

Legislative Analysis



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IDENTITY THEFT REVISIONS

House Bill 4325 as enrolled
Public Act 314 of 2010
Sponsor: Rep. Dudley Spade

Senate Bills 223, 225-226 as enrolled
Public Acts 315, 316-317 of 2010
Sponsor: Sen. Raymond E. Basham

House Committee: Judiciary
Senate Committee: Judiciary (HB 4325 discharged from committee)
Second Analysis (7-19-11)

BRIEF SUMMARY: This package of bills addresses identity theft.

- House Bill 4325 would amend the Identity Theft Protection Act to outline forfeiture proceedings for property seized for violations of the act.
- Senate Bill 233 would amend the same act to subject certain property to seizure and forfeiture, create enhanced penalties for subsequent violations of the act, and increase penalties for certain misdemeanor offenses.
- Senate Bill 225 would expand the venues in which an identity theft violation could be prosecuted.
- Senate Bill 226 would include in the sentencing guidelines the felony penalties for violations of the Identity Theft Protection Act. (It also makes other changes described later.)

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on the state and local units of government. A more detailed discussion follows later in the analysis. (See ***Fiscal Information.***)

THE APPARENT PROBLEM:

Despite state and federal laws criminalizing identity theft, attempts to educate the public on how to protect personal information, and technological advances to thwart unauthorized uses of personal identifying information, identity theft remains the fastest growing crime in the nation.

After several years of being in effect, it has become apparent that the state's identity theft statute needs to be revised. For instance, there are no enhanced penalties for repeat violations. Also, it has been recommended that the venue provisions of the statute be expanded to allow the crimes to be prosecuted where the crime occurred, where the victim lives, or where the information to commit the crime was used, so that victims

aren't forced to travel far from home in order for the perpetrator to be prosecuted. To offset costs related to the investigation and prosecution of identity theft crimes, some feel that property and profits from identity theft activities should be seized and forfeited similarly to items seized in drug raids. Last session, legislation to address these concerns passed the House but failed to be enacted. Supporters of the package have reintroduced the legislation.

THE CONTENT OF THE BILLS:

Taken together, the bills would allow forfeiture of property associated with a violation of the Identity Theft Protection Act and increase penalties for violations; establish forfeiture procedures; expand the venues in which an identity theft violation could be prosecuted; and include the increased penalties for identity theft violations and violations of other acts in the sentencing guidelines. The effective date is April 1, 2011.

House Bill 4325

The bill would add several new sections to the Identity Theft Protection Act (MCL 445.79a, 445.79b, and 445.79b) to establish procedures for seizure and forfeiture of property associated with a violation of the act.

Seizure of Property. Property subject to forfeiture could be seized upon process issued by the circuit court. Seizure without process could be made under the following circumstances:

- The property was seized incident to a lawful arrest, under a search warrant, or as a result of an inspection under an administrative inspection warrant.
- The property was the subject of a prior judgment in favor of the state in an injunction or forfeiture proceeding under the act.
- There was probable cause to believe that the property was directly or indirectly dangerous to health or safety.
- There was probable cause to believe that the property was used or was intended to be used in violation of the act.
- There was probable cause to believe that the property was the proceeds from activity in violation of the act.

Forfeiture Proceedings. A forfeiture proceeding would have to be instituted promptly if property were seized under the above provisions.

If the property had been seized without process and the total value of the seized property did not exceed \$50,000, certain notification requirements would apply as detailed in the bill. A person claiming an interest in the property could file a claim within 20 days, but would also have to post a bond of 10 percent of the unclaimed property's value, subject to minimum and maximum amounts specified in the bill. The obligor (the person owing the debt) would be responsible for all costs and expenses of the forfeiture proceedings. The seizing agency would have to transmit the claim and bond, along with a list of the seized property, to the attorney general, county prosecutor, or city or township attorney for the local unit of government in which the seizure had been made. However, unless all criminal proceedings involving or relating to the property had been completed, a city or township attorney could not institute forfeiture proceedings without the consent of the

county prosecutor or attorney general (if he or she were actively handling a case involving or relating to the property).

Property that was not claimed, or for which a bond was not given, within 20 days could be declared as forfeited and the property would then be disposed of as provided in the bill.

