Hearing Date: March 27, 2009

ITEM 7
TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Section 530.6, subdivision (a)
Statutes 2000, Chapter 956

Identity Theft
03-TC-08

City of Newport Beach, Claimant

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COMMISSION ON STATE MANDATES
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SACRAMENTO, CA 95814
PHONE: (916) 323-3562
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March 18, 2009

TO: Tom Sheehy, Chief Deputy Director, Department of Finance
Francisco Lujano, Director, Securities Management Division, State Treasurer's Office
Richard Chivaro, Deputy Controller & Chief Counsel, State Controller's Office
Cynthia Bryant, Director, Office of Planning & Research
Paul Glaab, City Council Member
Steve Worthley, County Supervisor
Sarah Olsen, Public Member
Commission on State Mandates

FROM: PAULA HIGASHI, Executive Director

SUBJECT: COMMISSION ON STATE MANDATES MEETING – ITEMS 7-8
FRIDAY, March 27, 2009, 9:30 A.M.
State Capitol, Room 447
Sacramento

Public Meeting/Hearing

Item 7 *Identity Theft*, 03-TC-08. The attached Supplemental Analysis addresses issues raised in claimant's request to modify the Proposed Statement of Decision (Item 8) or postpone (continue) the hearing. The request to postpone was denied.
There may be testimony on this item.

Item 8 Proposed Statement of Decision for Item 8. See Supplemental Analysis.

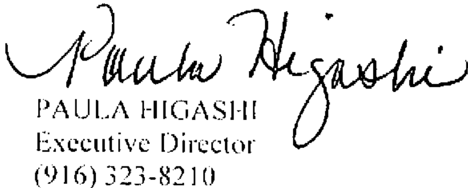
Public Comment

Blue Reference Binder: Government Code Update

One of the budget trailer bills amended Government Code section 17561, subdivision (d), changing the date that the Controller shall pay any eligible reimbursement claim from August 15 to October 15.

Please replace the Government Code in your Blue Reference Binder with the enclosed update.

We look forward to seeing you at the next meeting.



PAULA HIGASHI
Executive Director
(916) 323-8210

cc: Camille Shelton, Chief Legal Counsel

Enclosures: Supplemental Analysis, Letter from City of Newport Beach, and Updated Government Code

The City requests that the balance of the paragraph after the second sentence be stricken, or in the alternative the finding be removed and the City be allowed to address the issue in the Parameters and Guideline phase without prejudice.

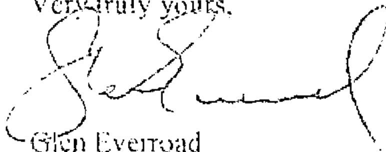
As was evident in the City's March 4, 2009, filing, the City is in agreement with Staff, and as it turned out, with the Department of Finance, as to what is and is not mandated. That is not the issue here. The issue is that a finding has been made as to Parameters and Guidelines when no such document has been filed with or is under consideration by the Commission. Moreover, given the options presented by AB 1222, no Parameters and Guidelines may ultimately be filed with this Commission for full Staff analysis. The City simply asks that it be allowed to make whatever arguments and to present whatever testimony it is able to muster to support any Parameter and Guidelines it may choose to file.

Otherwise if you do not see fit to grant the above request, the City requests that the above-stated matter be continued to May 29, 2009. The City was time-barred from bringing its request under California Code of Regulations, title 2, section 1183.01, subdivision (c)(2)(A) for a mandatory granting of the request, as the City received its proposed Statement of Decision today, March 16, 2009, and the City's representative received it on March 13. Thus the City brings its request under to California Code of Regulations, title 2, section 1183.01, subdivision (c)(2)(C). This request is brought pursuant to California Code of Regulations, title 2, section 1181.1, subdivision (h)(1), in that, the Staff increased the number of issues pending by raising an issue in the Final Staff Analysis and proposed Statement of Decision which was heretofore unraised, unbriefed, and unsupported by any evidence or argument by the test claimant or any state agency or any interested party. The City requests an opportunity to respond solely to the new issue raised regarding the referral activity and its bar from the Parameters and Guidelines phase as not being reasonably necessary.

Should this request be granted the City also requests that a briefing schedule be set to allow for interested parties to comment on the City's response. Should this request be denied, the City requests a postponement of the hearing to allow for pre-hearing to review the issue with Staff and interested parties.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Glen Everroad
Revenue Manager
City of Newport Beach

Hearing Date: March 27, 2009
J:\MANDATES\2003\TC\03tc08\TC\FSSA

ITEMS 7 AND 8
TEST CLAIM AND PROPOSED STATEMENT OF DECISION
SUPPLEMENTAL STAFF ANALYSIS

Penal Code Section 530.6, Subdivision (a)
Statutes 2000, Chapter 956

Identity Theft
03-TC-08

City of Newport Beach, Claimant

Background

On February 2, 2009, Commission staff issued the draft staff analysis for this test claim which concluded that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

The draft staff analysis also included specific findings that two activities were not reimbursable. First, referral of the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts is not a mandated activity and therefore is not reimbursable. Second, the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, already required local law enforcement agencies to provide complainants with a copy of the report.

On March 3, 2009, the claimant submitted comments concurring with the draft staff analysis and made the following additional comment:

> [T]he City, however, reserves the right to revisit during the Parameters and Guidelines phase, the issue of including the activity of referring the matter to the law enforcement agency where the suspected crime was committed for further

> investigation. Although Staff has found that this activity was not mandated, it may still be considered as reasonabl[y] necessary to carry out the mandate.[1]

The claimant's comment was addressed in the final staff analysis on page 12 and in the Proposed Statement of Decision as follows:

> The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[2] If local law enforcement opts to undertake this activity it would do so after the completion of all of the state mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.[3]

On March 16, 2009 the claimant, the City of Newport Beach, filed a request to amend the Proposed Statement of Decision or, in the alternative, a request for a continuance of this test claim. Specifically, the claimant requests that the Proposed Statement of Decision be amended to delete any findings regarding the parameters and guidelines and suggests that the above paragraph be stricken with the exception of the first two sentences. This would enable the claimant to provide evidence at the parameters and guidelines stage that the activity of referring the matter to the law enforcement agency where the suspected crime was committed for further investigation is reasonably necessary to carry out the mandate. On March 18, 2009, the Executive Director denied the request to postpone the hearing and issued this supplemental analysis.

Discussion

Amendment of the Proposed Statement of Decision

The claimant states that the final staff analysis and Proposed Statement of Decision make a finding on the parameters and guidelines, which is not before the commission, and that staff increased the number of issues pending by raising an issue for the first time in the final staff analysis and Proposed Statement of Decision. However, the only issue addressed in the final staff analysis and the Proposed Statement of Decision that was not addressed in the draft staff analysis was not raised by staff. The issue of whether the activity of determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is a

[1] Exhibit F, page 153.

[2] Exhibit F, page 153.

[3] Proposed Statement of Decision, page 12.

mandated activity was raised by claimant in the original test claim filing.[4] The issue of whether the referral activity is "reasonabl[y] necessary to carry out the mandate," was raised by claimant in its comments on the draft staff analysis and the final staff analysis and Statement of Decision simply responded to the claimant's comment.

The Commission's regulations state that "all written comments timely filed shall be reviewed by commission staff and may be incorporated into the final staff analysis."[5] Moreover, with regard to the parameters and guidelines, California Code of Regulations, title 2, Section 1183.1, subdivision (a) (11) specifies that the legal and factual basis for the parameters and guidelines are found in the administrative record for the test claim, which is on file with the Commission. Since the legal and factual basis must come from the file on the test claim, it is not improper for the Commission to make legal and factual findings at the test claim hearing that may have an effect on what may be included in the parameters and guidelines. Moreover, though it is true that "the most reasonable means of complying with the mandate" are those methods not specified in statute or executive order that are necessary to carry out the mandated program,[6] the test claim file provides the legal and factual basis to support the parameters and guidelines.

Here, the draft staff analysis included a finding that the referral activity was not mandated. More importantly, for purposes of the issue at hand, it is clear from the legislative intent for Senate Bill 602, Statutes of 2003, chapter 53, which is discussed in the draft staff analysis, that the local agency is responsible for taking a police report and beginning investigation. If the investigation reveals the crime was committed in another jurisdiction, then the investigation can be referred to another agency in the jurisdiction where the crime occurred.[7] Page 10 of the draft staff analysis[8] states in pertinent part:

> The adverb "further" means "1. Going beyond what currently exists: without further ado. 2. Being an addition."[9] Thus, "further investigation" necessarily requires the law enforcement agency that takes the police report to first begin an investigation before referring it out to another agency so that that the other agency may go beyond or add to the investigation that was begun by the referring agency. Still, some local agencies found this language confusing saying that it was unclear whether it permitted a local law enforcement agency to simply refer a matter to a jurisdiction where the suspected crime occurred without investigation.[10] Three years after enactment of the test claim statute, section 530.6 was amended by Statutes of 2003, chapter 533 which is not pled in this test claim, for the purpose of clarifying that the local law enforcement agency with jurisdiction over the

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[4] Exhibit A, page 103.

[5] 2 California Code of Regulations (CCR) 1183.07 subdivision (c).

[6] 2 CCR 1183.1, subdivision (a) (11).

[7] See Assembly Floor Analysis, as amended September 10, 2003, page 5.

[8] See Exhibit E, page 142.

[9] Roget's II , The New Thesaurus, Expanded Edition, page 435.

[10] Assembly Committee on Judiciary analysis of Sen. Bill (SB) 602, as amended June 26, 2003, page 7.

victim's residence or place of business must take the police report and begin an investigation[11] to say:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence or place of business, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. ~~or, i~~ If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

(Underlining and strikethrough of amendments and deletions added.)

The California Supreme Court stated:

> Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ....' " (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)[12]

In this instance, there is a statement of legislative intent to clarify the test claim statute.[13]

Thus, referral of the matter to another jurisdiction for further investigation of the facts is only permitted after the investigation has begun and at that point would be at the discretion of the referring law enforcement agency.[14] The clarifying language did not change the original requirement for the law enforcement agency where the alleged victim resides to begin an investigation of the matter because, as discussed above, the language "further investigation of the facts" necessarily implies that a preliminary investigation of the facts was conducted by the law enforcement agency that took the police report. Because this permissive authority to refer the matter to another jurisdiction does not require any action on behalf of local law enforcement, it does not impose a new state-mandated activity.

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[11] *Ibid.*

[12] *Williams v. Garcetti* (1993) 5 Cal.4th 561.

[13] Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

[14] *Ibid.*

Based upon the language contained in the test claim filing, the draft staff analysis and the claimants comments on the draft staff analysis discussed above, it is clear that the final staff analysis and proposed statement of decision were not the first documents to raise the issue of whether the referral activity is mandated or is reasonably necessary to implement the mandate.

However, staff has no legal objection to limiting the finding to the mandate issue and deferring discussion of whether the activity of referring the matter to the law enforcement agency where the suspected crime was committed for further investigation is "reasonably necessary." As a courtesy to the claimant, staff proposes that the relevant paragraph on page 12 of the final staff analysis and page 12 of the Proposed Statement of Decision be modified as follows:

> The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[15] ~~If local law enforcement opts to undertake this activity it would do so after the completion of all of the state-mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.~~[16]

CONCLUSION

Therefore, staff concludes that the relevant paragraph on page 12 of the final staff analysis and page 12 of the Proposed Statement of Decision should be modified as follows:

> The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[17] ~~If local law enforcement opts to undertake this activity it would do so after the completion of all of the state-mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public~~

[15] Exhibit F, page 153.

[16] Proposed Statement of Decision, page 12.

[17] Exhibit F, page 153.

~~policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.~~[18]

Recommendation Item 7

Staff recommends that the Commission adopt the final staff analysis as modified on March 18, 2009 with the language above. (Yellow Paper)

Recommendation Item 8

Staff recommends that the Commission adopt the Proposed Statement of Decision as modified on March 18, 2009 with the language above. (Blue Paper)

[18] Proposed Statement of Decision, page 12.

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ITEMS 7 AND 8
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> investigation. Although Staff has found that this activity was not mandated, it may still be considered as reasonabl[y] necessary to carry out the mandate.[1]

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Here, the draft staff analysis included a finding that the referral activity was not mandated. More importantly, for purposes of the issue at hand, it is clear from the legislative intent for Senate Bill 602, Statutes of 2003, chapter 53, which is discussed in the draft staff analysis, that the local agency is responsible for taking a police report and beginning investigation. If the investigation reveals the crime was committed in another jurisdiction, then the investigation can be referred to another agency in the jurisdiction where the crime occurred.[7] Page 10 of the draft staff analysis[8] states in pertinent part:

> The adverb "further" means "1. Going beyond what currently exists: without further ado. 2. Being an addition."[9] Thus, "further investigation" necessarily requires the law enforcement agency that takes the police report to first begin an investigation before referring it out to another agency so that that the other agency may go beyond or add to the investigation that was begun by the referring agency. Still, some local agencies found this language confusing saying that it was unclear whether it permitted a local law enforcement agency to simply refer a matter to a jurisdiction where the suspected crime occurred without investigation.[10] Three years after enactment of the test claim statute, section 530.6 was amended by Statutes of 2003, chapter 533 which is not pled in this test claim, for the purpose of clarifying that the local law enforcement agency with jurisdiction over the

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> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence or place of business, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. ~~or, i~~ If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

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> Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ....' " (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)[12]

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[12] *Williams v. Garcetti* (1993) 5 Cal.4th 561.

