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Social Security Numbers: Nine Non-Discoverable Digits

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Discovery of nine digits known as Social Security numbers (SSNs) in personal injury lawsuits is a phenomenon. Why do defendants request them? Under what conditions should plaintiffs exchange them?

First, a little history. SSNs were issued in 1936 as part of the New Deal, and the trend developed to apply for same at birth if born in America. Until 1972 the lower front area of the card upon which the SSN was printed had a legend that stated "FOR SOCIAL SECURITY PURPOSES—NOT FOR IDENTIFICATION."[1] Aside from causes of action for lost wages, etc., where the responsive material need exists for defense counsel to obtain records indexed under an SSN identifier, such as income tax records, SSNs are nevertheless a pervasive and broadly made boilerplate discovery demand.

In more recent times, with the rise of identity theft, the federal government published the following basic information about protecting these digits: "You should treat your Social Security number as confidential information and avoid giving it out unnecessarily… You should be very careful about sharing your number and card to protect against misuse of your number. Giving your number is voluntary even when you are asked for the number directly. If requested, you should ask:

- Why your number is needed;

- How your number will be used;

- What happens if you refuse; and

- What law requires you to give your number."[2]

This straightforward federal publication, relying upon federal law, made clear that providing an SSN is voluntary and, in fact, something to be kept confidential. The Supremacy Clause could create federal preemption of any contrary state law that obligated the exchange of SSNs. So again, one might ask why do plaintiffs' counsel exchange such confidential digits? Or, as the federal publication posited, why do defense counsel need these numbers? How will defense counsel use this confidential information? What are the consequences for not exchanging an SSN in the course of discovery, and what law requires their exchange?

Some defense counsel and their carriers might admit SSNs are used to run Central Index Bureau or other searches on plaintiffs, their backgrounds, prior accidents and the like—beyond that defense attorneys have no need for SSNs when lost wages or some other related causes of action are not involved. Notwithstanding these basic principles I was recently confronted with the following scenario when speaking with an insurance adjuster: "I can't even talk to you about settlement unless you provide me with your client's SSN." She said it was needed "for a Medicare search." Our client was a 20-year old college student[3] with no claim for lost wages, no prior accidents, in perfect health prior to the accident and not a Medicare beneficiary. This fork in the road is a real dilemma; reveal what shouldn't be to foster and expedite a possible settlement, or uphold my legal and possibly ethical obligation to maintain SSN confidentiality and be forced into a lawsuit.

As the lawsuit continues, a court may be misled into ordering the SSN's exchange or even more simply just order the exchange of these digits because of the mistaken belief that "they are entitled" or "that is how it has always been done." Many of us presented with this type of mess can ponder a solution pronounced several decades ago by Yogi Berra when he was famously quoted as saying, "When you come to a fork in the road…take it." True, it is not a real solution for this situation but at least it makes me smile.

Court Rulings

Starting with Articles 30 and 31 of the CPLR, nowhere do the words SSN exist. Yet, even in claims where lost wages or other verification of benefits are not claimed, defense boilerplate discovery almost always demands these digits for a bill of particulars and if not there then other discovery and inspection, at depositions and the like. Regarding bills of particulars, even a cursory review of CPLR §3043 fails to provide for the exchange of these nine-digits. Oral depositions are no different—where no claim is presented for lost wages, etc., then an SSN demand is improper, outside the scope of the claim, and should be neither requested nor provided.

Item 17 requests the Social Security Number of the decedent. This information is not material to any element of the causes of action alleged, and would not serve to amplify any aspect of the pleadings. The primary usefulness of the decedent's Social Security Number is as a tool for acquiring evidence. Since evidence itself is not the proper subject of a Bill of Particulars, a mere device for its acquisition is A fortiori inappropriately requested. Item 17 is therefore stricken.[4]

And in *Bibeau v. Cantiague*, 294 A.D.2d 525, 526 (2d Dept. 2002), the Appellate Division, Second Department, ruled the lower court abused its discretion in allowing for the exchange of these all important nine digits and reversed the sanction levied against the plaintiff for not exchanging same.

