imposter incurred"); *see* 18 U.S.C. § 3663A.

148. *See* 18 U.S.C. § 3663A(a)(2) (defining a victim as a person "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered" and citing cases in which a bank qualified as a victim for restitution purposes); Wood & Schecter, *supra* note 147, at 672.

149. FTC Press Release, *supra* note 1.

150. *See Identity Theft*, *supra* note 4, at 35.

151. *See id.*

152. *See, e.g.*, *In re* Crawford, 194 F.3d 954 (9th Cir. 1999); Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993).

153. 988 F.2d 1344 (4th Cir. 1993).

154. *Id.* at 1345.

registered voter.[155] Greidinger applied for voter registration but refused to supply his social security number and, therefore, was subsequently prevented from voting.[156] Greidinger challenged the state's voter registration scheme, alleging that the public disclosure of his social security number "unconstitutionally burden[ed] his right to vote."[157]

Examining whether the disclosure of social security numbers constituted a "substantial burden" on the right to vote, the court found that "armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck."[158] The court concluded that egregious harm "can be inflicted from the disclosure of a SSN."[159] Ultimately, the court held that Greidinger's right to vote was substantially burdened because Virginia's statutes permitted public disclosure of social security numbers.[160]

However, in *In re Crawford*,[161] the Ninth Circuit held that the government's interest in requiring "nonattorney bankruptcy petition preparers" to disclose their social security numbers in bankruptcy filings outweighed the appellant's possible constitutional informational privacy interest.[162] Jack Ferm was a "nonattorney bankruptcy petition preparer" who had prepared and filed two bankruptcy petitions on behalf of two debtors without providing his social security number as required by law.[163] Ferm alleged that because bankruptcy filings are public records, the mandatory disclosure of his social security number violated his constitutional right to informational privacy.[164] The court acknowledged that public disclosure of Ferm's social security number subjected him to increased risk of identity theft, which "implicate[d] Ferm's informational privacy interests."[165] However, the court held that the government's interest in preventing fraud and the unautho-

155. *Id.* In addition, Statewide Voter Registration lists containing voters' social security numbers could be obtained by election candidates, political-party committees, political officers, and nonprofit organizations promoting voter registration. *Id.*

156. *Id.* at 1345-46.

157. *Id.* at 1346.

158. *Id.* at 1353.

159. *Id.* at 1354.

160. *Id.* (finding that Virginia's compelling state interest in preventing voter fraud could not justify public disclosure of social security numbers because that interest "could easily be met without the disclosure of the SSN").

161. 194 F.3d 954 (9th Cir. 1999).

162. *Id.* at 960.

163. *Id.* at 956 (stating that pursuant to 11 U.S.C. § 110(c), Ferm was fined for his failure to include his social security number on the bankruptcy filings).

164. *Id.* at 957-58.

165. *Id.* at 959.

rized practice of law in bankruptcy court outweighed "the speculative possibility of identity theft."[166]

2. Freedom of Information Act and State Public Disclosure Laws

The disclosure of social security numbers and the privacy interest in social security numbers have been frequently discussed and construed under the Freedom of Information Act (FOIA) and similar state open-records laws.[167] The FOIA generally requires a government agency to fully disclose public information when such information is requested by citizens.[168] However, there are nine exemptions under the FOIA restricting the disclosure of information that "would threaten broader societal concerns," such as privacy interests.[169] Exemption 6 under the FOIA "allows agencies to exempt from disclosure information contained in 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'"[170] This determination requires the court to balance "'the individual's right of privacy' against the basic policy of opening 'agency action to the light of public scrutiny.'"[171] Many courts have interpreted Exemption 6 of the FOIA to allow government agencies to exclude social security numbers from disclosure.[172]

For example, the Fifth Circuit considered whether the Army's redaction of social security numbers from a request made under the FOIA was appropriate to protect the privacy interests of Army personnel.[173] In *Sherman v. United States Department of the Army*,[174] the court found a "substantial informational privacy right" in social security numbers.[175] The court explained that an individual's privacy interest in his or her social security number does not stem from a concern that the social security number is embarrassing or compromising, but that the "simultaneous disclosure of an individual's name and confi-

166. *Id.* at 960. While the court did not consider a social security number to be "sensitive or intimate information" or that its disclosure led "directly to injury, embarrassment or stigma," the court did state that Ferm had "raised valid privacy concerns" and encouraged the Bankruptcy Courts "to consider enacting rules to limit the disclosure of [bankruptcy petition preparers'] SSNs." *Id.* at 960 n.9.

167. 5 U.S.C. § 552 (1994); *see, e.g.*, Sherman v. United States Dep't of the Army, 244 F.3d 357 (5th Cir. 2001); Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994).

168. 5 U.S.C. § 552; *Sherman*, 244 F.3d at 360.

169. 5 U.S.C. § 552; *Sherman*, 244 F.3d at 360.

170. *Sherman*, 244 F.3d at 361 (quoting 5 U.S.C. § 552(b)(6)).

171. *Id.* (citations omitted).

172. *See, e.g.*, *id.* at 360; *see also* Greidinger v. Davis, 988 F.2d 1344, 1354 (1999). Case law uniformly recognizes that social security numbers are exempt from disclosure under the FOIA "because their disclosure would 'constitute a clearly unwarranted invasion of privacy.'" *Id.* (quoting I.B.E.W. Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988).

173. *Sherman*, 244 F.3d at 359.

174. 244 F.3d 357 (5th Cir. 2001).

175. *Id.* at 366.

dential SSN exposes that individual to a heightened risk of identity theft and other forms of fraud."[176] The court determined that "individual citizens have a substantial informational privacy right to limit the disclosure of their SSNs, and consequently reduce the risk that they will be affected by various identity fraud crimes."[177] Finding that the plaintiff failed to articulate an overriding public interest in the disclosure of the social security numbers, the *Sherman* court upheld the Army's redaction of the social security numbers.[178]

In a similar case, the Ohio Supreme Court considered whether the state's public records act compelled the disclosure of city employees' social security numbers.[179] In *Beacon Journal Publishing Co. v. City of Akron*,[180] Beacon Journal Publishing Company (BJ) and Robert Paynter made a request pursuant to Ohio's public records statute to obtain a copy of the city's payroll files.[181] When the city provided BJ and Paynter a copy of the requested files with employee social security numbers deleted, BJ and Paynter requested a copy of the same records complete with employee social security numbers.[182] Because the city refused to provide the employees' social security numbers, BJ and Paynter filed a complaint alleging that, pursuant to Ohio's public records statute, they had a right to obtain a copy of the requested records complete with employee social security numbers.[183]

The Ohio Supreme Court found that the city employees had a legitimate expectation of privacy in their social security numbers.[184] The court held that the "high potential for fraud and victimization caused by the unchecked release of city employee SSNs outweigh[ed] the minimal information about the government processes gained" from disclosure of that information.[185] Reconciling federal law with Ohio's Public Records Act, the court held that the state's public records act did not require disclosure of the city employees' social security numbers.[186]

176. *Id.*

177. *Id.* The court further warned that the "increasing prevalence of identity fraud . . . demands that federal agencies take particular care" when publicly disclosing social security numbers. *Id.* at 367.