[13] Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

[14] *Ibid.*

Based upon the language contained in the test claim filing, the draft staff analysis and the claimants comments on the draft staff analysis discussed above, it is clear that the final staff analysis and proposed statement of decision were not the first documents to raise the issue of whether the referral activity is mandated or is reasonably necessary to implement the mandate.

However, staff has no legal objection to limiting the finding to the mandate issue and deferring discussion of whether the activity of referring the matter to the law enforcement agency where the suspected crime was committed for further investigation is "reasonably necessary." As a courtesy to the claimant, staff proposes that the relevant paragraph on page 12 of the final staff analysis and page 12 of the Proposed Statement of Decision be modified as follows:

> The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[15] ~~If local law enforcement opts to undertake this activity it would do so after the completion of all of the state mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.~~[16]

CONCLUSION

Therefore, staff concludes that the relevant paragraph on page 12 of the final staff analysis and page 12 of the Proposed Statement of Decision should be modified as follows:

> The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[17] ~~If local law enforcement opts to undertake this activity it would do so after the completion of all of the state mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public~~

[15] Exhibit F, page 153.

[16] Proposed Statement of Decision, page 12.

[17] Exhibit F, page 153.

~~policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.~~[18]

Recommendation Item 7

Staff recommends that the Commission adopt the final staff analysis as modified on March 18, 2009 with the language above. (Yellow Paper)

Recommendation Item 8

Staff recommends that the Commission adopt the Proposed Statement of Decision as modified on March 18, 2009 with the language above. (Blue Paper)

[18] Proposed Statement of Decision, page 12.

jurisdiction over his or her actual residence, section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 requires local law enforcement agencies to undertake the following state-mandated activities:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information;
- provide the complainant with an actual copy of that report; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[54] ~~If local law enforcement opts to undertake this activity it would do so after the completion of all of the state-mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.~~[55]

Issue 2. Do the state-mandated activities impose a new program or higher level of service on local agencies?

For section 530.6, subdivision (a) to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a new "program" or "higher level of service." The California Supreme Court, in the case of *County of Los Angeles v. State of California,*[56] defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[57] To determine if a required activity is new or imposes

[54] City of Newport Beach, comments on draft staff analysis, March 4, 2009, page 1.

[55] Proposed Statement of Decision, page 12.

[56] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[57] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

change the original requirement for the law enforcement agency where the alleged victim resides to begin an investigation of the matter because, as discussed above, the language "further investigation of the facts" necessarily implies that a preliminary investigation of the facts was conducted by the law enforcement agency that took the police report. Because this permissive authority to refer the matter to another jurisdiction does not require any action on behalf of local law enforcement, it does not impose a new state-mandated activity.

Thus, based on the foregoing analysis, the Commission finds that when a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 requires local law enforcement agencies to undertake the following state-mandated activities:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information;
- provide the complainant with an actual copy of that report; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis submitted March 4, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[55] ~~If local law enforcement opts to undertake this activity it would do so after the completion of all of the state mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. The Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and that this optional activity may not be addressed in the parameters and guidelines.~~[56]

Issue 2: Does the test claim statute constitute a new program or higher level of service?

For section 530.6, subdivision (a) to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a new "program" or "higher level of service." The California Supreme Court, in the case of *County of Los Angeles v. State of California,*[57]

[55] City of Newport Beach, comments on draft staff analysis, March 4, 2009, page 1.

[56] Proposed Statement of Decision, page 12.

[57] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

ITEM 7
TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Section 530.6, Subdivision (a)
Statutes 2000, Chapter 956

Identity Theft
03-TC-08

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

Background

This test claim was filed on September 25, 2003 and concerns increased activities of local law enforcement required by Penal Code section 530.6, subdivision (a) as added by Statutes 2000, chapter 956, when a complainant residing in the local law enforcement agency's jurisdiction reports identity theft to local law enforcement. Identity theft is defined as willfully obtaining "personal identifying information" and using that information for an unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person.[1] The use of the identifying information for an unlawful purpose completes the crime and each separate use constitutes a new crime.[2] Prior to enactment of the test claim statute, local law enforcement had discretion to decide whether or not to take a police report and begin an investigation when a complainant residing within its jurisdiction reported suspected identity theft. When a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, Penal Code section 530.6, subdivision (a) requires the local law enforcement agency to:

- take a police report of the matter,
- provide the complainant with a copy of that report, and,
- begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

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[1] See Penal Code section 530.5.

[2] *People v. Mitchell* (App. 3 Dist. 2008) 78 Cal.Rptr.3d 855, 164 Cal.App.4th 442, review denied.

The Test Claim Statute Imposes a Reimbursable State-Mandated Program for Cities and Counties for Some of the Required Activities within the Meaning of Article XIII B, Section 6 of the California Constitution

For reasons discussed in the analysis below, staff finds that state law did not require all of the state-mandated activities before January 1, 2000. Specifically, the requirements to take a police report and begin an investigation of the facts mandate a new program or higher level of service and impose costs mandated by the state within the meaning of Government Code section 17514 and 17556 because these activities were discretionary prior to enactment to the test claim statute and the test claim statute makes them mandatory. However, staff finds that referral of the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts is not a mandated activity and therefore is not reimbursable. Finally, staff finds that the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, already required local law enforcement agencies to provide complainants with a copy of the report.

CONCLUSION

Staff concludes that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

09/25/03	City of Newport Beach (claimant) filed test claim with the Commission on State Mandates (Commission)
10/07/03	Commission staff issued completeness review letter and requested comments from state agencies
11/05/03	Department of Justice (DOJ) requested a 60-day extension for filing comments due to schedule and workload conflicts
11/10/03	Department of Finance (DOF) submitted comments on test claim
01/05/04	DOJ submitted comments on the test claim
02/10/09	The Commission staff issued the draft staff analysis
03/04/09	Claimant submitted comments on the draft staff analysis
03/04/09	DOF submitted comments on the draft staff analysis
03/11/09	Commission staff issued final staff analysis

Background

According to the California Office of Privacy Protection, California law provides a number of protections for identity theft victims and the key to obtaining those benefits is a police report.[3] Specifically, California Penal Code section 530.8[4] entitles victims who obtain police reports to copies of documents relating to fraudulent transactions or accounts created using their personal information.[5] They are entitled to have information resulting from identity theft removed (blocked) from their credit reporting agency files.[6] They receive up to 12 free credit reports, one per month, in the 12 months from the date of the police report.[7] They can stop debt collection actions related to a debt resulting from identity theft. Before resuming collection, the collector must make a good faith determination that the evidence does not establish that the consumer is not responsible for the debt.[8] They can bring an action or assert a defense against anyone claiming a right to money or property in connection with a transaction resulting from identity

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[3] See *Know Your Rights: California Identity Theft Victims' Rights*, California Office of Privacy Protection.

[4] All further code references are to the California Penal Code unless otherwise specified.

[5] See also The Fair Credit Reporting Act (FCRA) § 609(e) [15 U.S.C. § 1681g].

[6] California Civil Code sections 1785.16, subdivision (k), 1785.16.1, 1785.16.2, and, 1785.20.3, subdivision (b); FCRA section 605B [15 U.S.C. § 1681c-2].

[7] California Civil Code section 1785.15.3, subdivision (b).

[8] California Civil Code section 1788.18.

theft.[9] If they are a victim of criminal identity theft, which occurs when an identity thief creates a false criminal record in the victim's name, they have additional rights including:

- The right to an expedited proceeding in Superior Court for getting a judge's order finding that they are factually innocent. If such an order is issued, the judge may also order the deletion, sealing, or labeling of records.[10]
- The right to be listed in the California Department of Justice's Identity Theft Victim Registry. This gives victims of criminal identity theft a mechanism for confirming their innocence.[11]

Test Claim Statute

This test claim concerns increased activities of local law enforcement required by section 530.6, subdivision (a) as added by Statutes 2000, chapter 956, when a complainant residing in the local law enforcement agency's jurisdiction reports identity theft to local law enforcement. The test claim statute, section 530.6, subdivision (a) provides:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

Claimant's Position

The claimant states that generally the location where a crime is committed determines where it will be investigated and where jurisdiction and venue for the investigation and enforcement may take place.[12] The claimant asserts that the test claim statute changes this to provide for venue and jurisdiction where the complainant resides.[13] The claimant states that Newport Beach is not the location of many thefts, though residents of Newport Beach have been victims of identity theft, and that the test claim statute requires Newport Beach to take and pursue a police report for crimes that did not occur in Newport Beach. Specifically, claimant asserts that the test claim statute requires local law enforcement to:

- take a police report;
- determine the appropriate law enforcement agency to investigate the matter further and make a referral to that agency;

[9] California Civil Code section 1798.93.

[10] Section 530.6, subdivision (b).

[11] Sections 530.6 and 530.7.

[12] Exhibit A, page 102.

[13] *Ibid.*

- provide a copy of the report to the complainant.[14]

Claimant submitted comments on March 4, 2009 concurring with the draft staff analysis and made the following additional comment:

> [T]he City, however, reserves the right to revisit during the Parameters and Guidelines phase, the issue of including the activity of referring the matter to the law enforcement agency where the suspected crime was committed for further investigation. Although Staff has found that this activity was not mandated, it may still be considered as reasonabl[y] necessary to carry out the mandate.[15]

This comment is addressed in the following analysis.

Department of Finance's (DOF) Position

DOF, in its comments on the test claim dated November 6, 2003, concludes that the test claim statute "may have resulted in increased costs as a result of 'a higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.'"[16] DOF submitted comments on March 4, 2009 concurring with the draft staff analysis to partially approve the test claim for the following activities:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.[17]

Department of Justice's (DOJ) Position

DOJ states, in its comments on the test claim submitted on January 5, 2004, that section 530.6, subdivision (a) does not impose a higher level of service. DOJ maintains that venue for identity theft crimes would be proper in the jurisdiction where the victim resides even without section 530.6, subdivision (a) because identity theft is a form of fraud or trespass against the person who is in constructive possession of his or her identity.[18] Thus, the crime "occurs" where the victim resides in addition to wherever the thief uses the identity of the victim for an unlawful purpose. DOJ's letter cites to an old case regarding theft and venue which is still good law,[19] to support this proposition. In addition, DOJ argues that even if the identity theft was committed outside of

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[14] Exhibit A, page 103.

[15] Exhibit F, page 153.

[16] Exhibit C, page 115.

[17] Exhibit F, page 153.

[18] Exhibit D, page 121.

[19] *People v. Robinson* (1930) 107 Cal. App. 211, 222.

the state, venue would be proper where the crime is consummated, that is, where the victim lives, citing to Penal Code section 778.[20] Finally, DOJ points out that the test claim statute, as added by Statutes 2000, chapter 956 was sponsored by the Los Angeles County District Attorney's Office and states that if the Commission finds that section 530.6 imposes a new program or higher level of service on local agencies there should be no subvention since the legislation was requested by local government and supported by many cities.[21]

Discussion

The courts have found that article XIII B, section 6, of the California Constitution recognizes the state constitutional restrictions on the powers of local government to tax and spend. "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[22] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[23] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[24]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[25] To determine if the program is new or imposes a higher level of service, the test claim statutes and/or executive orders must be compared with the legal requirements in effect immediately before the enactment.[26] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[27] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[28]

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[20] DOJ comments dated January 5, 2004, page 1.

[21] *Ibid*, page 2.

[22] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[23] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[24] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3rd 830, 835 *(Lucia Mar)*.

[25] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,*

[26] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[28] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[29] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[30]

Issue 1. Does Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 require local agencies to perform state-mandated activities?

The test claim statute, Section 530.6, subdivision (a) as added by Statutes 2000, chapter 956 states:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

When a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, the plain language of section 530.6, subdivision (a) requires the local law enforcement agency to:

1. take a police report of the matter,
2. provide the complainant with a copy of that report, and,
3. begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

The California Supreme Court has noted: "When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn 1st to the statutory language, since the words the Legislature chose are the best indicators of its intent."[31] Further, our Supreme Court has noted: "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . ."[32] Because there has been some confusion regarding the meaning of these words, a statutory construction analysis is necessary.

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[29] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[30] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[31] *Freedom Newspapers, Inc v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.

[32] *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.

The legislative history of section 530.6 indicates that the main purpose of the test claim statute is to help victims of identity theft to clear their names. Penal Code section 851.8 (A.B. 2861, Stats. 1980, chapter 1172) provides a procedure whereby a person who has been arrested or detained and is factually innocent may request a law enforcement agency or a court to seal or destroy the arrest record. However, this provision does not apply where the identity theft victim was not arrested or detained. Penal Code section 530.6 was intended to assist those victims who have not yet been arrested or detained.[33] The California Supreme Court has stated that the literal meaning of a statute must be read in accord with its purpose.[34] Thus the Legislature's intent to assist these victims will guide the following statutory construction analysis.