Rulings in this area dealt not only with the propriety of SSN demands but also the consequences of sharing these otherwise private numbers under circumstances when they may become public. In a case reported on Jan. 7, 2010, in the New York Law Journal, Justice Dana Winslow declined to order a subpoena that had printed upon it an SSN in *Ahamed v. CABS Nursing Home*. Justice Winslow recognized and ruled that to order the subpoena would make public otherwise private information.[5]

In *International Brotherhood v. US DOH*, 852 F.2d 87 (3d Cir. 1988), the U.S. Court of Appeals for the Third Circuit reversed the lower court's order to exchange an SSN. Ruling that public interest in disclosure is clearly outweighed by privacy of one's SSN, the court relied in part on a Senate committee report when ruling "the extensive use of Social Security numbers as universal identifiers in both the public and private sectors is 'one of the most serious manifestations of privacy concerns in the Nation.'"[6] One is forced to wonder if some measure against privacy and security concerns could be addressed by the SSN card lower legend being resurrected and printed stating it should not be shared or used as identification.

These cases unambiguously declare a bright line rule that broad demands for SSNs are improper. SSNs are tools for acquiring evidence and unless a specific allegation opens that door, it is not appropriate for discovery, whether written or at deposition. Finally, as far as consequences to plaintiff's counsel who maintains confidentiality, we learn it is an abuse of discretion to issue a sanction by refusing to exchange an SSN. While we benefit from these decisions, particularly in the absence of any procedural dictate under the CPLR, still more federal and state laws exists that prohibit the sharing of these nine digits.

Identity Theft

Even when specific claims may open the door to discoverability of SSNs, additional safeguards are necessary to prevent or at least reduce the chances of identity theft through accessing public court records containing SSNs. Clearly no absolutes exist in protecting against identity theft, but state and federal legislators enacted several laws in an effort to curb same.

Starting at the state level in 2006 New York enacted the "Social Security Number Protection Law" which corresponds with General Business Law §399-dd. As the name suggests, §399-dd affords protection through financial penalties for the dissemination of SSNs. This law recognized that many records on file with the county clerk or court (e.g., exhibits with discovery exchanges) are available to the public, and with few exceptions, an SSN should not be printed on any such records. Section 399-dd(5) goes even further to state that it is against public policy to require someone to waive the protections afforded under this law and to do so would be "void and unenforceable."

Further, §399-dd requires that those who do possess SSNs "must adopt reasonable measures to limit access to the Social Security numbers. Any person or employee who has access to Social Security numbers must have a legitimate reason for the access. Moreover each covered individual or entity must provide safeguards 'necessary' or 'appropriate' to include unauthorized access and to protect confidentiality of the numbers." Thus, even in the instance where defense counsel could lawfully obtain the SSN of a plaintiff (e.g., tax records on lost wages claim), prudence and this SSN protection law dictate that firms could receive said exchange but only after providing plaintiff's counsel with their certification setting forth the appropriate measures and safeguards in place to protect SSNs.

And when private information such as SSNs fall into unauthorized hands, General Business Law §899-aa sets forth a reporting requirement to both the victim and the New York state attorney general. Even more, the victim has a two-year statute of limitation to bring an action against the violator. As we will see below, under circumstances where SSNs may be exchanged, all counsel should err on the side of caution, heed these laws and codes, and not demand or exchange all nine digits in an effort to curb the potential for identity theft. Indeed, many practitioners have prudently implemented a form of encryption by only supplying the last four digits while others only provide the first three digits. At present, while the GBL affords protection for our SSNs, New York's Legislature has not yet enacted any specific CPLR guidelines.

In February 2010 the New York Law Journal published an article about this deficiency. At that time, a comprehensive proposal by the City Bar urged statewide uniform rules that limited nine categories of sensitive personal information from civil filings—Social Security numbers were the very first enumerated. Cited in the proposal was then Chief Administrative Judge Jonathan Lippman's Feb. 2, 2006, memorandum that expressed sensitivity to these very issues and recommended certain information not be included in judicial decisions—among them were dates of birth and SSNs. Footnote 13 of the proposal mentioned that a separate ethical rule was not necessary because New York Rules of Professional Conduct §3.4(c) would be breached upon dissemination of an SSN in a civil filing.

While the proposal acknowledged that since 2007 New York County Civil Court had a rule prohibiting

also has an e-filing rule that secures SSNs from Internet access to anyone other than consenting parties—but the e-filed document (including the SSN) would be viewable to the public from the courthouse. Thus, we have some state laws and at least one county affording some protection for SSNs, but uniform civil procedure rules are woefully lacking.

On the other hand and where the demand is proper in the first instance, our federal court system has a uniform rule of procedure addressing how to exchange SSNs. Unless otherwise ordered, or exemption exists, FRCP §5.2(a) prohibits filing of any paper with an individual's full SSN or date of birth, among other personal identifiers. Instead, the federal procedure is to encrypt these private identifiers by allowing the exchange of, for example, only the last four digits of a Social Security number. So serious and important is the need to protect identifiers such as SSNs, the City Bar opined the federal rule requiring encryption was insufficient and instead proposed a uniform rule that completely omitted or redacted SSNs from court papers.