178. *Id.* at 366-67. *But see In re* Crawford, 194 F.3d 954, 960 (9th Cir. 1999) (concluding that the plaintiff's privacy interest in his SSN and the "speculative possibility of identity theft" did not outweigh the government's interest in requiring social security numbers on all bankruptcy court filings).

179. Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164, 165 (Ohio 1994).

180. 640 N.E.2d 164 (Ohio 1994).

181. *Id.* at 164.

182. *Id.*

183. *Id.*

184. *Id.* at 167.

185. *Id.* at 169.

186. *Id.*

In a similar state public-disclosure case, *Progressive Animal Welfare Society v. University of Washington*,[187] Progressive Animal Welfare Society (PAWS) requested a copy of a grant proposal from the University of Washington pursuant to the state's public disclosure act.[188] After the University refused to disclose the information requested, PAWS filed suit to seek access to the grant proposal.[189] The University claimed that the information requested was protected under the personal-information exemption.[190] The court explained that this exemption applied only to personal information maintained for public employees "to the extent that disclosure would violate [the employees'] right to privacy."[191] Pursuant to the state's Public Records Act, an employee's right to privacy was violated only when disclosure of information about that person was "highly offensive to a reasonable person" and was not a "legitimate concern of the public."[192]

The *Progressive* court stated that the "public disclosure of a public employee's social security number would be highly offensive to a reasonable person and not of legitimate concern to the public."[193] However, the court found that the personal-information exemption did not apply because "nothing resembling protected 'personal information' appeared in the information requested."[194] Ultimately, the court affirmed the lower court's decision to disclose those portions of the grant proposal not otherwise exempt from disclosure.[195]

3. Tort-Based Statutes

Finally, the Supreme Court of Rhode Island considered whether the defendant had violated the state statute prohibiting unreasonable publicity to private matters in *Pontbriand v. Sundlun*.[196] In *Pontbriand*, the Governor of Rhode Island, responding to a banking crisis, released to the media a list of individuals who had deposited over $100,000 in particular banks.[197] This list contained the plaintiffs' respective names, social security numbers, and account balances.[198] The

187. 884 P.2d 592 (Wash. 1994).
188. *Id.* at 595.
189. *Id.* at 596.
190. *Id.* at 598.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id*. at 599.
195. *Id.*
196. 699 A.2d 856, 863 (R.I. 1997). Under Rhode Island law, an individual has "the right to be secure from unreasonable publicity given to one's private life." *Id*. (citing R.I. GEN. LAWS § 9-1-28.1(a)(3) (1956)).
197. *Id.* at 860. After the initial release to the media, a newspaper published a portion of the list, which included two of the plaintiffs. *Id*.
198. *Id.*

plaintiffs sued the Governor for violating their privacy rights provided by the state statute.[199] The Rhode Island Supreme Court reversed the lower court's grant of summary judgment.[200] The court held that under the tort-based statute, the plaintiffs could recover for invasion of privacy if a jury first determined that the plaintiffs maintained an expectation of privacy in their bank records and that society would recognize such expectation, and that the disclosure was offensive to a reasonable person.[201]

In conclusion, identity theft crimes continue to affect more and more lives. Consequently, courts have increasingly addressed various challenges to the dissemination and disclosure of social security numbers.

IV. Analysis

The issue presented to the Minnesota Supreme Court in *Bodah* was whether the employees' allegation that LME had disseminated the employees' social security numbers to sixteen different terminal managers constituted the requisite publicity to support a claim for publication of private facts under Minnesota law.[202]

A. *Parties' Arguments*

1. Lakeville Motor Express, Inc.

LME argued that the dissemination by fax of the employees' names and social security numbers to sixteen different terminal managers did not meet the publicity requirement of the publication of private facts tort as defined under Minnesota law.[203] LME argued that in *Lake v. Wal-Mart Stores, Inc.*, the Minnesota Supreme Court adopted the publicity test as defined by the *Restatement (Second) of Torts*.[204] Therefore, under Minnesota law, the employees could state a claim for publication of private facts only if they could allege that their private information "was communicated to the public at large or to so many persons that the private information must be regarded as substantially certain to become public knowledge."[205] According to LME, the employees' complaint alleged only that their social security numbers were given to a "small, select group of terminal manag-

199. *Id.* at 864.
200. *Id.* at 870.
201. *Id.* at 865.
202. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 552 (Minn. 2003).
203. Appellant Lakeville Motor Express, Inc.'s Brief and Appendix at 4, *Bodah* (No. C5-02-276).
204. *See id.* at 6-7.
205. *Id.* at 7. LME maintained that the communication of the employees' information was purely a private communication, dealing with the "company's need to maintain accurate employee" data for use in preparing "accident or injury reports." *Id.* at 7-8.

ers."[206] LME claimed that because the employees failed to allege that their social security numbers were communicated to the public at large, their claim was properly dismissed by the district court.[207]

LME also argued that the Minnesota Court of Appeals went beyond its role as "an error-correcting court" when it formulated an expanded publicity test rather than applying the publicity test adopted by the *Lake* court.[208] The court of appeals held that publicity was determined based on the "breadth of the disclosure" and the "nature of the private data and the damage."[209] The court of appeals expressed concern that the "unnecessary display or dissemination" of an individual's social security number would pose a serious threat because social security numbers provide access to numerous personal records.[210] LME believed that this rationale would subject any employer or business in Minnesota to the threat of a class action lawsuit if such information was not kept under "lock and key."[211] For these reasons, LME requested that the court reverse the court of appeals' decision and affirm the trial court's decision to dismiss the employees' claim.[212]

2. Bodah, Employees

The employees argued that their complaint should survive LME's motion to dismiss for failure to state a claim upon which relief can be granted because the complaint sufficiently alleged the publicity requirement under the tort of publication of private facts.[213] The employees argued that contrary to LME's assertion, the *Lake* court did not adopt a particular publicity requirement.[214] For this reason, the employees argued that the court of appeals correctly determined that

206. *Id.* at 10.

207. *Id.*

208. *Id.* at 12.

209. Bodah v. Lakeville Motor Express, Inc., 649 N.W.2d 859, 865-66 (Minn. Ct. App. 2002), *rev'd*, 663 N.W.2d 550. The court of appeals further concluded that the publicity requirement "ought to be whether it unreasonably exposed appellants to a significant risk that their social security numbers would be misused." *Id.* at 867.

210. *See id.* at 866.

211. Appellant Lakeville Motor Express, Inc.'s Brief and Appendix at 14, *Bodah* (No. C5-02-276).

212. *Id.* at 21. LME also argued against the court of appeals' determination that in an invasion of privacy case, the defendant has the burden to show that the private information did not meet the publicity requirement. *Id.* at 16. Finally, LME argued that the court of appeals' decision was based on speculation regarding the possible dissemination of the employees' social security numbers beyond the sixteen terminal managers. *Id.* at 18.

213. *Bodah*, 663 N.W.2d at 555.