"Take a Police Report of the Matter"

A police report prepared in accordance with the test claim statute includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information as specified by sections 530.5 and 530.55. What it means to "take a police report of the matter" is undefined in California law. Moreover, "police report" is not defined in any of the well known dictionaries. However, "police" means: "1. [t]he governmental department charged with the preservation of public order, the promotion of public safety, and the prevention and detection of crime. 2. The officers or members of this department.[35] "Report" means: "a formal oral or written presentation of facts."[36] The language of a related statute provides a victim of identity theft who provides a consumer credit reporting agency with a copy of a "police report prepared pursuant to Section 530.6. . *.regarding the public offenses described in section 530.5*" with up to twelve copies of his or her file (no more than one per month), following the date of the police report.[37] This language, when considered in conjunction with the Legislature's intent in passing the test claim statute to assist identity theft victim's in clearing their names supports the proposition that a police report prepared pursuant to section 530.6 must include information that establishes the elements of section 530.5.

The elements of the crime of identity theft are: 1) willfully obtaining personal identifying information, and 2) use of that information for any unlawful purpose.[38] Section 530.5 provides that a person that "willfully obtains personal identifying information as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person" is guilty of identity theft. The use of the identifying information for an unlawful purpose completes the crime and each separate use

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[33] See Sen. Com. on Pubic Safety, Analysis of Assem. Bill No. (AB) 1897, as Amended June 20, 2000.

[34] *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659.

[35] Black's Law Dictionary, 7th Edition, page 1178.

[36] *Ibid*, page 1303.

[37] California Civil Code section 1785.15.3 (Stats. 2002, c. 860), emphasis added.

[38] Section 530.5.

constitutes a new crime.[39] "Personal identifying information" is defined as the name, address, mother's maiden name, place of employment, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, the following identifying numbers: telephone, health insurance, credit card, taxpayer identification, school identification, state or federal driver's license, state or federal identification number, social security, employee identification number, professional or occupational, demand deposit account, savings account, checking account, PIN or password, alien registration, government passport, or any form of identification that is equivalent to those listed above.[40] Thus a "police report" under the test claim statute must include information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual, including, if available, information surrounding the suspected identity theft, places where the crimes occurred, and how and where the suspect obtained and used the personal identifying information in accordance with sections 530.5 and 530.55.

In addition to the protections afforded by California law, according to the Federal Trade Commission (FTC), in order for a police report to be considered an Identity Theft Report, and therefore entitle an identity theft victim to a number of federal law protections, the police report must contain details about the accounts and inaccurate information that resulted from the identity theft.[41] A person who suspects he or she is the victim of identity theft can file an Identity Theft Complaint on line with the FTC at https://www.ftccomplaintassistant.gov. The FTC advises victims to bring a printed copy of the ID Theft Complaint with them to the police station in order to better assist the police in creating a detailed police report so that victims can access the important federal protections available to them if they have an Identity Theft Report. The FTC has also prepared a Letter to Law Enforcement Officers encouraging local law enforcement to attach or incorporate the ID Theft Complaint into the police report, sign the "Law Enforcement Report Information" section of the FTC's ID Theft Complaint, and provide the identity theft complainant with a copy of the Identity Theft Report (the police report with the victim's ID Theft Complaint attached or incorporated) to permit the victim to dispute the fraudulent accounts and debts created by the identity thief.[42] Though the FTC suggestions are not binding upon local law enforcement agencies, the requirements for an Identity Theft Report are consistent with the required contents of a police report and the legislative intent "to help victims of identity theft to clear their names."

"Provide the Complainant with a Copy of That Report"

"Provide the complainant with a copy of that report" means that local law enforcement must make readily available to the complainant an actual copy of the police report taken. The word

[39] *People v. Mitchell* (App. 3 Dist. 2008) 78 Cal.Rptr.3d 855, 164 Cal.App.4th 442, review denied.

[40] Penal Code section 530.55.

[41] FTC Letter to Law Enforcement Officers, page 1

[42] *Ibid.*

"provide" is not defined in California law or in Black's Law Dictionary. However, one definition of "provide" is "[t]o make (something) readily available."[43] According to Black's Law Dictionary a "copy" means: "an imitation or reproduction of an original."[44] "That report," clearly refers to the "police report" immediately preceding "provide the complainant with a copy of that report" in the same sentence.

"Begin an Investigation of the Facts or Refer the Matter to the Law Enforcement Agency Where the Suspected Crime was Committed for Further Investigation of the Facts."

When a local law enforcement agency has taken a police report on the matter, the plain language of the test claim statute also requires it to "begin an investigation of the facts." The word "begin" means: "to originate; to come into existence; to start; to institute, to initiate; to commence."[45] While the word "investigation" means: "the process of inquiring into or tracking down through inquiry."[46] The word "investigate" means: "[t]o follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry."[47] Therefore, in the context of section 530.6, to "begin an investigation" means to commence an inquiry into suspected identity theft. However, "begin" certainly does not require a "complete" investigation such as would be required to criminally prosecute a suspect.

The test claim statute continues in pertinent part: "...or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts." This language is confusing because it could be read as requiring local law enforcement to either begin an investigation or refer the matter except that the sentence ends with "for *further investigation* of the facts" (emphasis added). The adverb "further" means "1. Going beyond what currently exists: without further ado. 2. Being an addition."[48] Thus, "further investigation" necessarily requires the law enforcement agency that takes the police report to first begin an investigation before referring it out to another agency so that that the other agency may go beyond or add to the investigation that was begun by the referring agency. Still, some local agencies found this language confusing saying that it was unclear whether it permitted a local law enforcement agency to simply refer a matter to a jurisdiction where the suspected crime occurred without investigation.[49] Three years after enactment of the test claim statute, section 530.6 was amended by Statutes of 2003, chapter 533 which is not pled in this test claim, for the purpose of clarifying that the local law enforcement

[43] Roget's II, The New Thesaurus, Expanded Edition, page 778.

[44] Black's Law Dictionary, Seventh Edition, page 337.

[45] Black's Law Dictionary, Sixth Edition, page 155.

[46] Black's Law Dictionary, *supra*, page 825.

[47] *Ibid.*

[48] Roget's II , The New Thesaurus, Expanded Edition, page 435.

[49] Assembly Committee on Judiciary analysis of Sen. Bill (SB) 602, as amended June 26, 2003, page 7.

agency with jurisdiction over the victim's residence or place of business must take the police report and begin an investigation[50] to say:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence or place of business, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. ~~or, i~~ If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

(Underlining and strikethrough of amendments and deletions added.)

The California Supreme Court stated:

> " 'Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ....' " (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)[51]

In this instance, there is a statement of legislative intent to clarify the test claim statute.[52]

Thus, referral of the matter to another jurisdiction for further investigation of the facts is only permitted after the investigation has begun and at that point would be at the discretion of the referring law enforcement agency.[53] The clarifying language did not change the original requirement for the law enforcement agency where the alleged victim resides to begin an investigation of the matter because, as discussed above, the language "further investigation of the facts" necessarily implies that a preliminary investigation of the facts was conducted by the law enforcement agency that took the police report. Because this permissive authority to refer the matter to another jurisdiction does not require any action on behalf of local law enforcement, it does not impose a new state-mandated activity.

Thus, based on the foregoing analysis, staff finds that when a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has

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[50] *Ibid.*

[51] *Williams v. Garcetti* (1993) 5 Cal.4th 561.

[52] Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

[53] *Ibid.*

jurisdiction over his or her actual residence, section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 requires local law enforcement agencies to undertake the following state-mandated activities:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information;
- provide the complainant with an actual copy of that report; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Staff finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity and as such is not reimbursable. Claimant, in comments on the draft staff analysis dated March 3, 2009, states that it "reserves the right to revisit [this issue] during the Parameters and Guidelines phase. . . as reasonabl[y] necessary to carry out the mandate."[54] If local law enforcement opts to undertake this activity it would do so after the completion of all of the state-mandated activities. Because this activity cannot occur until all mandated activities are complete, it cannot be reasonably necessary to carry out the mandated activities. Though such a referral may be in the spirit of the law and may be good public policy, it is not a specifically mandated activity, not necessary to carry out the mandate, and therefore not reimbursable. If the Commission finds that determining the appropriate law enforcement agency to investigate the matter further and making a referral to that agency is not a state-mandated activity, this optional activity may not be addressed in the parameters and guidelines.

Issue 2. Do the state-mandated activities impose a new program or higher level of service on local agencies?

For section 530.6, subdivision (a) to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a new "program" or "higher level of service." The California Supreme Court, in the case of *County of Los Angeles v. State of California,*[55] defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[56] To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim statute and the legal requirements in effect immediately prior to the enactment of the test claim statute.

[54] Exhibit F, page 153.

[55] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[56] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

For the reasons stated below, staff finds that state law did not require all of the state-mandated activities before January 1, 2000. The requirements to take a police report and begin an investigation of the facts represent a new program or higher level of service within the meaning of Government Code section 17514 and 17556. However, staff finds that the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, requires local law enforcement agencies to provide complainants with a copy of the report.

Duty of Local Law Enforcement to Take a Police Report and Begin an Investigation

DOJ argues that section 530.6, subdivision (a) does not impose a new program or higher level of service.[57] DOJ maintains that venue for identity theft crimes would be proper in the jurisdiction where the victim resides even without section 530.6, subdivision (a) because identity theft is a form of fraud or trespass against the person who is in constructive possession of his or her identity. Based on DOJ's reasoning, the crime "occurs" where the victim resides in addition to wherever the thief uses the identity of the victim for an unlawful purpose.

Prior to the enactment of the test claim statute, local law enforcement agencies in the jurisdiction where the complainant resided could take police reports from residents regarding alleged crimes of identity theft, even if the suspect resided in another jurisdiction and committed each offense of using the personal identifying information for unlawful purposes in a jurisdiction other than that in which the complainant resided. The following provisions of the Penal Code support this conclusion.

Section 830.1 provides that the authority peace officers "extends to any place in the state, as follows:

> (1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves. . . ."

A "public offense" is not specifically defined in California law but according to Black's Law Dictionary, a "public offense" is "an act or omission forbidden by law."[58] Thus, it would include all of the theft crimes, including identity theft.

Section 789, establishes the jurisdiction of a criminal action for "stealing or embezzling ... in any competent court into or through the jurisdictional territory of which such stolen or embezzled property has been brought." Penal Code section 789 was originally enacted in 1872 and has had three amendments that are of little significance to this test claim.[59]

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[57] Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

[58] Blacks Law Dictionary, Seventh Edition, page 1110.

[59] The essence of this provision has remained unchanged since 1872: the crime of "stealing" which is synonym for "theft" or "larceny" could be prosecuted where the property was originally taken or anywhere it was transported to or through. Moreover, Penal Code section 789, as enacted in 1872 simply enacted what was already well established common law. (See *People v. Staples* (1891) 91 Cal. 23 at 27.)

Theft in its various forms (burglary, carjacking, robbery, theft, or embezzlement), receipt or concealment, sale, withholding, or aiding in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained of stolen property are all crimes.[60] From 1993 to the present, section 786, subdivision (a) has provided that when a person takes property in one jurisdiction by burglary, carjacking, robbery, theft, or embezzlement and brings the property into another jurisdiction, or a person receives the property in another jurisdiction, the district attorney can prosecute in any of the jurisdictions. This makes sense because crimes were committed in all of the jurisdictions specified in section 786, subdivision (a). Similarly, a peace officer's authority extends to any public offense for which there is probable cause to believe has been committed within the political subdivision that employs the police officer. Therefore, local law enforcement in the City of Newport Beach had authority to take a police report from a resident of its jurisdiction in a case of suspected identity theft under one or more of the theft related Penal Code provisions discussed above prior to the test claim statute.

Prior to the enactment of the test claim statute, sections 830.1 and 789 authorized the peace officers who had jurisdiction over the victim's residence to exercise jurisdiction in identity theft cases. Therefore, the test claim statute simply clarifies and restates what was existing law with regard to the *discretion* of the law enforcement agency with jurisdiction over the victim's residence to exercise jurisdiction in the case of suspected identity theft. Thus, Newport Beach's ability to take police reports of identity theft claims brought by residents of its jurisdiction is not new. However, there was no specific state mandate to take a police report or begin an investigation of the facts in the case of suspected identity theft prior to the test claim statute, as added by Statutes 2000, chapter 956.[61] Because the test claim statute specifically mandates the taking of a police report and beginning of an investigation, DOJ's conclusion that it does not impose a new program or higher level of service is incorrect.

Moreover, Government Code section 17565 provides that "[i]f a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." Thus, though the Appropriations Committee analysis notes that many jurisdictions did prepare police reports and conduct investigations regarding reports of identity theft from residents within their jurisdictions prior to the test claim statute, as added by Statutes 2000, chapter 956,[62] this point is irrelevant to the issue of whether the test claim imposes a reimbursable state-mandated program or higher level of service. There was no California or federal law specifically requiring police to take a report or begin an investigation in the case of suspected identity theft prior to the enactment of the test claim statute. This means that prior to the test claim statute, local agencies were free to decline to take a police report or to decline to

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[60] See generally Penal Code sections 211, 215, 484, 487, 488, 496, 503-515.

[61] Note that there are specific provisions in state law mandating police reports for domestic violence and child abuse incidents (See e.g. Pen. Code, §§ 13730, 11164, 11165.9, and 11165.14.)

[62] Assembly Committee on Appropriations Analysis of AB 1897 (Davis) as amended: May 16, 2000.

begin an investigation in a case of suspected identity theft. The test claim statute removed that discretion.