The Federal Privacy Act of 1974 and Amendments (Public Law §93-579) also address the refusal to publish SSNs in court papers. In pertinent part, the act says: "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." While few exceptions exist, this section also states that when a government agency requests SSN disclosure it "shall inform that individual whether disclosure is mandatory or voluntary, what statutory or other authority solicits such number, and what uses will be made of the SSN." Identity theft, due process, and no doubt other reasons fueled this act and amendments. Simply stated, a person should generally not be asked for his SSN and if so, then be advised with specificity why and whether or not disclosure is voluntary —boilerplate demands should never be served and except when a specific claim is made, SSNs not be revealed.

Finally, 5 U.S.C. §552 entitled "public information; agency rules, opinions, orders, records, and proceedings" opens with a discussion of what public information an agency shall make available. Starting at §552(b)(6), however, the code broadly excluded certain records from disclosure which would invade personal privacy. By extension and with SSNs defined as private information, this section made non-discoverable, inter alia, records containing SSNs.

Best Practices

All practitioners should have several concerns regarding SSNs; first, maintaining the confidentiality of client or adversary SSNs by safeguarding against unauthorized access within and outside their offices. Improper access to SSNs obliges the report of same to victims and the New York State attorney general. Second, by not unnecessarily demanding and concomitantly not unnecessarily disclosing SSNs (regardless of on paper or orally) securing a litigant's SSN can easily be achieved. Horace's "A word once uttered can never be recalled" has never been more applicable than now because once an SSN has been shared it is incalculable how many other ways and times it can be inadvertently, negligently and criminally disseminated. Such a breach can result in misuse, identity theft and/or all the sequela therefrom which is a potential recipe for disaster not just for our clients but for custodian law firms.

Third, if the SSN is discoverable, the demanding law firm must first certify to his adversary the safeguards in place designed to protect the demanded SSN. Fourth, when an SSN exchange is proper, it must not be printed on a record (e.g., discovery response, exhibit, subpoena or motion) that could become public, like at the county clerk or court.

Until a uniform state rule of procedure is enacted, best practice would be to follow the federal system and encrypt the SSN. Best practice for a proper demand made during a deposition would be to provide the SSN off the record to otherwise avoid a transcript containing it to later become a record available to the public. With this, we should also be cognizant that SSNs are sometimes found in hospital and other records and therefore, we must be diligent in monitoring and redacting such records.

Additionally, the Health Insurance Portability and Accountability Act (HIPAA) medical authorizations should not include an SSN but if pressured should not contain all nine-digits. With the ease of the federal PACER electronic filing system, and New York state's e-filing (expected to be mandatory throughout New York soon), our clients' personal information has potentially become an even easier target for thieves than ever before.

Conclusion

The U.S. Senate report bears repeating with respect to identity theft as: "one of the most serious manifestations of privacy concerns in the Nation." Varying federal and state laws and case law (but no uniform CPLR guidance yet), are stepping stones that may protect our clients from non-disclosure of this private information and also being prey to identity thieves. While one cannot possibly follow Yogi Berra's anecdote I would humbly suggest avoiding the forked road altogether and instead, depending upon federal or state practice, be cognizant of the newer roads built or to be built that contain safer and clear methods of protecting SSNs. Times have changed and it is ever more important to refrain from the easy path or shortcuts.

Non-discovery or safeguarded discovery of SSNs requires the elimination of broad or boilerplate demands and the abstention of just handing out SSNs, even when adjusters, adversaries and sometimes even courts follow a script that has become outdated. And in situations when SSNs should be exchanged, be mindful that all nine digits are nevertheless non-discoverable and at a minimum should be encrypted to prevent identity theft.

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1. Source: **http://www.ssa.gov/history/hfaq.html**. See image at: **http://en.wikipedia.org /wiki/File:Social_security_card.gif**.

2. See SSA Publication No. 05-10002, May 2009, ICN 451384.

3. In an effort to further protect students, Education Law §2-b prohibits a school from posting or displaying SSNs.

4. See also *Probala v. Rian*, 26 Misc.3d 1201A (Sup. Ct. New York Co. 2009) and *Meyerson v. Prime Realty*, (NYLJ 18, col. 3, March 9, 2005).

5. Full decision can be found at **http://decisions.courts.state.ny.us/10JD/Nassau/decisions /INDEX/INDEX_new/WINSLOW/2009DEC/008512-08.pdf**.

6. S.Rep. No. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 6943.

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