214. Respondents' Brief at 6, *Bodah* (No. C5-02-276). According to the employees, LME erroneously argued that Minnesota law required the respondents to allege that LME "communicated the private facts to the public at large." *Id.* at 5.

neither *Lake* nor *C.L.D. v. Wal-Mart Stores, Inc.*[215] constrained its decision to determine any particular publicity requirement.[216]

The employees then argued that their complaint alleged sufficient publicity to satisfy the *Restatement*'s definition.[217] Noting that the *Restatement*'s definition of publicity requires that the communication reach the public at large, the employees asserted that the comment containing that definition does not define a specific number of persons to whom the communication must be made to support a claim of publication of private facts.[218] The employees argued that despite all the authority cited by LME to demonstrate examples of "insufficient publicity," LME's dissemination was simply greater publicity than what is commonly considered insufficient publicity.[219] The employees asserted that using the most conservative estimate, their social security numbers reached sixteen individuals, the sixteen terminal managers.[220] However, the employees claimed that there is a reasonable inference that their information reached beyond the sixteen terminal managers because LME did not initiate any measures to control the dissemination until four months after the information was faxed.[221] For these reasons, the employees concluded that LME's dissemination quantitatively satisfied even the traditional publicity requirement as defined in the *Restatement*.[222]

The employees next advocated the publicity requirement defined by the court of appeals, which considered the "the breadth of disclosure" as well as "the nature of the private data and the damage" implicated by its disclosure.[223] The employees emphasized the significant

215. 79 F. Supp. 2d 1080 (D. Minn. 1999). In *C.L.D. v. Wal-Mart Stores, Inc.*, the District Court of Minnesota considered a claim of publication of private facts. *Id.* at 1083. The court stated that "relevant Minnesota cases offer no guidance regarding what facts an invasion of privacy tort claimant must allege in order to satisfy the burden of showing that 'publicity' or 'publication' of private information has occurred." *Id.* However, the *C.L.D.* court was persuaded that "when the Minnesota Supreme Court does address the definition of 'publicity' it will . . . hold that disclosure to a few individuals . . . is insufficient to state a claim under [the tort of invasion of privacy]." *Id.* at 1085.

216. Respondents' Brief at 7, *Bodah* (No. C5-02-276). The employees argued that "the Court of Appeals drafted its decision in a vacuum of Minnesota jurisprudence." *Id.* at 8.

217. *See id.*

218. *See id.* at 8-9. The employees claimed that the *Restatement*'s examples of publicity are only "vague illustrations" telling the reader "that a 'disclosure to small group of persons' is not sufficient 'publicity', while dissemination to a 'large number of persons' is sufficient" publicity. *Id.* at 9 (citing RESTATEMENT, *supra* note 66, § 652D cmt. a).

219. Respondents' Brief at 12, *Bodah* (No. C5-02-276).

220. *Id.* at 9. The employees reached this number assuming that only the terminal managers viewed the employees' private information and that each terminal had only one manager. *Id.* However, the employees alleged in their complaint that their social security numbers were disseminated to sixteen trucking *terminals*, and not sixteen terminal managers. *Id.* at 12; *see* Appellant Lakeville Motor Express, Inc.'s Brief and Appendix app. at A-2, *Bodah* (C5-02-276).

221. Respondents' Brief at 13, *Bodah* (No. C5-02-276). According to the employees, this inference was further supported by LME's inability to produce any indication that the dissemination did in fact reach only the sixteen terminal managers. *Id.*

222. *Id.*

223. Bodah v. Lakeville Motor Express, Inc., 649 N.W.2d 859, 865-66 (Minn. Ct. App. 2002), *rev'd*, 663 N.W.2d 550.

need for effective privacy protection of social security numbers because the exposure of social security numbers often results in "dire financial and personal injury."[224] The employees conceded that the court of appeals' opinion did not sufficiently explain the effects of the "nature of the private data" analysis on publicity determinations.[225] However, the employees believed that the court of appeals' discussion on the unique nature of social security numbers was instructive.[226] Ultimately, the employees argued that when determining sufficient publicity, the sensitive nature of the private facts disclosed should affect the traditional publicity analysis.[227]

B. *Bodah Opinion*

The Minnesota Supreme Court adopted the *Restatement*'s definition of publicity, requiring that the private information be communicated to "the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[228] The court held that the employees' complaint did not allege sufficient publicity to state a claim for publication of private facts.[229] Therefore, the court concluded that the employees' claim could not survive the 12.02(e) motion to dismiss.[230]

In its analysis, the court first determined that while the *Lake* court adopted the publication of private facts tort, it did not define publicity.[231] Turning to the definition of publicity, the court rejected outright the court of appeals' definition of publicity, which combined the *Restatement*'s "breadth of disclosure" analysis with a "nature of the private data and the damage" analysis.[232] The court rejected this

224. Respondents' Brief at 17-18, *Bodah* (No. C5-02-276).

225. *Id.* at 18.

226. *Id.*

227. *Id.* The employees then asserted that the court of appeals did not place the burden of proof on the defendant, but merely recognized that a defendant could succeed by converting a motion to dismiss for failure to state a claim upon which relief can be granted into a motion for summary judgment. *Id.* at 23. In their final argument, the employees asserted that the court of appeals did not base its decision on "improper speculation and innuendo" regarding matters not contained in the record nor in the complaint. *Id.* at 24. The employees pointed out again that the complaint alleged an invasion of their privacy through dissemination to sixteen different trucking *terminals* and not simply terminal managers. *Id.*

228. *Bodah*, 663 N.W.2d at 552, 554 (quoting RESTATEMENT, *supra* note 66, § 652D cmt. a).

229. *Id.* at 552.

230. *Id.* The court first addressed the burden of proof issue, ruling that the court of appeals did not shift the burden to LME but that the court of appeals merely suggested that LME could have converted its motion to dismiss into a motion for summary judgment. *Id.* at 555.

231. *Id.* at 553.

232. *Id.* at 556. The court of appeals had created a narrow publicity requirement for this case that, where dissemination of information was not done "for profit or with malicious intent," the publicity requirement "ought to be whether the dissemination unreasonably exposed [the employees] to a significant risk that their social security numbers would be misused." Bodah. v. Lakeville Motor Express, Inc., 649 N.W.2d 859, 867 (Minn. Ct. App. 2002), *rev'd*, 663 N.W.2d 550.

test for several reasons.[233] First, the court found that this definition "emasculate[d] the distinction between public and private by suggesting that 'publicity' can be established by either 'widespread dissemination or improper use.' "[234] Second, the court stated that this definition blurred the line between the publicity element and the "highly offensive" and "legitimate concern to the public" elements found in the *Restatement*.[235] Finally, the court stated that the court of appeals' determination that "an actionable situation requires a level of publication that unreasonably exposes [a complainant] to significant risk of loss under all the circumstances" placed an inappropriate emphasis on the reasonableness of a defendant's actions.[236] The court also rejected the "special relationship" or "particular public" approach to defining publicity.[237]

The court considered whether any legitimate or compelling public policy reasons "justified imposing liability for egregious but limited disclosures of private information."[238] Yet, the court found that the *Restatement*'s publicity definition "best addresse[d] the invasion of privacy cause of action–[that] absent dissemination to the public at large, the claimant's 'private persona' ha[d] not been violated."[239]

Applying the *Restatement*'s definition of publicity, the court concluded that the employees' allegation did "not constitute publication to the public at large nor to so large a group of people that the communication must be regarded as substantially certain to become public."[240] The court also concluded that the employees' claim that their social security numbers had not been redacted or erased and were "still being shared or [were] accessible in general," failed to allege sufficient publicity and was mere speculation.[241] Therefore, the Minnesota Supreme Court reversed the court of appeals' ruling because the facts as alleged in the employees' complaint did not "support the conclusion that there [was] 'publicity' to withstand" LME's motion to dismiss.[242]

233. *Bodah*, 663 N.W.2d at 556.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* The *Bodah* court did not discuss its reason for rejecting this test.
238. *Id.* at 557.
239. *Id.*
240. *Id.* at 557-58.
241. *Id.* at 558. The court found that this "general allegation" was mere speculation because a letter written by LME's president indicated that the faxed list had been returned or "destroyed and not shared." *Id.*
242. *Id.* at 558-59.