Property taken or detained under the Identity Theft Protection Act would not be subject to an action to recover personal property. It would be considered to be in the custody of the seizing agency and subject only to this provision or an order or judgment of the court. The seizing agency could place the seized property under seal; remove it to a place designated by the court; take custody of the property and remove it to an appropriate location for disposition in accordance with law; or, if money were seized, deposit it into an interest-bearing account in a financial institution (a state or nationally chartered bank, or federally chartered savings and loan association, savings bank, or credit union whose deposits were federally insured and that maintained a principal or branch office within the state).

The attorney for a person charged with a crime related to or involving the money seized under the act would have 60 days within which to examine the money, beginning with the day notice had been given to the property's owner but before the money had been deposited. If a county prosecutor, city or township attorney, or the attorney general fails to sustain the burden of proof in the forfeiture proceedings, the court would have to order the money returned, including any interest earned while deposited.

Title to real property forfeited under the act would be determined by a court of competent jurisdiction. If the real property were encumbered by a bona fide security interest, it would be subject to the interest of the secured party who neither had knowledge of nor consented to the crime.

If a court entered an order of forfeiture, the court could order a person who claimed an interest in the forfeited property to pay the expenses of the proceedings of forfeiture to the entity having budgetary authority over the seizing agency (local unit of government or the State of Michigan).

Disposition of Forfeited Property. The seizing agency could do any of the following:

- Retain the property for official use.
- Sell whatever is not required to be destroyed by law or harmful to the public. The proceeds of the sale and any money or other thing of value forfeited would have to be deposited with the treasurer of the entity having budgetary authority over the seizing agency. These funds would be applied to cover expenses relating to the forfeiture and sale. The remaining balance would be distributed equitably among the agencies involved in the forfeiture. Money and all interest and other earnings on forfeited money received by a seizing agency would have to be used to enhance law enforcement efforts as appropriated by the entity having budgetary authority over the seizing agency. Further, a distribution from these funds would

serve as a supplement to, and not a replacement for, the funds budgeted on the bill's effective date for law enforcement efforts pertaining to identity theft.

- Take custody of the property and remove it for disposition in accordance with law.

A receiver could be appointed by the court to dispose of real property that had been forfeited. The receiver would be entitled to reasonable compensation and would have the authority to list the forfeited real property for sale; arrange for necessary maintenance and preservation of the property; accept purchase offers; and execute instruments transferring title to the property.

If a court entered an order of forfeiture, the court could order a person who claimed an interest in the forfeited property to pay the expenses of the forfeiture proceedings to the entity having budgetary authority over the seizing agency.

Senate Bill 223

The bill would amend the Identity Theft Protection Act (MCL 445.69 et al.) to:

- Specify graduated penalties for second and third or subsequent violations of the act that are felonies.
- Increase the maximum term of imprisonment to 93 days for certain misdemeanor violations, and specify increased fines for second and third or subsequent misdemeanor violations.
- Identify the types of property subject to forfeiture for a violation of the act.

Personal Identifying Information. Currently, the act makes it a felony, punishable by up to five years' imprisonment and/or a maximum fine of \$25,000, to commit identity theft; to obtain, possess, sell, or transfer another person's personal identifying information for the purpose of committing identity theft; or to falsify a police report concerning identity theft. Under the bill, a second violation would be punishable by up to 10 years' imprisonment and/or a maximum fine of \$50,000. A third or subsequent violation would be punishable by up to 15 years' imprisonment and/or a maximum fine of \$75,000.

Trade or Commerce Prohibitions. The act also prohibits certain conduct in the practice of trade or commerce. A knowing or intentional violation of these prohibitions is a misdemeanor punishable by up to 30 days' imprisonment and/or a maximum fine of \$1,000. The bill would increase the maximum term of imprisonment to 93 days for a first or subsequent violation. In addition, the bill would increase the maximum fine to \$2,000 for a second violation, and \$3,000 for a third or subsequent violation.

Security Breach Violations. Under the act, providing notice of a security breach when a security breach has not occurred, with the intent to defraud, is a misdemeanor punishable by up to 30 days' imprisonment and/or a maximum fine of \$250 for each violation. The bill would increase the maximum term to 93 days, and would increase the maximum fine to \$500 for a second violation, and \$750 for a third or subsequent violation.

The act prohibits distributing an advertisement or making any other solicitation that misrepresents the occurrence of a security breach that may affect the recipient. A

violation is a misdemeanor punishable by up to 30 days and/or \$1,000 for each violation. The bill would increase the maximum term to 93 days, and would increase the maximum fine to \$2,000 for a second violation, and \$3,000 for a third or subsequent violation.