The taking of a police report on an allegation of identity theft and beginning an investigation carry out the governmental function of providing service to the public and the mandatory activities imposed by section 530.6 impose unique requirements on local governments that do not apply generally to all residents and entities of the state. To the extent local agencies provide police protection; they are serving a peculiarly governmental function.[63] The purpose of the test claim statute is "to provide expedited remedies for a victim of identity theft to clear his or her name."[64] A police report provides important factual information which guides the court's decision on whether to declare the alleged victim factually innocent and therefore entitled to California's identity theft protections. The taking of the report and beginning of an investigation supports effective police protection in the area of identity theft.

Duty to Provide a Copy of the Police Report to the Complainant

Providing complainants with a copy of the police report and other activities related to providing police reports to complainants were already required under the California Public Records Act, and therefore do not constitute a new program or higher level of service. Since 1981, Government Code section 6254, subdivision (f), of the California Public Records Act has required local law enforcement agencies to disclose and provide records of incidents reported to and responded by law enforcement agencies to the victims of an incident.[65] Government Code section 6254, subdivision (f), states in relevant part the following:

> [S]tate and local law enforcement agencies shall disclose the names and addresses of the persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident . . . .

Except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation, law enforcement agencies are required to disclose and provide to the victim the following information:

> The time, substance, and location of all complaints or requests for assistance received by the agency; the time and nature of the response; the time, date, and location of the occurrence; the time and date of the report; the name and age of the victim; the factual circumstances surrounding the crime or incident; and a general description of any injuries, property, or weapons involved.[66]

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[63] See *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[64] Assembly Committee on Appropriations Analysis of AB 1897, *supra.*

[65] Government Code section 6254 was added by Statutes 1981, chapter 684. Section 6254 was derived from former section 6254, which was originally added in 1968 (Stats. 1968, ch. 1473).

[66] Government Code section 6254, subdivision (f)(2).

Although the general public is denied access to the information listed above, the victim of identity theft is entitled to the information described above.[67] Furthermore, the information required to be disclosed to victims under Government Code section 6254, subdivision (f), satisfies the purpose of the test claim statute. As indicated in the legislative history, the purpose of the test claim statute is to assist victims of identity theft in clearing their names. As discussed above, a police report is required to qualify the victim for numerous protections under California and federal law. Also credit card companies and financial institutions may ask victims to show a copy of a police report to verify the crime.[68] Staff finds that the disclosure of information describing the factual circumstances surrounding the incident pursuant to Government Code section 6254, subdivision (f), is evidence that can support a victim's request for a judicial determination of factual innocence pursuant to section 530.6, subdivision (b) where the identity thief has committed crimes with which the identity theft victim has been charged.

Finally, staff acknowledges that the requirements under the test claim statute and the requirements under the Public Records Act are different in two respects. First, unlike the Public Records Act, the test claim statute requires local law enforcement to "provide the complainant with a copy" of the police report, but does not require the complainant to request the copy. However, Government Code section 6253, subdivision (b), requires the local agency to "upon request" make the records "promptly available." As discussed above, one meaning of "provide" in common usage is "[t]o make (something) readily available."[69] Thus, the requirement of the test claim to "provide a copy of that report" to the victim is essentially the same activity as required by the Public Records Act of making the copy "promptly available". Second, the test claim statute does not specifically mandate when law enforcement agencies are required to provide the complainant with a copy of the police report while Government Code section 6253, subdivision (b), requires the records to be made "promptly available" and generally defines "promptly available" as within no more than 10 days. However, these differences are minor and the activities of providing, retrieving, and copying information related to a case of suspected identity theft are not new. Thus, the activity 'provide complainant with a copy of that report" does not constitute a new program or higher level of service.

Additionally, while the test claim statute is silent on fee authority for providing a copy of the report, Government Code Section 6253, subdivision (b) authorizes local agencies to impose a fee to cover the direct costs of duplication or a statutory fee if available. Most jurisdictions, including Newport Beach, currently charge a fee for the direct costs of providing a copy of a police report. The Los Angeles Police Department currently charges $23 per report while Newport Beach Police Department charges only $4. There are some cities that choose not to charge crime victims for copies of police reports, but providing free copies to victims is a policy decision which is at the discretion of the local agency and not mandated by the state.

Therefore, based on the above discussion staff finds that only the following activities mandated by section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 constitute a new program or higher level of service:

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[67] *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 786.

[68] California Attorney General, Identity Theft: Tips for Victims, http://caag.state.ca.us/idtheft/tips.htm (accessed 1/29/09).

[69] Roget's II, The New Thesaurus, Expanded Edition, page 778.

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information, and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Issue 3: Are there costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant estimates that for the tasks of taking a police report, providing a copy of the police report to the victim, ascertaining the appropriate jurisdiction and referring the matter for further investigation is in excess of $15,000 per year.[70] Claimant also asserts that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here.[71]

DOJ argued that even in the event that the Commission finds that there is a state-mandated program or higher level of service that it should deny the claim because the exception under Government Code section 17556, subdivision (a) should apply in this case.[72] Government Code section 17556 subdivision (a) prohibits the Commission from finding costs mandated by the state if the test claim is submitted by a local entity that requested the test claim legislation. Government Code section 17556 subdivision (a) requires a specific request for the test claim legislation in the form of a resolution of the governing body of the city, county or school district claimant or a letter from the delegated representative of the governing body. However, Government Code section 17556 subdivision (a) does not apply in this case because there is no evidence of a specific request for this legislation by the claimant. Staff pulled the author's bill file and found no evidence of anything from Newport Beach's governing body requesting the legislation. Moreover, a search of the City of Newport Beach's Resolutions for the years 1999 and 2000 shows no evidence of a specific request for this legislation. Though many local governments supported Assembly Bill 1897, support of a bill does not constitute a request for legislation under Government Code section 17556, subdivision (a).

Government Code section 17556 subdivision (g) provides an exemption from finding costs mandated by the state for statutes that create a new crime or infraction, eliminate a crime or infraction, or change the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. Thus, though the test claim statute relates to investigations of suspected crimes, Government Code section 17556 subdivision (g)

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[70] Exhibit A, page 104.

[71] Exhibit A, page 105.

[72] Exhibit D, page 122.

does not apply because the test claim statute, as added by Statutes 2000, chapter 956 does not create or eliminate a crime or infraction or change the penalty for a crime or infraction.

Therefore, staff finds costs mandated by the state as defined by Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply for local law enforcement agencies to:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information, and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

CONCLUSION

Staff concludes that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

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Exhibit A

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

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COMMISSION ON STATE MANDATES

Claim No. 03-TC-08

TEST CLAIM FORM

Local Agency or School District Submitting Claim

City of Newport Beach

Contact Person

Allan P. Burdick/Pamela A. Stone (MAXIMUS, INC.)

Telephone No.

(916) 485-8102
Fax (916) 485-0111

Address

4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Representative Organization to be Notified

League of California Cities

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

Chapter 956, Statutes of 2000; Penal Code, Section 530.6.

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

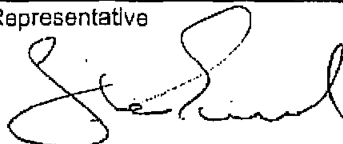
Name and Title of Authorized Representative

Glen Everroad, Revenue Manager

Telephone No.

(949) 644-3140

Signature of Authorized Representative



Date:

24 Sept 03

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
City of Newport Beach

IDENTITY THEFT

Chapter 956, Statutes of 2000

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

Generally, when a crime has been committed, the location where the crime was committed determines where it will be investigated and where jurisdiction and venue for the investigation and possible subsequent criminal enforcement may take place. *See,* Penal Code, Section 777, *et seq.* However, the test claim legislation requires that if the asserted crime is identity theft, the local law enforcement agency is now required to take a police report in the jurisdiction where the complainant resides, provide the complaining party of a copy of the police report, and either commence to investigate if the crime was within the jurisdiction, or ascertain the jurisdiction and refer the matter to the other jurisdiction for investigation if the crime was committed outside the jurisdiction.

This change was wrought in the test claim legislation by virtue of the addition of Penal Code, Section 530.6, which now states as follows:

> (a) A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime as committed for an investigation of the facts.
> (b) A person who reasonably believes that he or she is the victim of identity theft may petition a court for an expedited judicial determination of his or her factual

> innocence, where the perpetrator of the identity theft was arrested for or convicted of a crime under the victim's identity, or where the victim's identity has been mistakenly associated with a record of criminal conviction. Any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or other material, relevant, and reliable information submitted by the parties. Where the court determines that the petition is meritorious and that there is no reasonable cause to believe that the petitioner committed the offense for which the perpetrator of the identity theft was arrested or convicted, the court shall find the petitioner factually innocent of that offense. If the petitioner is found factually innocent, the court shall issue an order certifying this determination. The Judicial Council of California shall develop a form for use in issuing an order pursuant to these provisions. A court issuing a determination of factual innocence pursuant to this section may at any time vacate that determination if the petition, or any information submitted in support of the petition, is found to contain any material misrepresentation or fraud.

This test claim legislation changed substantially the manner in which police reports are taken and provided. Prior to this legislation, if a person were to have claimed in the city or county in which he or she lived that he or she believed he or she was the victim of identity theft, the person would be referred to the jurisdiction wherein the theft was committed or the defendant was located. However, with this new test claim legislation, not only is the local law enforcement agency required to take a police report; it must now also determine the appropriate law enforcement agency to investigate the matter further, and refer this matter to them. Additionally, the police report must be taken, and a copy afforded the claimant for his or her use.

Newport Beach is not commonly the locale where such thefts actually take place. However, given the demographics of the area, residents of Newport Beach have been subjected to identity theft. As a result, while the theft may not have taken place within Newport Beach nor the defendant be located within the jurisdiction, Newport Beach is required to take and pursue such a police report.

B. LEGISLATIVE HISTORY PRIOR TO 1975

Prior to 1975, there was no requirement to take a police report of an identity theft complaint in the jurisdiction wherein the complainant resided, much less make a copy of same available to the claimant. The test claim legislation also requires that Newport Beach determine the appropriate jurisdiction to investigate the suspected crime and refer the matter to it for further investigation.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

The mandated activities are contained in Penal Code, Section 530.6.

D. COST ESTIMATES

Because of the demographics of Newport Beach, our present estimate of the cost to take the complaints of persons who believe they have been the victim of identity theft, provide a copy of said complaint, and ascertain the appropriate investigating jurisdiction and refer the matter for further investigation and possible prosecution is in excess of $15,000 per year.

REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the claimant as a result of the statutes on which this test claim is based are all reimbursable costs as such costs are "costs mandated by the Sate" under Article XIII B (6) of the California Constitution, and Government Code § 17500 *et al.* of the Government Code. Section 17514 defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."
2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975.:
3. The costs are as a result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

E. MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by this statute clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate is Unique to Local Government

Only local government takes police reports and investigates possible crimes.

Mandate Carries Out a State Policy

This legislation carries out the state's policy of making it easier for victims of identity theft to make police reports about such crimes and requires law enforcement agencies to determine the appropriate jurisdiction and refer the matter for further investigation and possible legal action.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code § 17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code § 17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.
2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.
3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.
4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.
5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.
6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.
7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

Although this legislation does include a provision regarding the enforcement of a crime, the portion of the test claim legislation which serves as the foundation for this test claim is the requirement that the local law enforcement agency take a police report for a crime which has not been committed within its jurisdiction and over which it has no

jurisdiction or requirement for investigation or criminal enforcement. Thus, the provision with regard to a new crime is not applicable here.

CONCLUSION

The within legislation requires law enforcement agencies to take police reports for crimes which did not happen within its jurisdiction and over which it has no jurisdiction to seek prosecution. Additionally, this legislation requires that the local law enforcement agency determine the appropriate jurisdiction to investigate the suspected crime, and refer the police report to that jurisdiction for further investigation and possible prosecution.

F. CLAIM REQUIREMENTS

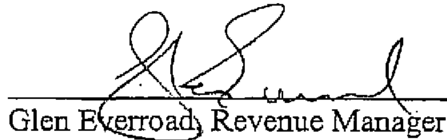
The following elements of this test claim are provided pursuant to Section 1183, Title 2 of the California Code of Regulations:

Exhibit 1: Chapter 956, Statutes of 2000

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the Sate of California that the statements made in this document are true and complete to the best of my personal knowledge except as to those matters stated upon information and belief, and as to those matters I believe them to be true.

Executed this 24 day of September, 2003, at Newport Beach, California, by:



Glen Everroad, Revenue Manager

DECLARATION OF GLEN EVERROAD

I, Glen Everroad, make the following declaration under oath:

I am the Revenue Manager for the City of Newport Beach. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

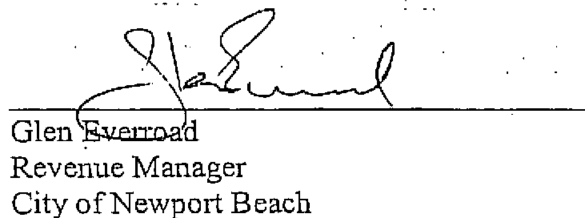
I declare that I have examined the City of Newport Beach's State mandated duties and resulting costs in implementing the subject law and guidelines, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

> "'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 24 day of September, 2003, at Newport Beach, California.