C. *Commentary*

The crux of *Bodah* was the publicity requirement that the employees' private information—their social security numbers—had to reach the "public at large" or "so many persons" that the information became or could have been "regarded as substantially certain to become one of public knowledge."[243] Considering an issue of first impression, the *Bodah* court dismissed the employees' claim solely because LME's dissemination of the social security numbers to sixteen terminal managers did not constitute sufficient publicity.[244] In so ruling, the court failed to recognize several key issues surrounding a simple disclosure of social security numbers, including the nature of the privacy interest in social security numbers as well as the emotional and potential economic harm that can result from the dissemination of such information.

In light of modern information technology and increased reliance on social security numbers as quasi-universal identifiers, today's privacy concerns challenge the traditional reach of the private facts tort.[245] Social security numbers are a key to one's identity and are frequently used to commit various forms of identity-theft crime.[246] As a result, an individual maintains a substantial privacy interest in his or her social security number. Moreover, due to this privacy interest and the heightened awareness of identity theft, individuals who learn that their social security number has been disseminated arguably experience emotional distress due to the fear of becoming an identity theft victim and incur costs while taking measures to prevent misuse of their identifying information.[247]

Finally, in the absence of effective legislation aimed at preventing identity theft and its consequences, the private facts tort is one tool that may be used to control the dissemination of social security numbers, reduce the risk of identity theft, and provide relief for the harms caused by such dissemination. However, the *Restatement*'s stringent publicity requirement often operates as a bar to recovery because such a dissemination rarely reaches the public at large. Therefore, due to the significant role that social security numbers play in identity theft and the serious harms that flow from the dissemination of social security numbers, the *Restatement*'s publicity requirement should be

243. RESTATEMENT, *supra* note 66, § 652D cmt. a.

244. *Bodah*, 663 N.W.2d at 557-58.

245. *See* Solove, *supra* note 18, at 1230-32 (stating that Warren and Brandeis "traditional model" of understanding privacy does not adequately address modern privacy problems because modern privacy problems are not "discrete wrongs to specific individuals" but are "systemic in nature").

246. *See Identity Theft*, *supra* note 4, at 32.

247. *See id.* at 42-44.

redefined to allow recovery for a limited dissemination of social security numbers.

1. Nature of the Information: Privacy Interests in Social Security Numbers

In *Bodah*, the employees' complaint expressly asserted that the employees maintained an inherent privacy interest in their social security numbers.[248] The Minnesota Court of Appeals agreed that social security numbers are indeed private facts because they facilitate access to many private and personal records and enable another person to commit identity theft.[249] However, the Minnesota Supreme Court failed to recognize the unique nature of social security numbers and the potential harms that can be caused by a simple disclosure of social security numbers. Instead, the *Bodah* court should have recognized the employees' interest in protecting their social security numbers from dissemination.

In a variety of settings, courts have increasingly recognized the inherent privacy interest in social security numbers, and for this reason, courts have afforded greater protection to social security numbers. As noted by the court in *In re Crawford*, social security numbers serve as "unique identifier[s] that cannot be changed and [are] not generally disclosed by individuals to the public."[250] Moreover, social security numbers are unique because they operate as a key to identity, providing ready access to an individual's private, sensitive information.[251] As a key to identity, social security numbers can be used against a person to commit identity theft and other fraudulent crimes.[252]

Recognizing the role that social security numbers play in identity theft and the harms caused by identity theft, many courts have concluded that an individual maintains a privacy interest in his or her social security number.[253] Citing examples of the "potential harm that the dissemination of an individual's SSN can inflict," the *Greidinger* court stated that the appellant's decision to withhold his social secur-

248. Appellant Lakeville Motor Express, Inc.'s Brief and Appendix app. at A-5, *Bodah* (C5-02-276).

249. Bodah v. Lakeville Motor Express, 649 N.W.2d 859, 862-63 (Minn. Ct. App. 2002), *rev'd*, 663 N.W.2d 550. The court of appeals discussed the unique nature of social security numbers even though the parties to the case did not dispute the private nature of such information. *Id.* at 863.

250. *In re* Crawford, 194 F.3d 954, 958 (9th Cir. 1999).

251. *See* Solove, *supra* note 18, at 1254.

252. *Id.*

253. *See, e.g.*, Sherman v. United States Dep't of the Army, 244 F.3d 357, 365 (5th Cir. 2001); Greidinger v. Davis, 988 F.2d 1344, 1353 (4th Cir. 1993); Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164, 165-69 (Ohio 1994). *But see In re Crawford*, 194 F.3d at 960 (ruling that the government's interests outweighed the plaintiff's privacy interests).

ity number was "eminently reasonable."[254] The court concluded that Virginia's statutes requiring a citizen to disclose his or her social security number in order to vote essentially subjected a would-be voter to the "possibility of a profound invasion of privacy."[255] Moreover, in *Sherman*, the court found that an individual maintained a "substantial informational privacy right to limit the disclosure" of his or her social security number and reduce the risk of identity theft.[256] Similarly, the court in *Beacon Journal* held that city employees' social security numbers were exempt from disclosure under Ohio's public records statute because disclosure would violate the employees' constitutional right to privacy.[257] In making its decision, the court found that the high risk for fraud and victimization resulting from the disclosure of employee social security numbers outweighed any minimal information regarding government operation gained from such disclosure.[258]

In addition, the court in *Progressive* stated that the public disclosure of an employee's social security number would violate an individual's right to privacy because such disclosure "would be highly offensive and of no legitimate concern to the public."[259] Finally, the court in *Pontbriand* held that the plaintiffs' allegations, that the public disclosure of their names, account balances, and social security numbers gave unreasonable publicity to their private matters, raised "genuine issues of material fact."[260]

In conclusion, some courts have recognized that egregious harms may be inflicted upon an individual due to the dissemination of his or her social security number.[261] Consequently, these courts have emphasized the privacy interest in social security numbers and shielded social security numbers from public disclosure, essentially treating social security numbers as private facts.[262] However, the *Bodah* court bypassed any discussion of whether social security numbers are private facts. The *Bodah* court should have recognized that social security numbers are inherently private facts that should be protected from dissemination.

254. *Greidinger*, 988 F.2d at 1354.