Forfeiture. Under the bill, the following property would be subject to forfeiture:

- Any personal or real property that had been used, possessed, or acquired in violation of the act.
- Except as otherwise provided, a conveyance, including an aircraft, vehicle, or vessel, used or intended for use to transport, or to facilitate the transportation of, personal or real property used, possessed, or acquired in violation of the act.
- Books, records, computers, electronic equipment, and research products and materials, including microfilm, digital media, tapes, and data, used or intended for use in violation of the act.
- Any money, negotiable instruments, securities, or any other thing of value that was found in close proximity to any property subject to forfeiture would be presumed to be subject to forfeiture. The presumption could be rebutted by clear and convincing evidence.

However, property used to commit a violation of the act would not be subject to forfeiture unless the owner of the property actively participated in or consented to the violation.

Property of a telecommunication provider, Internet service provider, computer network service provider, or an interactive computer service provider would not be subject to forfeiture unless the owner of the property actively participated in or consented to the violation.

Senate Bill 225

The bill would amend the Code of Criminal Procedure (MCL 762.10c) to expand the violations that may be prosecuted in the jurisdiction in which the offense occurred, in which the information used to commit the violation was illegally used, or in which the victim lives, including violations of the Identity Theft Protection Act.

Senate Bill 226

The bill would amend the Code of Criminal Procedure (MCL 777.13p et al.) to include in the sentencing guidelines the maximum term of imprisonment for felony offenses involving identity theft and other crimes.

Identity Theft

Offenses involving identity theft would be classified as against the public order. A second offense would be a Class D felony with a maximum term of imprisonment of 10 years; a third or subsequent offense would be a Class C felony with a 15-year maximum term of imprisonment. Obtaining, possessing, selling, or transferring personal identifying information of another or falsifying a police report with intent to commit ID theft - second offense would be a Class D felony with a 10-year maximum term of imprisonment; a third or subsequent offense would be a Class C felony with a maximum term of imprisonment of 15 years.

Unrelated Felonies. The bill also adds some language regarding felonies unrelated to identity theft. These put into sentencing guidelines provisions penalties imposed in various other statutes but not yet placed in the guidelines.

The unauthorized practice of residential building, residential maintenance, or alteration contracting - second or subsequent offense - would be a Class G felony against the public trust with a maximum term of imprisonment of two years; causing serious injury or death would be a Class F felony against the public trust with a four-year maximum term of imprisonment.

The unauthorized sale, delivery, or importation of spirits of 80,000 ml or more would be a Class F felony against the public order with a maximum term of imprisonment of four years.

The description relating to precious metal and gem dealer violations would be revised to instead apply to a precious metal and gem dealer failing to record transaction or falsifying transaction record, or making improper purchase; the penalty remains unchanged.

The improper return of 10,000 or more nonrefundable containers would be a Class H felony against the public order with a statutory maximum prison sentence of five years. The improper acceptance or delivery of 10,000 or more nonrefundable containers by a dealer or distributor would be a Class H felony against the public order with a statutory maximum sentence of five years. Changing, altering, or modifying reverse vending machines or data for reverse vending machines would be a Class G felony against the public order with a statutory maximum of two years.

The bill would also make some editorial or stylistic changes to the descriptions of violations pertaining to fraudulent actions involving the sale of a franchise.

BACKGROUND INFORMATION:

Two other bills, House Bill 4326 and Senate Bill 224, were originally part of the House and Senate bill packages on identity theft. They were virtually identical to each other and would have amended the Michigan Penal Code to include a felony violation of the Identity Theft Protection Act as a predicate offense in the code's definition of racketeering. Neither bill was enacted, but the racketeering provision was included in House Bill 5577 (Public Act 362 of 2010), which was part of a multi-bill package revising the human trafficking statutes.

Two other bills in the 2009-2010 legislative session dealing with identity theft were enacted—Senate Bills 149 and 150 (Public Acts 318 and 319). Senate Bill 149 amended the Identity Theft Protection Act to, among other things to prohibit communicating under false pretenses to request personal identifying information, prohibit creating or operating an unauthorized webpage to solicit personal identifying information, and prohibit altering a computer or software setting to solicit personal identifying information, with or without the intent to commit identity theft or another crime. It also increased penalties for certain violations of the act, allowed for civil suits, and authorized investigations by the attorney general. Senate Bill 150 was a complementary amendment to sentencing guidelines. A separate analysis is available for those bills at <http://www.legislature.mi.gov>.