Glen Everroad
Revenue Manager
City of Newport Beach

Assembly Bill No. 1897

CHAPTER 956

An act to amend Section 530.5 of, and to add Section 530.6 to, the Penal Code, relating to identity theft.

[Approved by Governor September 29, 2000. Filed with Secretary of State September 30, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1897, Davis. Identity theft: remedies.

Existing law provides that every person who willfully obtains personal identifying information about another person without that person's consent, and uses that information for any unlawful purpose, including to obtain or attempt to obtain credit, goods, services, or medical information in the name of that person, is guilty of a crime punishable by imprisonment in a county jail not to exceed one year, a fine not to exceed $1,000, or both, or by imprisonment in the state prison, a fine not to exceed $10,000, or both. Existing law also provides when a person is convicted of using that information to commit a separate crime, that court record shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime. Existing law also provides that if a consumer submits to a credit reporting agency a copy of a valid police report pursuant to these provisions, the consumer credit reporting agency shall promptly and permanently block reporting any information that the consumer alleges appears on his or her credit report as a result of that violation so that the information cannot be reported. Existing regulations of the Department of Motor Vehicles also provide that a person may apply for a new driver's license or identification card number in the event of fraudulent use by another, upon submission of a police report and specified supporting information.

This bill would provide that a person who has learned or reasonably suspects that his or her personal identifying information has been used by another to commit a crime, may initiate a law enforcement investigation by contacting the local law enforcement agency with jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and either begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the crime or suspected crime was committed for an investigation of the facts. This bill would also provide that a person who reasonably believes that he or she is the victim of identity theft may petition a court for an expedited judicial determination of his or her factual innocence order certifying

that he or she is a victim of identity theft, where the perpetrator of the identity theft was arrested for or convicted of a crime under the victim's identity, or where the victim's identity has been mistakenly associated with a record of criminal conviction. The bill would specify the sort of information to be used in making this determination, would direct the court to issue an order certifying that the petitioner is factually innocent where it finds that the petition is meritorious and there is no reason to believe the petitioner committed the offense. The bill would direct the Judicial Council to develop a form for use in connection with these proceedings, and would authorize courts to vacate determinations of factual innocence if a petition or supporting information is found to contain any material misrepresentation or fraud.

The bill would impose a state-mandated local program by requiring a higher level of service from local law enforcement.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 530.5 of the Penal Code is amended to read:

530.5. (a) Every person who willfully obtains personal identifying information, as defined in subdivision (b), of another person without the authorization of that person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished either by imprisonment in a county jail not to exceed one year, a fine not to exceed one thousand dollars ($1,000), or both that imprisonment and fine, or by imprisonment in the state prison, a fine not to exceed ten thousand dollars ($10,000), or both that imprisonment and fine.

(b) "Personal identifying information," as used in this section, means the name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, or credit card number of an individual person.

(c) In any case in which a person willfully obtains personal identifying information of another person without the authorization of that person, and uses that information to commit a crime in addition to a violation of subdivision (a), and is convicted of that crime, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime.

SEC. 2. Section 530.6 is added to the Penal Code, to read:

530.6. (a) A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for an investigation of the facts.

(b) A person who reasonably believes that he or she is the victim of identity theft may petition a court for an expedited judicial determination of his or her factual innocence, where the perpetrator of the identity theft was arrested for or convicted of a crime under the victim's identity, or where the victim's identity has been mistakenly associated with a record of criminal conviction. Any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or other material, relevant, and reliable information submitted by the parties. Where the court determines that the petition is meritorious and that there is no reasonable cause to believe that the petitioner committed the offense for which the perpetrator of the identity theft was arrested or convicted, the court shall find the petitioner factually innocent of that offense. If the petitioner is found factually innocent, the court shall issue an order certifying this determination. The Judicial Council of California shall develop a form for use in issuing an order pursuant to these provisions. A court issuing a determination of factual innocence pursuant to this section may at any time vacate that determination if the petition, or any information submitted in support of the petition, is found to contain any material misrepresentation or fraud.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for

reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

92

Exhibit B

BILL LOCKYER
Attorney General

State o
DEPARTMENT O

1300 I STREET, SUITE 1120
Sacramento, CA 95814
(916) 322-2735
Facsimile: (916) 327-6831

November 5, 2003

RECEIVED
NOV 06 2003
COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Notice of Complete Test Claim Filing Schedule for Comment - Identity Theft, 03-TC-08.

Dear Ms. Higashi:

I have received the aforementioned notice. The notice lists a November 6, 2003 due date for filing comments with the Commission. However, my work schedule and workload have precluded me from giving the test claim a complete review. Therefore, I request a 60-day extension until January 6, 2004 to review the test claim and provide comment, if appropriate. If you have any questions, I can be contacted at 916-322-2735. Thank you.

Sincerely,

PAUL L. SEAVE
Special Assistant Attorney General
Director, Crime and Violence Prevention Center

cc: Mr. Allan P. Burdick
Mr. Glen Everroad
Mr. Keith Gmeinder
Mr. Michael Harvey
Mr. Paul Minney
Mr. Keith Peterson
Mr. David Wellhouse
Ms. Harmeet Barkschat
Mr. Steve Smith
Ms. Annette Chinn
Mr. Leonard Kaye, Esq.
Ms. Cindy Sconce
Ms. Nancy Patton

November 7, 2003

Mr. Paul L. Seave
Special Assistant Attorney General
Director, Crime and Violence Prevention Center
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

Re: **Request for Extension of Time**
Identity Theft, 03-TC-08
City of Newport Beach, Claimant
Penal Code Section 530.6

Dear Mr. Seave:

Your request for an extension of time to file comments on the above-named matter is approved for good cause. Comments from state agencies are now due on or before **January 6, 2004.**

Please contact Nancy Patton at (916) 323-8217 with questions.

Sincerely,

SHIRLEY OPIE
Assistant Executive Director

j:mandates/2003/tc/03tc08/extok

EXHIBIT C

DEPARTMENT OF
FINANCE

GRAY DAVIS, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

November 6, 2003

RECEIVED

NOV 10 2003

COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of October 7, 2003, the Department of Finance has reviewed the test claim submitted by the City of Newport Beach (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 956, Statutes of 2000, (AB 1897, Davis) are reimbursable state mandated costs (Claim No. 03-TC-08 "Identity Theft"). Commencing with Page 1, Section A, of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

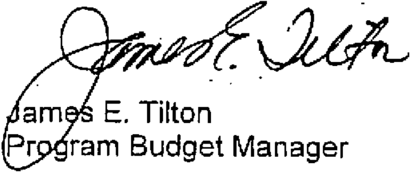
- Requiring law enforcement agencies to take reports of identity theft claims from victims who reside in their jurisdictional area, even if the crime did not occur there.
- Requiring local law enforcement agencies to determine the appropriate law enforcement agency in which to investigate said claims, and referral of the matter, if necessary, to that law enforcement agency for investigation.
- Providing copies of the police report for claimants at no charge.

As the result of our review, we have concluded that the statute may have resulted in increased costs as a result of "a higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution." If the Commission reaches the same conclusion at its scheduled hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines which will then have to be developed for the program.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your October 7, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Marcia Caballin, Principal Program Budget Analyst at (916) 445-8913 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,



James E. Tilton
Program Budget Manager

Attachments

Attachment A

DECLARATION OF MARCIA CABALLIN
DEPARTMENT OF FINANCE
CLAIM NO. CSM-03-TC-08

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 956, Statutes of 2000, (AB 1897, Davis) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

November 6, 2003
at Sacramento, CA

Marcia Caballin
Marcia Caballin

PROOF OF SERVICE

Test Claim Name: Identity Theft
Test Claim Number: CSM-03-TC-08

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On November 6, 2003, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Paul L. Seave
Attorney General's Office
Crime & Violence Prevention Center
1300 I Street, Suite 1120
Sacramento, CA 95814

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Room 500
Sacramento, CA 95816

League of California Cities
Attention: Ernie Silva
1400 K Street
Sacramento, CA 95815

City of Newport Beach
Mr. Glen Everroad
City of Newport Beach
P.O. Box 1768
Newport Beach, CA 92659-1768

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Ms. Harmeel Barkschat
Mandate Resource Services
5325 Elkhorn blvd. #307
Sacramento, CA 95842

Mr. Steve Smith
Mandated Cost Systems
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

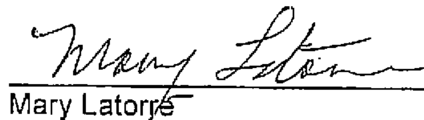
Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

Ms. Cindy Sconce
Centration, Inc.
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 6, 2003 at Sacramento, California.



Mary Latorre

BILL LOCKYER
Attorney General

*State of Califor*nia EXHIBIT D
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 322-3360
Telephone: (916) 324-5467
Facsimile: (916) 324-8835
E-Mail: Ramon.delaGuardia@doj.ca.gov

January 5, 2004

RECEIVED
JAN 0 5 2004
COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

RE: City of Newport Beach: Identity Theft Test Claim No. 03-TC-08

Dear Ms. Higashi:

This matter has been sent to the Office of the Attorney General for comment. The test claim does not impact any programs of the Office of the Attorney General or the California Department of Justice.

We do however, have comments regarding the validity of the test claim.

The City of Newport Beach claims Penal Code section 530.6 is a state mandate because it permits a victim of identity theft to file a police report with the authorities at their place of residence. Newport Beach reasons this requires a higher level of service because:

> "the location where a crime is committed determines where it will be investigated and where jurisdiction and venue for the investigation and possible subsequent criminal enforcement may take place." (Test Claim, page 1.)

But identity theft is a crime against the person and occurs where the victim is located. Identity theft is a form of fraud or trespass against the victim who is in constructive possession of their identity. But venue for crimes of this nature has long been permitted where the property is located or the trespass occurs. (See *People v. Robinson* (1930) 107 Cal.App. 211, 222.) Even if identity theft was committed by persons outside the state, venue would be proper where the crime was consummated, that is where the victim lives. (See Pen. Code § 778.) Thus, we question whether the test claim legislation has changed the venue rules to impose a higher level of service on local police departments.

Additionally, we wish to bring to the Commission's attention that the test claim legislation was sponsored by the Los Angeles County District Attorneys Office, the Los Angeles County Sheriff and other sheriffs as well as the League of California Cities and several individual cities. (See attached Senate Rules Committee Analysis of AB 1897.)[1] Assuming Penal Code section 530.6 does create a mandate, there should be no subvention of funds because local government requested the mandate. (Cal. Const. Art. XIII B, § 6 (a).)

Thank you for the opportunity to review and comment on this matter.

Sincerely,

RAMON DE LA GUARDIA
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: See Attached Service List
Louis Mauro, SAAG

[1] Chapter 956, Statutes of 2000.

Senate Rules Committee Analysis of AB 1897

|SENATE RULES COMMITTEE | AB 1897|
|Office of Senate Floor Analyses |
|1020 N Street, Suite 524 |
|(916) 445-6614 Fax: (916) |
|327-4478 |

THIRD READING

Bill No: AB 1897
Author: Davis (D)
Amended: 8/18/00 in Senate
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE : 6-0, 6/27/00
AYES: Vasconcellos, Burton, Johnston, McPherson, Polanco, Rainey

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

ASSEMBLY FLOOR : 78-0, 5/30/00 - See last page for vote

SUBJECT : Identity theft: remedies

SOURCE : Los Angeles County District Attorney

DIGEST : This bill creates a judicial process whereby victims of identity theft can clear their names.

Assembly Amendments :

1. The first provision in the amendments sets out specific factors a court must consider in ruling on request for a determination of factual innocence by a victim of identity theft. This provision would allow courts and litigants to focus on specific facts and would perhaps make appellate review of these actions more clear.

2. The second provision concerns a new Judicial Council form that would allow victims to fairly easily file for

CONTINUED

a necessary hearing. Judicial Council forms are usually fill-in-the-blank documents that require little or no

legal training.

ANALYSIS : Existing law:

1. Provides a process for a person arrested for a crime to obtain a court order for destruction of arrest records based upon the person's factual innocence. This process would be available to a victim of identity theft.

2. Provides that it is an alternative felony/misdemeanor for a person to willfully obtain personal identifying information, as defined, of another person and use another individual's personal identifying information and obtain, or attempt to obtain, credit, goods, or services in the name of the other person without the consent of that person.

3. Defines "personal identifying information" as the name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, or credit card number of an individual person.

4. Provides that every person who falsely represents or identifies himself as another person or a fictitious person to certain enumerated peace officers upon a lawful detention or arrest to evade proper identification is guilty of a misdemeanor.

5. Provides that a person who manufactures or sells documents falsely purported to be government identification is guilty of a misdemeanor punishable by imprisonment in county jail for one year and/or by a fine of not more than $1,000 for a first-time conviction and not more than $5,000 for a subsequent conviction.

6. Provides that any person who possesses a document falsely purported to be government identification knowing that it is not a government issued document is guilty of a misdemeanor, punishable by a fine of not less than $1,000 and not more than $2,500.

7. Provides that any person who gives false information to a peace officer performing his or her duties under the Vehicle Code is guilty of an infraction.

This bill:

1. Allows a person who suspects that he or she is a victim of identity theft to initiate an investigation at his or her local law enforcement agency and to obtain a police

report to document the fact of the identity theft and that the law enforcement agency "shall begin an investigation of the facts, or if the suspected crime occurred in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed . . ."