255. *Id.*

256. *Sherman*, 244 F.3d at 366.

257. *Beacon*, 640 N.E.2d at 165.

258. *Id.* at 169.

259. Progressive Animal Welfare Soc'y v. Univ. of Wash., 884 P.2d 592, 598 (Wash. 1994) (construing a state public disclosure act provision exempting from disclosure information that "would be highly offensive to a reasonable person and is not of legitimate concern to the public").

260. Pontbriand v. Sundlun, 699 A.2d 856, 865 (R.I. 1997).

261. *See, e.g.*, *Sherman*, 244 F.3d at 366; Greidinger v. Davis, 988 F.2d 1344, 1354 (4th Cir. 1993).

262. *Greidinger*, 988 F.2d at 1354.

2. Harms Flowing from the Dissemination of Social Security Numbers

Those courts that have shielded social security numbers from public disclosure have based their decisions on the harms that may be inflicted because of such disclosure.[263] As the *Greidinger* court stated, the harm caused by the disclosure of a social security number is alarming.[264] Indeed, the harms that may be inflicted from the dissemination of a social security number are serious and warrant closer examination. Once an individual's social security number has been disseminated, that individual may suffer emotional distress from the fear that his or her social security number will eventually be used to commit identity theft. Also, the individual may incur expenses when taking measures to prevent identity theft. Therefore, an individual who suffers either of these harms should be allowed to recover damages from the individual who disseminated his or her social security number.

For example, in *Bodah*, the employees alleged that as a proximate result of the disclosure of their social security numbers, they had experienced and would continue to experience "emotional distress knowing that their social security numbers have been disseminated publicly and they are now at a greater risk for identity theft."[265] Further, the employees alleged that they had "incurred costs and [would] in the future incur costs to monitor their credit ratings and take preventative measures against identity theft."[266]

Given the growing amount of information detailing the nature of identity theft and its serious consequences, an individual who learns that his or her social security number has been disseminated likely will fear becoming a victim and incur costs taking the prescribed preventative measures.[267] These harms—emotional distress and pecuniary loss—are similar to harms recognized in other tort contexts and should be recognized as harms giving rise to a cause of action for invasion of privacy.[268]

First, emotional distress from fear of becoming an identity theft victim is similar to the "fear of developing a future condition or dis-

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263. *See, e.g.*, *Sherman*, 244 F.3d at 366; *Greidinger*, 988 F.2d at 1354.

264. *Greidinger*, 988 F.2d at 1354.

265. Appellant Lakeville Motor Express, Inc.'s Brief and Appendix at A-5 to A-6, Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003) (C5-02-276).

266. *Id.* at A-6.

267. *See* FED. TRADE COMM'N, ID THEFT: WHAT'S IT ALL ABOUT (Oct. 2003), http://www.ftc.gov/bcp/conline/pubs/credit/idetheftmini.htm; Privacy Rights Clearinghouse, Victims' Stories, *at* http://www.privacyrights.org/cases/victim.htm (last visited Apr. 17, 2004).

268. *See* Fairfield v. Am. Photocopy Equip. Co., 291 P.2d 194, 199 (Cal. 1955) (stating that an individual whose right of privacy has been invaded is entitled to recover damages that "the law authorizes in cases of torts of that character").

ease" due to another party's negligence.[269] In particular, courts have allowed plaintiffs to recover for cancerphobia, the fear of developing cancer in the future.[270] In *Hagerty v. L&L Marine Services, Inc.*,[271] the court considered the plaintiff's claim of cancerphobia after the plaintiff had been drenched with a chemical that the plaintiff understood to be carcinogenic.[272] The court noted that cancerphobia is simply a "specific type of mental anguish or emotional distress."[273] Remanding the case for trial, the court stated that "with or without physical injury . . . a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence."[274] In a similar case, *Anderson v. Welding Testing Laboratory, Inc.*,[275] the court permitted the plaintiff to recover damages for anxiety and mental anguish resulting from his fear of developing cancer in his hand, which had become disabled due to significant radiation burns.[276] The *Anderson* court sympathized with the plaintiff's condition, emphasizing that the plaintiff lived every day with a fear that the swollen, painful condition in his hand might spread and that he might lose his fingers.[277]

Emotional distress from the fear of becoming a victim of identity theft is similar to the emotional distress from the fear of developing cancer. In both cases, the injured party seeks recovery for a purely emotional injury that is not presently accompanied by any measurable physical injury but was caused by the defendant's action. Specifically, a cancerphobia claimant seeks recovery for emotional distress due to the defendant's conduct based on the "protracted latency period" in which it is uncertain whether cancer may eventually manifest itself.[278]

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269. *See* Fournier J. Gale III & James L. Goyer III, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUM. L. REV. 723, 729 (1985). *See generally* Glen Donath, Comment, *Curing Cancerphobia Phobia: Reasonableness Redefined*, 62 U. CHI. L. REV. 1113 (1995).

270. *See* Hagerty v. L&L Marine Servs., Inc., 788 F.2d 315, 319 (5th Cir. 1986); Anderson v. Welding Testing Lab., Inc., 304 So. 2d 351, 353 (La. 1974). The term cancerphobia has been used to describe "the emotional distress caused by the fear of developing cancer." Gale & Goyer, *supra* note 269, at 724.

271. 788 F.2d 315 (5th Cir. 1986).

272. *Id.* at 317.

273. *Id.* at 318; *see* Gale & Goyer, *supra* note 269, at 725 (stating that cancerphobia, "as a measure of compensable damages in a legal action, is merely a subcategory of damages for emotional distress or mental anguish").

274. *Hagerty*, 788 F.2d at 318. The court found that the plaintiff had presented sufficient evidence "to make summary judgment of his cancerphobia claim improper" and explained that the jury must decide whether there was sufficient indicia of genuineness of fear, as well as the "existence, severity and reasonableness" of the plaintiff's fear. *Id.* at 318-19.

275. 304 So. 2d 351 (La. 1974).

276. *Id.* at 352-53.

277. *Id.* at 353.

278. Day v. NLO, 851 F. Supp. 869, 880 (S.D. Ohio 1994) (noting that exposure to certain chemicals may cause diseases with "protracted latency periods," which may not manifest themselves until years after the initial exposure).

Similarly, an individual whose social security number has been disseminated seeks to recover for the fear that he or she may eventually become a victim of identity theft because of the defendant's act. The plaintiff experiences emotional distress because it cannot be immediately determined when, if ever, his or her social security number will be misused, just as one cannot predict ahead of time the onset of cancer.[279] The individual may reasonably fear becoming a victim simply by knowing that many victims are denied loans and employment opportunities and can even be falsely arrested for the acts committed by the identity thief.[280] Further, the individual may reasonably fear becoming a victim of identity theft by knowing that victims must often incur expenses and spend countless hours making phone calls and contacts, battling to resolve their identity theft and restore their good name.[281]

For example, one victim of identity theft, Michelle Brown, estimated that she had spent over five hundred hours trying to restore her good name and credit, although "the burden seemed like it cost [her] a lifetime."[282] Heddi Larae Ille obtained Brown's personal information by stealing her rental application from Brown's landlord.[283] Ille then fraudulently used Brown's personal information from 1998 until July 1999.[284] Brown's "name, personal identifiers and records were grossly misused to obtain over $50,000 in goods and services, to rent properties, and to engage in federal criminal activities."[285] In September 1999, when Ille was in police custody, Brown was detained by Customs and Immigration agents in Los Angeles International Airport.[286] At that point, Brown realized that her identity and records had been linked with Ille's criminal record.[287] She was detained for an hour until a police officer arrived to verify her story.[288] According to Brown, throughout her experience as an identity-theft victim, she spent "countless sleepless nights and seemingly endless days, dedicating [her] valuable time, energy, peace of mind, and what should have been a normal life, trying to restore" her credit and good name.[289]

279. On average, victims of identity theft learn of the theft fourteen months after the crime has been committed. *Identity Theft*, *supra* note 4, at 43.