FISCAL INFORMATION:

Senate Bills 223, 225, and 226 would have an indeterminate fiscal impact on the state and on local units of government. Data are not available to determine how many persons will be convicted of second or third offenses of the Identity Theft Protection Act.

To the extent that the bills result in additional jail or prison sentences, the bills would increase state and/or local incarceration costs. Local incarceration costs at local jails vary by county. The average cost of incarceration in a state prison is roughly \$34,000 per prisoner per year. However, the incremental cost of adding one or more prisoners to the system can vary significantly around this average. Costs of state-funded probation supervision average about \$2,100 per supervised offender per year. Any increase in penal fine revenues resulting from the bills would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

House Bill 4325 will have an indeterminate fiscal impact on the judiciary. The bill creates new procedures for handling forfeiture of property proceedings under the ID Theft Protection Act, which would increase the administrative workload and casework with the presumed increase in forfeiture proceedings. However, language within the bill indicates that in those instances that the property is deemed forfeited, the local unit of government may use the proceeds from the sale of the property for the payment of proper expenses of the proceedings for forfeiture and sale. This provision would seemingly reduce the fiscal burden this bill would have on the judiciary.

ARGUMENTS:

For:

The seizure and forfeiture provisions of House Bill 4325 and Senate Bill 223 are modeled after existing state seizure and forfeiture laws for drug crimes and will create a strong disincentive to engage in identity theft and large scale computer crimes and will enable law enforcement to recoup some of the expenses in investigating and prosecuting such crimes. Increasing the penalties as Senate Bill 223 will do should act as a stronger deterrent yet provide a more appropriate punishment, especially for repeat offenses.

Senate Bill 225 would enable victims of identity theft to have their cases prosecuted where they live, as opposed to where the perpetrator committed the theft. This should ease, at least to some extent, the burden imposed on victims of ID theft to restore their credit and see the perpetrator prosecuted.

Senate Bill 226 would simply add the maximum terms of imprisonment for felony violations of the ID theft act to the sentencing guidelines. In addition, the bill would include sentencing guidelines for several other felony offenses that also needed to be included in the guidelines.

Against:

Critics of forfeiture laws maintain that such laws are often overly broad, applying even to "intended" acts, such as House Bill 4235 would do, and thus often result in punishing businesses and innocent family members and friends who can have their own property seized due to the actions or perceived actions of another. The bill also provides an

expedited forfeiture process for seizures under \$50,000. This means that the family car can be seized and forfeited on the actions or alleged actions of one family member – even without a conviction – if the local prosecutor or, in a state case, the attorney general, approves. Unlike seizure and forfeiture provisions in the Revised Judicature Act that pertain to other crimes, there is no automatic return of property if charges are never brought or the owner acquitted.

House Bill 4325 does specify that the seized property cannot be subject to forfeiture if the owner can establish that the property was used in the criminal act without consent, and that the property can be regained by posting a bond and filing a claim, but this can be a very long and expensive process – some estimates in media articles posted on the web have put the process as taking up to several years and at least \$10,000 in court and filing fees. For many, the value of the property seized could be less than the cost to recover the property and yet still represent a financial hardship if the property were forfeited. If no claim were filed, or if the required bond were not posted within the statutory time period, the property would be administratively forfeited.

Therefore, though intended to create strong disincentives to engaging in criminal activities and to punish wrongdoers, forfeiture laws such as this one have long disadvantaged low- and moderate-income persons who lack the resources necessary to post the required bond or to hire an attorney to fight to regain their possessions.

Response:

Though it is true that forfeiture of property in an identity theft case could go forward without a criminal conviction, property would still have to go through a civil proceeding in circuit court before being forfeited. This would be true for property seized under court order as well as for property seized without a warrant, such as at the time of an arrest. Even if the property was valued at less than \$50,000, for which an expedited forfeiture proceeding would be allowed, the court forfeiture proceeding would be triggered if a claim was filed and the requisite bond was posted. During the court proceeding, defenses can be presented; for example, the owner of the property could establish he or she had no knowledge of the defendant's actions, did not give the defendant consent to use the property in the commission of a crime, or that no charges were brought or sustained against the defendant.

House Bill 4325 is modeled after the state drug forfeiture provisions, which have been in place for many years and have been upheld in court cases as being constitutional and preserving due process rights.

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