The Red Flags Rule (Revisited) – Congress Fixes “Problem”

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… In the June 2009 issue of the Avoiding Liability Bulletin I wrote about the Red Flags Rule, promulgated by the Federal Trade Commission, requiring those covered by the Rule to comply with specified requirements in an effort to identify and prevent identity theft, which has become a problem of large and potentially devastating proportion throughout the country. The FTC took a very broad view of who was considered to be a “creditor” under the law and federal regulations, and their position was that psychotherapists, lawyers, accountants, physicians, and many other professionals were covered by the new mandate. The FTC seemed to take the position that if payment is made after services are rendered, credit has been extended. Thus, at least according to the FTC, if patients routinely pay at the end of the hour, credit has been extended. Or, if the therapist or counselor billed on a monthly basis, this too would be an indication that the practitioner’s business was one where credit was regularly extended.

At the time I wrote the article, enforcement for non-compliance with the Rule was scheduled to begin on August 1, 2009. This date was subsequently extended on more than one occasion, with the most recent date for the commencement of enforcement being January 1, 2011. In the interim, however, there were many protests about the FTC’s overly broad interpretation of the Rule. I indicated in the June article that it was my view that the FTC went beyond the statute and the intent of Congress, and that there were federal court decisions that were supportive of that view. The FTC believed otherwise. I contacted a few attorneys at the time who were challenging or planning to challenge the FTC in federal court. I recommended that therapists and counselors check with their respective professional associations for their view on the Rule – and what they were recommending to their respective memberships.

As a result of all of the protests over the FTC’s position, Congress, at the behest of a number of trades and professions, recently passed a bill (S. 3987) that was signed into law by President Obama. The Red Flag Program Clarification Act of 2010, as the Act is titled, makes amendments to the Fair Credit Reporting Act to clarify (and narrow) the definition of “creditor.” Without getting into the technicalities and legal niceties, the new law is intended to make clear that small businesses like the practices of physicians, accountants, veterinarians, dentist’s, and other health care providers should not be swept under the Red Flags Rule in the future just because these businesses allow payment to be deferred, when they don’t offer or maintain accounts that pose a reasonably foreseeable risk of identity theft. If you were under the impression that your business was covered by the Red Flags Rule, it might be worthwhile to check again!

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