280. FED. TRADE COMM'N, *supra* note 267.

281. *See* McKelvey, *supra* note 7, at 1086-87.

282. *Identity Theft*, *supra* note 4, at 26.

283. *Id.* Michelle Brown, a resident of California employed in international banking, testified before the United States Senate about her experience as an identity theft victim. *Id.*

284. *Id.* at 26-27.

285. *Id.* at 26. In July 1999, Ille was taken into official custody and in September 1999 was convicted of three felony counts for perjury, grand theft, and possession of stolen property but was never convicted of identity theft. *Id.* at 27.

286. *Id.*

287. *Id.*

288. *Id.* Brown stated that since that experience, she has refused to leave the country for fear that she may again be detained. *Id*. at 28.

289. *Id.*

In light of stories like Michelle Brown's, which illustrate the consequences of identity theft, an individual who learns that his or her social security number has been disseminated will likely fear becoming a victim. Ultimately, cancerphobia and privacy plaintiffs, like the *Bodah* employees, suffer emotional distress from the fear of becoming a victim and losing their quality of life.

The *Restatement (Second) of Torts* provides that an invasion of privacy plaintiff may recover damages for emotional distress if such emotional distress is normally caused by the invasion and is reasonable.[290] As awareness and understanding of identity theft increases, an individual may reasonably suffer emotional distress from learning that his or her social security number had been disseminated. Emotional distress from the fear of becoming a victim of identity theft is similar to the emotional distress in cancerphobia cases and, therefore, should be recognized under the private facts tort as a specific type of emotional distress resulting from an invasion of the victim's privacy.[291] Certainly the consequences of cancer are far more severe than those of identity theft, but that is no reason to deny legal recognition to the quite rational fear experienced upon learning that one's social security number has been disseminated.

Second, the costs of monitoring a personal credit history after one learns that his or her social security number has been disseminated are similar to the costs awarded to a plaintiff for medical monitoring necessitated by a defendant's negligent conduct.[292] In *Hansen v. Mountain Fuel Supply Co.*,[293] the plaintiffs had been exposed to asbestos while renovating the basement of the defendant's office.[294] They claimed that due to this exposure, they had to "undergo periodic medical tests to facilitate early diagnosis and treatment of diseases."[295] The plaintiffs argued that "but for their exposure to asbestos, they would not be obligated to incur these additional medical expenses."[296] The *Hansen* court concluded that a "plaintiff forced to incur the cost

290. *See* RESTATEMENT, *supra* note 66, § 652H cmt. b (stating that a plaintiff may recover damages for emotional distress proven to have been suffered so long as it is "of a kind that normally results from such an invasion" and the damage is "normal and reasonable in its extent").

291. Under federal sentencing guidelines, the emotional distress suffered by identity theft victims is a factor that may be used to justify an upward departure from the guidelines. *See* United States v. Karro, 257 F.3d 112, 118-19 (2d Cir. 2001); *see also* United States v. Akindele, 84 F.3d 948, 953-55 (7th Cir. 1996) (affirming an upward departure in an identity theft case due to the "great deal of worry and inconvenience" suffered by the victims).

292. Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 982 (Utah 1993). *See generally* Allan T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 863 (1988) (stating that courts have often awarded tort victims medical expenses "resulting from the injury, that are reasonably certain to be necessarily incurred in the future").

293. 858 P.2d 970 (Utah 1993).

294. *Id.* at 972.

295. *Id.* at 975-76.

296. *Id.* at 976.

of medical monitoring as a result of a defendant's negligent conduct should be entitled to compensation for those expenses."[297]

Similar to medical monitoring, the monitoring of credit reports and bank statements is a proactive measure that one can take to quickly learn of possible identity theft.[298] Individuals who suspect that their information may be used to commit identity theft often must spend time and money taking preventive measures, including contacting consumer reporting agencies as well as obtaining and monitoring their credit reports.[299] People who are forced to incur expenses ordering and monitoring their credit reports because their social security number has been disseminated should be compensated for these costs.

Moreover, the private facts tort should protect an individual's interest in his or her reputation, an interest long protected under defamation principles.[300] Defamation law developed as a means for a plaintiff to recover compensation for the injury to his or her reputation and good name.[301] A defamation plaintiff may recover for the general damages to his or her reputation, which are presumed damages.[302] Defamation law recognizes that, even absent proof of actual harm, the plaintiff should be compensated because it is reasonably likely that the defamation did in fact harm the plaintiff.[303]

Like a defamation plaintiff, a privacy plaintiff should be allowed to recover damages absent proof of harm. Once an individual's social security number has been disseminated, the likelihood of harm to the individual justifies awarding the individual presumed damages for harms caused by the dissemination. That a plaintiff has not yet become a victim of identity theft should not bar the plaintiff from recovering the expenses reasonably likely to result from having his or her social security number disseminated.

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297. *Id.* at 978. The court established a ten-element test to determine whether a plaintiff is entitled to recover medical monitoring costs and then remanded the case to allow the plaintiffs to prove their case under the new test. *Id.* at 981.

298. *See* FED. TRADE COMM'N, *supra* note 267 (advising that those who suspect their "personal information has been used to commit fraud or theft" should contact a consumer reporting agency, place a fraud alert on their credit reports, and review copies of their credit reports).

299. *Id.*

300. Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1999) ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements.").

301. *Id.*; *see* RESTATEMENT, *supra* note 66, § 559 (stating that a communication is "defamatory if it tends to harm" a person's reputation).

302. *See* RESTATEMENT, *supra* note 66, § 621 cmt. a (stating that general damages "are a form of compensatory damages"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760-61 (1985) (holding that in matters of private communication, the state's interest in "providing remedies for defamation . . . supports awards of presumed" damages).

303. *See Dun & Bradstreet, Inc.*, 472 U.S. at 760-61. "[P]roof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Id.* (quoting W. PROSSER, LAW OF TORTS § 112 (4th ed. 1971)).