2. Provides that a victim of suspected identity theft may petition the court for an "expedited" judicial determination of factual innocence under the following circumstances and pursuant to the following procedures:

   A. Where the perpetrator of the identity theft was convicted of a crime under the victim's identity.

   B. Where the identity theft victim's name has been mistakenly associated with a record of criminal conviction.

   C. Judicial determination of these issues shall be made after consideration of declarations, affidavits, police report and reliable information submitted by the parties. Where the court determines that the petition is meritorious and that there is no reasonable cause to believe that the petitioner committed the offense for which the perpetrator of the identity theft was arrested or convicted, the court shall find the petitioner factually innocent of that offense.

   D. Where the court finds the petitioner factually innocent, the court shall issue an order certifying

that fact. The Judicial Council would be required to develop a form for use in issuing an order pursuant to these provisions. A court issuing a determination of factual innocence may at any time vacate that determination if the petition, or any information submitted in support of the petition, is found to contain any material misrepresentation of fraud.

Prior Legislation

SB 1374 (Leslie), Chapter 488, Statutes of 1998.

AB 156 (Murray), Chapter 768, Statutes of 1997.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT : (Verified 8/18/00)

Los Angeles County District Attorney (source)
Attorney General
Los Angeles County Superior Court

California Public Interest Research Group
Consumers Union
League of California Cities
Privacy Rights Clearinghouse
Sacramento County Sheriff's Department
San Bernardino County Sheriff's Department
San Diego County Sheriff's Department
City of Lakewood
City of Dana Point
City of Stockton
City of San Diego
Culver City
California District Attorneys Association

ARGUMENTS IN SUPPORT : According to the sponsor, the Los Angeles County District Attorney, "Criminal identity theft" - the use of another's identity information during arrest or through prosecution - is sharply on the rise. Criminal identity theft creates a false criminal record for a blameless victim. Today, growing numbers of innocent victims of this practice are subject to erroneous arrest and incarceration, or collateral harm such as denial of

employment, because a false criminal history has been created by criminal's use of their identifying information.

ASSEMBLY FLOOR :
AYES: Aanestad, Ackerman, Alquist, Aroner, Ashburn, Baldwin, Bates, Battin, Baugh, Bock, Brewer, Briggs, Calderon, Campbell, Cardenas, Cardoza, Cedillo, Corbett, Correa, Cox, Cunneen, Davis, Dickerson, Ducheny, Dutra, Firebaugh, Florez, Frusetta, Gallegos, Granlund, Havice, Honda, House, Jackson, Kaloogian, Keeley, Knox, Kuehl, Leach, Lempert, Leonard, Longville, Lowenthal, Machado, Maddox, Maldonado, Margett, Mazzoni, McClintock, Migden, Nakano, Olberg, Oller, Robert Pacheco, Rod Pacheco, Papan, Pescetti, Reyes, Romero, Runner, Scott, Shelley, Steinberg, Strickland, Strom-Martin, Thompson, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Wright, Zettel, Hertzberg

RJG:sl 8/21/00 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **03-TC-08: IDENTITY THEFT**

I declare:

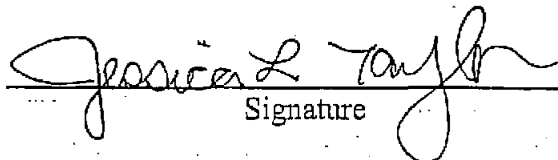
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 5, 2004, I served the attached **LETTER TO MS. PAULA HIGASHI DATED JANUARY 5, 2004,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

SEE ATTACHED MAILING LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 5, 2004, at Sacramento, California.

JESSICA L. TAYLOR
Declarant


Signature

MAILING LIST
03-TC-08: IDENTITY THEFT

Paul L. Seave Attorney General's Office Crime & Violence Prevention Center 1300 I Street, Ste 1120 Sacramento, CA 95814	Ms. Harmeet Barkschat Mandate Resource Services 5325 Elkhorn Blvd., #307 Sacramento, CA 95842
Mr. Steve Smith Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Ms. Annette Chinn Cost Recovery Systems 705-2 East Bidwell Street, #294 Folsom, CA 95630
Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Ms. Cindy Sconce Centration, Inc., 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670
Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacraento, CA 95814	Mr. Michael Havey State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 500 Sacramento, CA 95816
Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841
Mr. Glen Everroad City of Newport Beach 3300 Newport Blvd. P.O. Box 1768 Newport Beach, CA 92659-1768	Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117
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COMMISSION ON STATE MANDATES
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Exhibit E

February 10, 2009

Mr. Allan Burdick
MAXIMUS
3130 Kilgore Road, Suite 400
Rancho Cordova, CA 95670

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis, Comment Period, and Hearing Date
Identify Theft, 03-TC-08
Penal Code Section 530.6, Subdivision (a)
Statutes 2000, Chapter 956
City of Newport Beach, Claimant

Dear Mr. Burdick:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

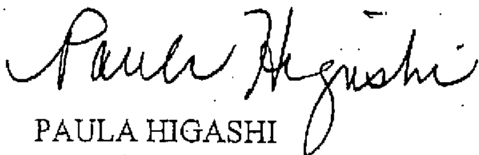
Any party or interested person may file written comments on the draft staff analysis by Tuesday, **March 3, 2009**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Friday, March 27, 2009**, at 9:30 a.m. in Room 447, State Capitol, Sacramento, CA. The final staff analysis will be issued on or about March 13, 2009. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Heather Halsey at (916) 323-3562 if you have questions.

Sincerely,



PAULA HIGASHI
Executive Director

Enclosures:
Draft Staff Analysis

J:mandates/2003/tc/03tc08/corres/dsatrans

Hearing Date: March 27, 2009
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ITEM ____
TEST CLAIM
DRAFT STAFF ANALYSIS

Penal Code Section 530.6, subdivision (a)
Statutes 2000, Chapter 956

Identity Theft
03-TC-08

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

Background

This test claim was filed on September 25, 2003 and concerns increased activities of local law enforcement required by Penal Code section 530.6, subdivision (a) as added by Statutes 2000, chapter 956, when a complainant residing in the local law enforcement agency's jurisdiction reports identity theft to local law enforcement. Identity theft is defined as willfully obtaining "personal identifying information" and using that information for an unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person.[1] The use of the identifying information for an unlawful purpose completes the crime and each separate use constitutes a new crime.[2] Prior to enactment of the test claim statute, local law enforcement had discretion to decide whether or not to take a police report and begin an investigation when a complainant residing within its jurisdiction reported suspected identity theft. When a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, Penal Code section 530.6, subdivision (a) requires the local law enforcement agency to:

- take a police report of the matter,
- provide the complainant with a copy of that report, and,
- begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

The Test Claim Statute Imposes a Reimbursable State-Mandated Program for Cities and Counties for Some of the Required Activities within the Meaning of Article XIII B, Section 6 of the California Constitution

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[1] See Penal Code section 530.5.

[2] *People v. Mitchell* (App. 3 Dist. 2008) 78 Cal.Rptr.3d 855, 164 Cal.App.4th 442, review denied.

For reasons discussed in the analysis below, staff finds that state law did not require all of the state-mandated activities before January 1, 2000. Specifically, the requirements to take a police report and begin an investigation of the facts mandate a new program or higher level of service and impose costs mandated by the state within the meaning of Government Code section 17514 and 17556 because these activities were discretionary prior to enactment to the test claim statute and the test claim statute makes them mandatory. However, staff finds that referral of the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts is not a mandated activity and therefore is not reimbursable. Finally, staff finds that the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, already required local law enforcement agencies to provide complainants with a copy of the report.

CONCLUSION

Staff concludes that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

09/25/03	City of Newport Beach filed test claim with the Commission on State Mandates ("Commission")
10/07/03	Commission staff issued completeness review letter and requested comments from state agencies
11/05/03	DOJ requested a 60-day extension for filing comments due to schedule and workload conflicts.
11/10/03	DOF submitted comments on test claim
01/05/04	DOJ submitted comments on the test claim

Background

According to the California Office of Privacy Protection, California law provides a number of protections for identity theft victims and the key to obtaining those benefits is a police report.[3] Specifically, California Penal Code section 530.8,[4] entitles victims who obtain police reports to copies of documents relating to fraudulent transactions or accounts created using their personal information.[5] They are entitled to have information resulting from identity theft removed (blocked) from their credit reporting agency files.[6] They receive up to 12 free credit reports, one per month, in the 12 months from the date of the police report.[7] They can stop debt collection actions related to a debt resulting from identity theft. Before resuming collection, the collector must make a good faith determination that the evidence does not establish that the consumer is not responsible for the debt.[8] They can bring an action or assert a defense against anyone claiming a right to money or property in connection with a transaction resulting from identity theft.[9] If they are a victim of criminal identity theft, which occurs when an identity thief creates a false criminal record in the victim's name, they have additional rights including:

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[3] See *Know Your Rights: California Identity Theft Victims' Rights*, California Office of Privacy Protection.

[4] All further code references are to the California Penal Code unless otherwise specified.

[5] See also The Fair Credit Reporting Act (FCRA) § 609(e) [15 U.S.C. § 1681g].

[6] California Civil Code sections 1785.16, subdivision (k), 1785.16.1, 1785.16.2, and, 1785.20.3, subdivision (b); FCRA section 605B [15 U.S.C. § 1681c-2].

[7] California Civil Code section 1785.15.3, subdivision (b).

[8] California Civil Code section 1788.18.

[9] California Civil Code section 1798.93.

- The right to an expedited proceeding in Superior Court for getting a judge's order finding that they are factually innocent. If such an order is issued, the judge may also order the deletion, sealing, or labeling of records.[10]
- The right to be listed in the California Department of Justice's Identity Theft Victim Registry. This gives victims of criminal identity theft a mechanism for confirming their innocence.[11]

Test Claim Statute

This test claim concerns increased activities of local law enforcement required by section 530.6, subdivision (a) as added by Statutes 2000, chapter 956, when a complainant residing in the local law enforcement agency's jurisdiction reports identity theft to local law enforcement. The test claim statute, section 530.6, subdivision (a) provides:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

Claimant's Position

The claimant states that generally the location where a crime is committed determines where it will be investigated and where jurisdiction and venue for the investigation and enforcement may take place.[12] The claimant asserts that the test claim statute changes this to provide for venue and jurisdiction where the complainant resides.[13] The claimant states that Newport Beach is not the location of many thefts, though residents of Newport Beach have been victims of identity theft, and that the test claim statute requires Newport Beach to take and pursue a police report for crimes that did not occur in Newport Beach. Specifically, claimant asserts that the test claim statute requires local law enforcement to:

- take a police report;
- determine the appropriate law enforcement agency to investigate the matter further and make a referral to that agency;
- provide a copy of the report to the complainant.[14]

[10] Section 530.6, subsection (b).

[11] Sections 530.6 and 530.7.

[12] Test Claim, page 1.

[13] *Ibid.*

[14] Test Claim, page 2.

Department of Finance's (DOF) Position

DOF concludes that the test claim statute "may have resulted in increased costs as a result of 'a higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.'"[15]

Department of Justice's (DOJ) Position

DOJ, on the other hand, states that section 530.6, subdivision (a) does not impose a higher level of service. DOJ maintains that venue for identity theft crimes would be proper in the jurisdiction where the victim resides even without section 530.6, subdivision (a) because identity theft is a form of fraud or trespass against the person who is in constructive possession of his or her identity.[16] Thus, the crime "occurs" where the victim resides in addition to wherever the thief uses the identity of the victim for an unlawful purpose. DOJ's letter cites to an old case regarding theft and venue which is still good law,[17] to support this proposition. In addition, DOJ argues that even if the identity theft was committed outside of the state, venue would be proper where the crime is consummated, that is, where the victim lives, citing to Penal Code section 778.[18] Finally, DOJ points out that the test claim statute, as added by Statutes 2000, chapter 956 was sponsored by the Los Angeles County District Attorney's Office and states that if the Commission finds that section 530.6 imposes a new program or higher level of service on local agencies there should be no subvention since the legislation was requested by local government and supported by many cities.[19]

Discussion

The courts have found that article XIII B, section 6, of the California Constitution recognizes the state constitutional restrictions on the powers of local government to tax and spend. "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[20] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[21] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[22]

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[15] DOF comments dated November 6, 2003, page 1.

[16] DOJ comments dated January 5, 2004, page 1.

[17] *People v. Robinson* (1930) 107 Cal. App. 211, 222.

[18] DOJ comments dated January 5, 2004, page 1.

[19] *Ibid*, page 2.

[20] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[21] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[22] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3rd 830, 835 *(Lucia Mar)*.

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[23] To determine if the program is new or imposes a higher level of service, the test claim statutes and/or executive orders must be compared with the legal requirements in effect immediately before the enactment.[24] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[25] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[26]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[27] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[28]

Issue 1. Does Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 require local agencies to perform state-mandated activities?

The test claim statute, Section 530.6, subdivision (a) as added by Statutes 2000, chapter 956 states:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

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[23] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,*

[24] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[25] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[26] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[27] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[28] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

When a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, the plain language of section 530.6, subdivision (a) requires the local law enforcement agency to:

1. take a police report of the matter,
2. provide the complainant with a copy of that report, and,
3. begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

The California Supreme Court has noted: "When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn 1st to the statutory language, since the words the Legislature chose are the best indicators of its intent."[29] Further, our Supreme Court has noted: "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . ."[30] Because there has been some confusion regarding the meaning of these words, a statutory construction analysis is necessary.