The United States Supreme Court recently held that damages for emotional distress are not recoverable absent proof of actual harm.[304] The statutory context, however, compelled this result. In *Doe v. Chao*,[305] Doe sued the Department of Labor under the Privacy Act for allowing his social security number to be disclosed beyond the limits provided in the Act.[306] Interpreting a provision in the Privacy Act, the Court held that Doe could not recover general damages for his claim of emotional distress because the Act provided recovery only for actual damages.[307] Thus, *Chao* does not stand for the proposition that damages for emotional distress due to the dissemination of a social security number are unavailable at common law. In fact, the Court specifically noted that "the common law has provided [privacy tort] victims with a claim for 'general' damages, which for privacy and defamation torts are presumed damages: a monetary award calculated without reference to specific harm."[308]

Knowing that social security numbers are often used to commit identity theft, someone who learns that his or her social security number has been disseminated may reasonably fear becoming a victim of identity theft. This fear is a form of emotional distress that should be compensated as an invasion of the individual's privacy. Moreover, in response to this fear, the person will likely take measures to prevent the possible misuse of his or her social security number. The time and money spent monitoring credit reports to detect early signs of identity fraud should also be compensated as a harm flowing from the dissemination of the plaintiff's social security number. The emotional distress and pecuniary loss claimed by the employees in *Bodah* reflect the type of harms resulting from the dissemination of social security numbers and should be compensated under the private facts tort. Imposing this liability would provide an incentive for private entities like LME to carefully manage employees' social security numbers.

Social security numbers are a key to identity, and therefore, the dissemination of an individual's social security number may inflict serious harm on the individual. Such dissemination invades an individual's core sense of security and privacy, resulting in emotional distress and pecuniary loss. In the absence of effective legislation restricting private entities' dissemination of social security numbers, the publicity requirement of the private facts tort should be redefined to control the dissemination of social security numbers and provide relief for

304. *See* Doe v. Chao, No. 02-1377, 2004 U.S. LEXIS 1622, at *24 (Feb. 24, 2004).
305. No. 02-1377, 2004 U.S. LEXIS 1622 (Feb. 24, 2004).
306. *Id.* at **6-7.
307. *See id.* at **11-12, *16.
308. *Id.* at *14.

these harms.[309] As noted by the court in *In re Crawford*, "[I]n an era of rampant identity theft, concern regarding the dissemination of SSNs is no longer reserved for libertarians inveighing against the specter of national identity cards."[310]

3. The Publicity Requirement: Defining an Appropriate Threshold

The publicity requirement under the private facts tort provides that a private matter must be communicated to the public at large.[311] Yet, an individual may suffer emotional distress and pecuniary loss from a limited disclosure of his or her social security number. Thus, the current publicity test under the private facts tort does not adequately protect an individual's privacy interest in his or her social security number. To better protect an individual's privacy interest and protect against the serious harms resulting from the dissemination of social security numbers, the *Restatement*'s publicity requirement should be redefined.

Currently, a majority of jurisdictions apply the *Restatement*'s publicity test exactingly.[312] For example, in *Vogel,* the court concluded that there was insufficient publicity because the plaintiff's private information was communicated to only four people.[313] Similarly, in *Kuhn*, the court dismissed the plaintiff's claim due to insufficient publicity to only a "small group" of the plaintiff's co-workers.[314] The court in *Dancy* dismissed the plaintiffs' claim, finding that the disclosure had reached only "some" co-workers and not the general public.[315] Additionally, the *Bodah* decision can be counted among these decisions. The *Bodah* court concluded that the *Restatement*'s publicity requirement was an appropriate standard for the private facts cause of action, and as such, LME's dissemination to sixteen terminal managers did not constitute sufficient publicity.[316]

These cases illustrate that the majority of courts apply the publicity requirement as it was originally conceived by Warren and Brandeis: a communication must reach the same number of people that

309. *See* Nicole M. Buba, *Waging War Against Identity Theft: Should the United States Borrow from the European Union's Battalion?*, 23 Suffolk Transnat'l L. Rev. 633, 649 (2000) (criticizing the ITADA for doing "little to regulate the exchange and dissemination of personal data prior to its theft or misuse"); s*ee also* Wood & Schecter, *supra* note 147, at 8 (stating that "with regard to third party tort liability [the ITADA] does not address the procedures used by identity thieves to gain access to confidential information").

310. *In re* Crawford, 194 F.3d 954, 958 (9th Cir. 1999).

311. Restatement, *supra* note 66, § 652D.

312. *See, e.g.*, Dancy v. Fina Oil & Chem. Co., 3 F. Supp. 2d 737 (E.D. Tex. 1997); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994); Vogel v. W.T. Grant Co., 327 A.2d 133 (Pa. 1974).

313. *Vogel*, 327 A.2d at 137.

314. *Kuhn*, 865 F. Supp. at 1448.

315. *Dancy*, 3 F. Supp. 2d at 740.

316. Bodah v. Lakeville Motors Express, Inc., 663 N.W.2d 550, 557 (Minn. 2003).

would be reached by a newspaper.[317] Under this traditional application, a plaintiff's ability to meet the publicity requirement depends exclusively on the number of people the information reaches, or the breadth of the disclosure.[318] However, a stringent application of the *Restatement*'s publicity requirement often precludes any consideration of whether public policy warrants a more flexible application of the requirement to protect the disclosure of private information to only a few people.[319] A more flexible application of the requirement would provide that the more sensitive the information is, the fewer people the information would need to reach in order to constitute sufficient publicity. In other words, the sensitive nature of the information and the breadth of the disclosure would be considered together in determining publicity. As an Iowa court noted, if the *Restatement*'s publicity requirement was strictly applied in every case, it would undermine privacy law's general goal of protecting an individual's "'right . . . to be let alone . . . [and] to be free from unwarranted publicity.'"[320]

A minority of jurisdictions have moved away from the traditional, stringent application of the *Restatement*'s publicity test and have instead adopted a particular public or special relationship test.[321] The *McSurely*, *Miller*, and *Beaumont* decisions illustrate the special relationship test to determine publicity.[322] Under the special relationship test, there is sufficient publicity if the private matter reaches a particular public "whose knowledge of the private facts would be embarrassing to the plaintiff."[323] These decisions held that the *nature* of the public receiving the information should determine sufficient publicity.[324] Moreover, these decisions demonstrate a willingness to apply the publicity requirement flexibly in order to protect a plaintiff's privacy interests.[325]

Both the majority and minority application of the *Restatement*'s publicity requirement have their respective shortcomings. First, the

317. *See* Warren & Brandeis, *supra* note 49, at 196; *see also* RESTATEMENT, *supra* note 66, § 652D cmt. a (stating that publication through a newspaper, radio broadcast, or a statement made to a large audience is sufficient publicity under the private facts tort).

318. *See* RESTATEMENT, *supra* note 66, § 652D cmt. a.

319. *See* DAVID A. ELDER, PRIVACY TORTS § 3.3 (2002).

320. Hill v. MCI WorldCom Communications, Inc., 141 F. Supp. 2d 1205, 1212 (S.D. Iowa 2001) (quoting Bremmer v. Journal Tribune Publ'g Co., 76 N.W.2d 762, 764 (Iowa 1956)). The *Hill* court held that under Iowa law for publication of private facts, the publicity requirement may be met when a confidential relationship exists between the plaintiff and the third party recipient of the information. *Id.* at 1213.

321. *See* McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985); Miller v. Motorola, 560 N.E.2d 900 (Ill. Ct. App. 1990); Beaumont v. Brown, 257 N.W.2d 522 (Mich. 1977).