The legislative history of section 530.6 indicates that the main purpose of the test claim statute is to help victims of identity theft to clear their names. Penal Code section 851.8 (A.B. 2861, Stats. 1980, chapter 1172) provides a procedure whereby a person who has been arrested or detained and is factually innocent may request a law enforcement agency or a court to seal or destroy the arrest record. However, this provision does not apply where the identity theft victim was not arrested or detained. Penal Code section 530.6 was intended to assist those victims who have not yet been arrested or detained.[31] The California Supreme Court has stated that the literal meaning of a statute must be read in accord with its purpose.[32] Thus the Legislature's intent to assist these victims will guide the following statutory construction analysis.

"Take a Police Report of the Matter"

A police report prepared in accordance with the test claim statute includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information as specified by sections 530.5 and 530.55. What it means to "take a police report of the matter" is undefined in California law. Moreover, "police report" is not defined in any of the well known dictionaries. However, "police" means: "1. [t]he governmental department charged with the preservation of public order, the promotion of public safety, and the prevention and detection of crime. 2. The officers or members of this department.[33] "Report" means: "a formal oral or written presentation

[29] *Freedom Newspapers, Inc v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.

[30] *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.

[31] See Sen. Com. on Pubic Safety, Analysis of Assem. Bill No. (AB) 1897, as Amended June 20, 2000.

[32] *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659.

[33] Black's Law Dictionary, 7th Edition, page 1178.

of facts."[34] The language of a related statute provides a victim of identity theft who provides a consumer credit reporting agency with a copy of a "police report prepared pursuant to Section 530.6. . .*regarding the public offenses described in section 530.5*" with up to twelve copies of his or her file (no more than one per month), following the date of the police report.[35] This language, when considered in conjunction with the Legislature's intent in passing the test claim statute to assist identity theft victim's in clearing their names supports the proposition that a police report prepared pursuant to section 530.6 must include information that establishes the elements of section 530.5.

The elements of the crime of identity theft are: 1) willfully obtaining personal identifying information, and 2) use of that information for any unlawful purpose.[36] Section 530.5 provides that a person that "willfully obtains personal identifying information as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person" is guilty of identity theft. The use of the identifying information for an unlawful purpose completes the crime and each separate use constitutes a new crime.[37] "Personal identifying information" is defined as the name, address, mother's maiden name, place of employment, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, the following identifying numbers: telephone, health insurance, credit card, taxpayer identification, school identification, state or federal driver's license, state or federal identification number, social security, employee identification number, professional or occupational, demand deposit account, savings account, checking account, PIN or password, alien registration, government passport, or any form of identification that is equivalent to those listed above.[38] Thus a "police report" under the test claim statute must include information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual, including, if available, information surrounding the suspected identity theft, places where the crimes occurred, and how and where the suspect obtained and used the personal identifying information in accordance with sections 530.5 and 530.55.

In addition to the protections afforded by California law, according to the Federal Trade Commission (FTC), in order for a police report to be considered an Identity Theft Report, and therefore entitle an identity theft victim to a number of federal law protections, the police report must contain details about the accounts and inaccurate information that resulted from the identity

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[34] *Ibid*, page 1303.

[35] California Civil Code section 1785.15.3 (Stats. 2002, c. 860), emphasis added.

[36] Section 530.5.

[37] *People v. Mitchell* (App. 3 Dist. 2008) 78 Cal.Rptr.3d 855, 164 Cal.App.4th 442, review denied.

[38] Penal Code section 530.55.

theft.[39] A person who suspects he or she is the victim of identity theft can file an Identity Theft Complaint on line with the FTC at https://www.ftccomplaintassistant.gov. The FTC advises victims to bring a printed copy of the ID Theft Complaint with them to the police station in order to better assist the police in creating a detailed police report so that victims can access the important federal protections available to them if they have an Identity Theft Report. The FTC has also prepared a Letter to Law Enforcement Officers encouraging local law enforcement to attach or incorporate the ID Theft Complaint into the police report, sign the "Law Enforcement Report Information" section of the FTC's ID Theft Complaint, and provide the identity theft complainant with a copy of the Identity Theft Report (the police report with the victim's ID Theft Complaint attached or incorporated) to permit the victim to dispute the fraudulent accounts and debts created by the identity thief.[40] Though the FTC suggestions are not binding upon local law enforcement agencies, the requirements for an Identity Theft Report are consistent with the required contents of a police report and the legislative intent "to help victims of identity theft to clear their names."

"Provide the Complainant with a Copy of That Report"

"Provide the complainant with a copy of that report" means that local law enforcement must make readily available to the complainant an actual copy of the police report taken. The word "provide" is not defined in California law or in Black's Law Dictionary. However, one definition of "provide" is "[t]o make (something) readily available."[41] According to Black's Law Dictionary a "copy" means: "an imitation or reproduction of an original."[42] "That report," clearly refers to the "police report" immediately preceding "provide the complainant with a copy of that report" in the same sentence.

"Begin an Investigation of the Facts or Refer the Matter to the Law Enforcement Agency Where the Suspected Crime was Committed for Further Investigation of the Facts."

When a local law enforcement agency has taken a police report on the matter, the plain language of the test claim statute also requires it to "begin an investigation of the facts." The word "begin" means: "to originate; to come into existence; to start; to institute, to initiate; to commence."[43] While the word "investigation" means: "the process of inquiring into or tracking down through inquiry."[44] The word "investigate" means: "[t]o follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry."[45] Therefore, in the context of section 530.6, to "begin an investigation" means to commence an inquiry into suspected identity theft. However, "begin" certainly does not require a "complete" investigation such as would be required to criminally prosecute a suspect.

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[39] FTC Letter to Law Enforcement Officers, page 1

[40] *Ibid.*

[41] Roget's II, The New Thesaurus, Expanded Edition, page 778.

[42] Black's Law Dictionary, Seventh Edition, page 337.

[43] Black's Law Dictionary, Sixth Edition, page 155.

[44] Black's Law Dictionary, *supra*, page 825.

[45] *Ibid.*

The test claim statute continues in pertinent part: "...or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts." This language is confusing because it could be read as requiring local law enforcement to either begin an investigation or refer the matter except that the sentence ends with "for *further investigation* of the facts" (emphasis added). The adverb "further" means "1. Going beyond what currently exists: without further ado. 2. Being an addition."[46] Thus, "further investigation" necessarily requires the law enforcement agency that takes the police report to first begin an investigation before referring it out to another agency so that that the other agency may go beyond or add to the investigation that was begun by the referring agency. Still, some local agencies found this language confusing saying that it was unclear whether it permitted a local law enforcement agency to simply refer a matter to a jurisdiction where the suspected crime occurred without investigation.[47] Three years after enactment of the test claim statute, section 530.6 was amended by Statutes of 2003, chapter 533 which is not pled in this test claim, for the purpose of clarifying that the local law enforcement agency with jurisdiction over the victim's residence or place of business must take the police report and begin an investigation[48] to say:

> A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence or place of business, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. ~~or, i~~ If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

(Underlining and strikethrough of amendments and deletions added.)

The California Supreme Court stated:

> " 'Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ....' " (*Times Mirror Co. v. Superior Court.* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)[49]

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[46] Roget's II , The New Thesaurus, Expanded Edition, page 435.

[47] Assembly Committee on Judiciary analysis of Sen. Bill (SB) 602, as amended June 26, 2003, page 7.

[48] *Ibid.*

[49] *Williams v. Garcetti* (1993) 5 Cal.4th 561.

In this instance, there is a statement of legislative intent to clarify the test claim statute.[50]

Thus, referral of the matter to another jurisdiction for further investigation of the facts is only permitted after the investigation has begun and at that point would be at the discretion of the referring law enforcement agency.[51] The clarifying language did not change the original requirement for the law enforcement agency where the alleged victim resides to begin an investigation of the matter because, as discussed above, the language "further investigation of the facts" necessarily implies that a preliminary investigation of the facts was conducted by the law enforcement agency that took the police report. Because this permissive authority to refer the matter to another jurisdiction does not require any action on behalf of local law enforcement, it does not impose a new state-mandated activity.

Thus, based on the foregoing analysis, staff finds that when a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 requires local law enforcement agencies to undertake the following state-mandated activities:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information;
- provide the complainant with an actual copy of that report; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Issue 2. Do the state-mandated activities impose a new program or higher level of service on local agencies?

For section 530.6, subdivision (a) to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a new "program" or "higher level of service." The California Supreme Court, in the case of *County of Los Angeles v. State of California,*[52] defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[53] To determine if a required activity is new or imposes

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[50] Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

[51] *Ibid.*

[52] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[53] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

a higher level of service, a comparison must be undertaken between the test claim statute and the legal requirements in effect immediately prior to the enactment of the test claim statute.

For the reasons stated below, staff finds that state law did not require all of the state-mandated activities before January 1, 2000. The requirements to take a police report and begin an investigation of the facts represent a new program or higher level of service within the meaning of Government Code section 17514 and 17556. However, staff finds that the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, requires local law enforcement agencies to provide complainants with a copy of the report.

Duty of Local Law Enforcement to Take a Police Report and Begin an Investigation

DOJ argues that section 530.6, subdivision (a) does not impose a new program or higher level of service.[54] DOJ maintains that venue for identity theft crimes would be proper in the jurisdiction where the victim resides even without section 530.6, subdivision (a) because identity theft is a form of fraud or trespass against the person who is in constructive possession of his or her identity. Based on DOJ's reasoning, the crime "occurs" where the victim resides in addition to wherever the thief uses the identity of the victim for an unlawful purpose.

Prior to the enactment of the test claim statute, local law enforcement agencies in the jurisdiction where the complainant resided could take police reports from residents regarding alleged crimes of identity theft, even if the suspect resided in another jurisdiction and committed each offense of using the personal identifying information for unlawful purposes in a jurisdiction other than that in which the complainant resided. The following provisions of the Penal Code support this conclusion.

Section 830.1 provides that the authority peace officers "extends to any place in the state, as follows:

(1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves. . . ."

A "public offense" is not specifically defined in California law but according to Black's Law Dictionary, a "public offense" is "an act or omission forbidden by law."[55] Thus, it would include all of the theft crimes, including identity theft.

Section 789, establishes the jurisdiction of a criminal action for "stealing or embezzling ... in any competent court into or through the jurisdictional territory of which such stolen or embezzled property has been brought." Penal Code section 789 was originally enacted in 1872 and has had three amendments that are of little significance to this test claim.[56]

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[54] Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

[55] Blacks Law Dictionary, Seventh Edition, page 1110.

[56] The essence of this provision has remained unchanged since 1872: the crime of "stealing" which is synonym for "theft" or "larceny" could be prosecuted where the property was originally taken or anywhere it was transported to or through. Moreover, Penal Code section 789, as

Theft in its various forms (burglary, carjacking, robbery, theft, or embezzlement), receipt or concealment, sale, withholding, or aiding in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained of stolen property are all crimes.[57] From 1993 to the present, section 786, subdivision (a) has provided that when a person takes property in one jurisdiction by burglary, carjacking, robbery, theft, or embezzlement and brings the property into another jurisdiction, or a person receives the property in another jurisdiction, the district attorney can prosecute in any of the jurisdictions. This makes sense because crimes were committed in all of the jurisdictions specified in section 786, subdivision (a). Similarly, a peace officer's authority extends to any public offense for which there is probable cause to believe has been committed within the political subdivision that employs the police officer. Therefore, local law enforcement in the City of Newport Beach had authority to take a police report from a resident of its jurisdiction in a case of suspected identity theft under one or more of the theft related Penal Code provisions discussed above prior to the test claim statute.

Prior to the enactment of the test claim statute, sections 830.1 and 789 authorized the peace officers who had jurisdiction over the victim's residence to exercise jurisdiction in identity theft cases. Therefore, the test claim statute simply clarifies and restates what was existing law with regard to the *discretion* of the law enforcement agency with jurisdiction over the victim's residence to exercise jurisdiction in the case of suspected identity theft. Thus, Newport Beach's ability to take police reports of identity theft claims brought by residents of its jurisdiction is not new. However, there was no specific state mandate to take a police report or begin an investigation of the facts in the case of suspected identity theft prior to the test claim statute, as added by Statutes 2000, chapter 956.[58] Because the test claim statute specifically mandates the taking of a police report and beginning of an investigation, DOJ's conclusion that it does not impose a new program or higher level of service is incorrect.

Moreover, Government Code section 17565 provides that "[i]f a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." Thus, though the Appropriations Committee analysis notes that many jurisdictions did prepare police reports and conduct investigations regarding reports of identity theft from residents within their jurisdictions prior to the test claim statute, as added by Statutes 2000, chapter 956,[59] this point is irrelevant to the issue of whether the test claim imposes a reimbursable state-mandated program or higher level of service. There was no California or federal law specifically requiring police to take a report or begin an investigation in the case of suspected identity theft prior to the enactment of the test claim statute. This means that prior to

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enacted in 1872 simply enacted what was already well established common law. (See *People v. Staples* (1891) 91 Cal. 23 at 27.)