322. *McSurely*, 753 F.2d at 112; *Miller*, 560 N.E.2d at 903; *Beaumont*, 257 N.W.2d at 531.

323. *See Beaumont*, 257 N.W.2d at 531. The *Miller* court stated that "where a special relationship exists between the plaintiff and the 'public' to whom the information has been disclosed, the disclosure may be just as devastating to the person even though the disclosure was made to a limited number of people." 560 N.E.2d at 903.

324. *McSurely*, 753 F.2d at 112; *Miller*, 560 N.E.2d at 903; *Beaumont*, 257 N.W.2d at 531.

325. *McSurely*, 753 F.2d at 112; *Miller*, 560 N.E.2d at 903; *Beaumont*, 257 N.W.2d at 531.

majority's stringent application of publicity often precludes recovery to many plaintiffs. Second, it is unclear whether the minority's application of the particular public test will provide relief for the limited but egregious disclosure to a public with whom the plaintiff shares no special relationship. Moreover, while the case law provides some guidance on how many people do *not* constitute the "public at large," as the court in *Ozer v. Borquez*[326] stated, "there is no threshold number which constitutes 'a large number' of persons."[327] Finally, the particular public test may be difficult to apply because it is not based on a bright-line number of people constituting the public.

While the publicity requirement could be redefined to impose liability for any dissemination of social security numbers, such a standard would be impractical. Imposing such liability would recognize that with the aid of current technology, publication of social security numbers to *even one person* may carry a risk that the social security numbers may be misused and eventually result in serious harm, even though the information did not reach the public at large. While these harms warrant a restriction on the dissemination of social security numbers, this type of per se prohibition on the transfer of social security numbers would very likely subject businesses and private entities to a constant threat of lawsuits and make business management overly burdensome.[328]

To provide relief for the harms caused by the dissemination of social security numbers, the *Restatement*'s existing publicity requirement should be expanded to include interests beyond its current breadth of disclosure analysis. When determining publicity under the private facts tort, courts should consider the following three factors on a sliding scale: 1) the breadth of the disclosure, 2) the nature of the recipients, and 3) the nature of the information disclosed. The breadth of disclosure factor is nothing new—it is based on decisions such as *Vogel*, *Kuhn*, and *Dancy*, which have determined publicity based simply on the size of the public receiving the information.[329] Next, the nature-of-the-recipients factor stems from those decisions that have adopted the particular public test.[330] Likewise, that factor is

326. 940 P.2d 371 (Colo. 1997).

327. *Id.* at 378.

328. *See* Appellant Lakeville Motor Express, Inc.'s Brief and Appendix at 13-14, Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003) (No. C5-02-276); *see also* Komuves, *supra* note 11, at 536-38 (noting that lending institutions, credit bureaus, universities, medical organizations, and law enforcement are among many organizations currently using social security numbers as personal identifiers).

329. Dancy v. Fina Oil & Chem. Co., 3 F. Supp. 737, 740 (E.D. Tex. 1997); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443, 1448 (D. Nev. 1994); Vogel v. W.T. Grant Co., 327 A.2d 133, 137 (Pa. 1974).

330. *McSurely*, 753 F.2d at 112; *Miller*, 560 N.E.2d at 903; *Beaumont*, 257 N.W.2d at 531.

nothing new.[331] Finally, adding the nature-of-the-information factor simply recognizes that certain types of information, namely social security numbers, should be considered in the publicity analysis because they can be used against the plaintiff to commit identity theft. Weighing these three factors together would allow courts to consider the facts and circumstances of each case when determining whether there has been sufficient publicity to support a claim for publication of private facts.[332] This publicity test would thus better protect and preserve a plaintiff's privacy interests that are often unrecognized under the current *Restatement*'s publicity requirement.

Applying this test to the facts in *Bodah*, the dissemination to sixteen terminal managers constitutes the breadth of the disclosure, the employees' names and social security numbers constitute the nature of the information, and the terminal managers constitute the nature of the recipients. Because the employees did not allege any special relationship with the terminal managers,[333] the nature of the recipients factor would have no effect in determining publicity. While the information arguably did not reach a large number of persons, only sixteen terminal managers, the balance may be tipped in favor of publicity because of the nature of the information disclosed. Thus, the *Bodah* court should have recognized the employees' substantial privacy interest in their social security numbers.

Additionally, the court should have recognized that the employees' names, coupled with social security numbers, increased the employees' risk of identity theft. The court should have balanced the significance of the nature of the information against the number of individuals receiving the information and concluded that there was sufficient publicity to support the employees' claim. This publicity test does not allow a plaintiff to recover invasion of privacy damages for any dissemination; rather, a plaintiff may recover only for a dissemination that is reasonably likely, in light of the facts and circumstances, to result in identity theft. This expanded publicity test would have better protected the *Bodah* employees' right to prevent the publication of their private information. Additionally, this expanded test may protect other plaintiffs whose social security numbers have been disseminated.

331. *See, e.g.*, *McSurely*, 753 F.2d at 112; *Miller*, 560 N.E.2d at 903; *Beaumont*, 257 N.W.2d at 531.

332. *See* Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997).

333. Appellant Lakeville Motor Express, Inc.'s Brief and Appendix at 14, *Bodah* (C5-02-276).

V. Conclusion

Identity theft cannot be prevented.[334] Every individual faces a varying level of risk that his or her social security number will be misappropriated and used to commit some form of identity fraud.[335] Indeed, complaints to the FTC about identity theft have almost doubled every year since 1998.[336] Because social security numbers can be used to easily establish a credit account, they are highly prized by identity thieves.[337] In the absence of effective federal legislation regulating the dissemination and exchange of social security numbers, the private facts tort is a tool that could be used to provide relief for harms caused by such dissemination. However, the *Restatement*'s publicity test maintains a high threshold that often precludes recovery for a limited but egregious dissemination of private information like social security numbers.

In *Bodah v. Lakeville Motor Express, Inc.*, the Minnesota Supreme Court ignored the unique nature of the information disseminated, the employees' social security numbers, and applied the publicity requirement exactingly.[338] In so ruling, the *Bodah* court did not consider the nature of the privacy interest in social security numbers nor the harm that may result from an unchecked dissemination of such identifying information.

The harms associated with the dissemination of social security numbers are serious, and individuals are left with no legal recourse for the emotional distress and pecuniary loss caused by the dissemination of social security numbers. Thus, the *Restatement*'s publicity requirement should consider not only the breadth of disclosure, but also the nature of the recipients and the nature of the information disclosed to allow a plaintiff to recover for the emotional distress and pecuniary loss associated with the unchecked dissemination of his or her social security number. The *Restatement*'s publicity test should be expanded to adequately protect a plaintiff's privacy interest in his or her social security number and to create an appropriate incentive for private entities to limit access to and the exchange of social security numbers.

334. Fed. Trade Comm'n, *supra* note 267.
335. *See id.*
336. FTC Press Release, *supra* note 1.
337. *See Identity Theft*, *supra* note 4, at 33 (stating that identity thieves typically obtain a social security number together with a name because those two pieces of information together are "often all that is needed to apply for credit").
338. *Bodah*, 663 N.W.2d at 552.