[57] See generally Penal Code sections 211, 215, 484, 487, 488, 496, 503-515.

[58] Note that there are specific provisions in state law mandating police reports for domestic violence and child abuse incidents (See e.g. Pen. Code, §§ 13730, 11164, 11165.9, and 11165.14.)

[59] Assembly Committee on Appropriations Analysis of AB 1897 (Davis) as amended: May 16, 2000.

the test claim statute, local agencies were free to decline to take a police report or to decline to begin an investigation in a case of suspected identity theft. The test claim statute removed that discretion.

The taking of a police report on an allegation of identity theft and beginning an investigation carry out the governmental function of providing service to the public and the mandatory activities imposed by section 530.6 impose unique requirements on local governments that do not apply generally to all residents and entities of the state. To the extent local agencies provide police protection; they are serving a peculiarly governmental function.[60] The purpose of the test claim statute is "to provide expedited remedies for a victim of identity theft to clear his or her name."[61] A police report provides important factual information which guides the court's decision on whether to declare the alleged victim factually innocent and therefore entitled to California's identity theft protections. The taking of the report and beginning of an investigation supports effective police protection in the area of identity theft.

Duty to Provide a Copy of the Police Report to the Complainant

Providing complainants with a copy of the police report and other activities related to providing police reports to complainants were already required under the California Public Records Act, and therefore do not constitute a new program or higher level of service. Since 1981, Government Code section 6254, subdivision (f), of the California Public Records Act has required local law enforcement agencies to disclose and provide records of incidents reported to and responded by law enforcement agencies to the victims of an incident.[62] Government Code section 6254, subdivision (f), states in relevant part the following:

> [S]tate and local law enforcement agencies shall disclose the names and addresses of the persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident . . . .

Except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation, law enforcement agencies are required to disclose and provide to the victim the following information:

> The time, substance, and location of all complaints or requests for assistance received by the agency; the time and nature of the response; the time, date, and location of the occurrence; the time and date of the report; the name and age of

[60] See *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[61] Assembly Committee on Appropriations Analysis of AB 1897, *supra.*

[62] Government Code section 6254 was added by Statutes 1981, chapter 684. Section 6254 was derived from former section 6254, which was originally added in 1968 (Stats. 1968, ch. 1473).

the victim; the factual circumstances surrounding the crime or incident; and a general description of any injuries, property, or weapons involved.[63]

Although the general public is denied access to the information listed above, the victim of identity theft is entitled to the information described above.[64] Furthermore, the information required to be disclosed to victims under Government Code section 6254, subdivision (f), satisfies the purpose of the test claim statute. As indicated in the legislative history, the purpose of the test claim statute is to assist victims of identity theft in clearing their names. As discussed above, a police report is required to qualify the victim for numerous protections under California and federal law. Also credit card companies and financial institutions may ask victims to show a copy of a police report to verify the crime.[65] Staff finds that the disclosure of information describing the factual circumstances surrounding the incident pursuant to Government Code section 6254, subdivision (f), is evidence that can support a victim's request for a judicial determination of factual innocence pursuant to section 530.6, subdivision (b) where the identity thief has committed crimes with which the identity theft victim has been charged.

Finally, staff acknowledges that the requirements under the test claim statute and the requirements under the Public Records Act are different in two respects. First, unlike the Public Records Act, the test claim statute requires local law enforcement to "provide the complainant with a copy" of the police report, but does not require the complainant to request the copy. However, Government Code section 6253, subdivision (b), requires the local agency to "upon request" make the records "promptly available." As discussed above, one meaning of "provide" in common usage is "[t]o make (something) readily available."[66] Thus, the requirement of the test claim to "provide a copy of that report" to the victim is essentially the same activity as required by the Public Records Act of making the copy "promptly available". Second, the test claim statute does not specifically mandate when law enforcement agencies are required to provide the complainant with a copy of the police report while Government Code section 6253, subdivision (b), requires the records to be made "promptly available" and generally defines "promptly available" as within no more than 10 days. However, these differences are minor and the activities of providing, retrieving, and copying information related to a case of suspected identity theft are not new. Thus, the activity 'provide complainant with a copy of that report" does not constitute a new program or higher level of service.

Additionally, while the test claim statute is silent on fee authority for providing a copy of the report, Government Code Section 6253, subdivision (b) authorizes local agencies to impose a fee to cover the direct costs of duplication or a statutory fee if available. Most jurisdictions, including Newport Beach, currently charge a fee for the direct costs of providing a copy of a police report. The Los Angeles Police Department currently charges $23 per report while Newport Beach Police Department charges only $4. There are some cities that choose not to

[63] Government Code section 6254, subdivision (f)(2).

[64] *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 786.

[65] California Attorney General, Identity Theft: Tips for Victims, http://caag.state.ca.us/idtheft/tips.htm (accessed 1/29/09).

[66] Roget's II, The New Thesaurus, Expanded Edition, page 778.

charge crime victims for copies of police reports, but providing free copies to victims is a policy decision which is at the discretion of the local agency and not mandated by the state.

Therefore, based on the above discussion staff finds that only the following activities mandated by section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 constitute a new program or higher level of service:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information, and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Issue 3: Are there costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant estimates that for the tasks of taking a police report, providing a copy of the police report to the victim, ascertaining the appropriate jurisdiction and referring the matter for further investigation is in excess of $15,000 per year.[67] Claimant also asserts that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here. (Test Claim, page 4.)

DOJ argued that even in the event that the Commission finds that there is a state-mandated program or higher level of service that it should deny the claim because the exception under Government Code section 17556, subdivision (a) should apply in this case.[68] Government Code section 17556 subdivision (a) prohibits the Commission from finding costs mandated by the state if the test claim is submitted by a local entity that requested the test claim legislation. Government Code section 17556 subdivision (a) requires a specific request for the test claim legislation in the form of a resolution of the governing body of the city, county or school district claimant or a letter from the delegated representative of the governing body. However, Government Code section 17556 subdivision (a) does not apply in this case because there is no evidence of a specific request for this legislation by the claimant. Staff pulled the author's bill file and found no evidence of anything from Newport Beach's governing body requesting the legislation. Moreover, a search of the City of Newport Beach's Resolutions for the years 1999 and 2000 shows no evidence of a specific request for this legislation. Though many local governments supported Assembly Bill 1897, support of a bill does not constitute a request for legislation under Government Code section 17556, subdivision (a).

Government Code section 17556 subdivision (g) provides an exemption from finding costs mandated by the state for statutes that create a new crime or infraction, eliminate a crime or

[67] Test Claim Page 3.

[68] DOJ Comment Letter, page 2.

infraction, or change the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. Thus, though the test claim statute relates to investigations of suspected crimes, Government Code section 17556 subdivision (g) does not apply because the test claim statute, as added by Statutes 2000, chapter 956 does not create or eliminate a crime or infraction or change the penalty for a crime or infraction.

Therefore, staff finds costs mandated by the state as defined by Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply for local law enforcement agencies to:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information, and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

CONCLUSION

Staff concludes that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places were the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

Original List Date:	9/30/2003	Mailing Information: Draft Staff Analysis
Last Updated:	7/19/2006	
List Print Date:	01/08/2009	
Claim Number:	03-TC-08	
Issue:	Identity Theft	

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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MAR 0 4 2009

COMMISSION ON
STATE MANDATES

RESPONSE TO DRAFT STAFF ANALYSIS

On Original Test Claim
Chapter 956, Statutes of 2000
Penal Code section 530.6

Claim no. 03-TC-08

Identity Theft

City of Newport Beach, Claimant

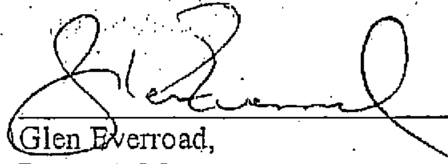
Test claimant City of Newport Beach submits the following in response to the Draft Staff Analysis issued by Commission staff on February 10, 2009. The City supports the Draft Staff Analysis.

The City, however, reserves the right to revisit during the Parameters and Guidelines phase the issue of including the activity of referring the matter to the law enforcement agency where the suspected crime was committed for further investigation. Although the Staff has found that this activity was not mandated, it may still be considered as reasonably necessary to carry out the mandate.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 2nd day of March, 2009, at Newport Beach, California, by:



Glen Everroad,
Revenue Manager
City of Newport Beach

Ms. Jolene Tollenaar
MGT of America
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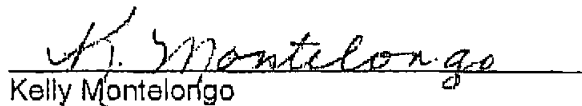
Ms. Juliana F. Gmur
MAXIMUS
2380 Houston Avenue,
Clovis, CA 93611

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on 3/05/09 at Sacramento, California.



Kelly Montelongo

DEPARTMENT OF
FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR

STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

March 3, 2009

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MAR 04 2009

COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of February 10, 2009, the Department of Finance has reviewed the draft staff analysis for Claim No. 03-TC-08, "Identity Theft."

As the result of our review, Finance concurs with the Commission on State Mandate's (Commission) staff analysis to partially approve the test claim for the following activities:

- Take a police report supporting a violation of Penal Code Section 530.5, which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose. This would include, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information.

- Begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list which accompanied your February 10, 2009 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

Diana L. Ducay
Program Budget Manager

Enclosure

Attachment A

DECLARATION OF CARLA CASTAÑEDA
DEPARTMENT OF FINANCE
CLAIM NO. 03-TC-08

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

March 4, 2009
at Sacramento, CA

Carla Castañeda

PROOF OF SERVICE

Test Claim Name: Identity Theft
Test Claim Number: CSM-03-TC-08

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, Floor, Sacramento, CA 95814.

On 3/05/09, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, Floor, for Interagency Mail Service, addressed as follows:

A-16
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Facsimile No. 445-0278

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Ms. Juliana F. Gmur
MAXIMUS
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Clovis, CA 93611

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on 3/05/09 at Sacramento, California.

K. Montelongo
Kelly Montelongo

United States District Court, N.D. California.
Yolanda BAUGH and Donyelle Baugh, Plaintiffs,
v.
CBS, INC., Group W Television, KPIX, and Dan Moguloff, Defendants.
No. C 93-0601 FMS (ARB).

June 22, 1993.

Crime victims who were filmed by news reporters in their home following domestic violence incident sued broadcaster, broadcaster's local affiliate, and owner of affiliate alleging various torts under California law after film was broadcast on television news magazine segment concerning victim assistance programs. On defendants' motions to dismiss or for summary judgment, the District Court, Fern M. Smith, J., held that: (1) news magazine program was entitled to protection under "news account" exception to liability under California statute governing claims for appropriation of likeness for commercial purposes; (2) genuine issue of material fact as to whether broadcast disclosed matters which were degrading to plaintiffs precluding summary judgment in favor of defendants on claim for disclosure of private facts under California law; (3) California's Uniform Single Publication Act barred plaintiffs' claims for intrusion on seclusion, trespass, unfair competition, fraud and intentional and negligent infliction of emotional distress to extent that claims relied on actual broadcast of news magazine segment, but not to extent that they relied on tortious physical intrusion into plaintiffs' home by news reporters; and (4) allegations stated claim for intentional infliction of emotional distress under California law.

Motions granted in part; denied in part.

West Headnotes

[1] Federal Civil Procedure 170A ⚷1829

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1829 k. Construction of Pleadings. Most Cited Cases

On motion to dismiss, court must accept as true all material allegations in complaint, as well as reasonable inferences to be drawn from them; however, court need not accept conclusory allegations, unreasonable inferences nor unwarranted deductions of fact.

[2] Federal Civil Procedure 170A ⚷2491.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases

Summary disposition is particularly favored in cases involving First Amendment rights. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.; U.S.C.A. Const.Amend. 1.

[3] Torts 379 ⚷387

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k386 Conduct or Misappropriation Actionable in General
379k387 k. In General. Most Cited Cases
(Formerly 379k8.5(6))

Under California law, claim for appropriation of likeness for commercial purposes may present one of two theories: first type of appropriation is right of publicity and arises from commercially exploitable opportunities embodied in plaintiff's likeness, and second type of appropriation is appropriation of name and likeness that brings injury to feelings, that concerns one's own peace of mind, and that is mental and subjective. West's Ann.Cal.Civ.Code § 3344(a).

[4] Torts 379 ⚷393

379 Torts

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379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Crime victims failed to state claim for appropriation of likeness for commercial purposes under California statute based on use of film of them taken in her home by news reporters following incident of domestic violence in television news magazine segment concerning victim assistance program; although news magazine was not traditional news show, it was entitled to protection under "news account" exception to statute. West's Ann.Cal.Civ.Code § 3344(a, d).

[5] Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Fact that network television news magazine program generated advertising revenue did not prevent broadcaster from claiming "news account" immunity from suit alleging appropriation of likeness for commercial purposes under California law. West's Ann.Cal.Civ.Code § 3344(a, d).

[6] Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Whether broadcaster can claim "news account" immunity from claim of appropriation of likeness for commercial purposes under California law, appropriate focus is on use of likeness itself; if plaintiff's face was used in connection with news account, then no liability may be found under "news account" exception to statute. West's Ann.Cal.Civ.Code § 3344(a, d).

[7] Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Broadcaster, by mixing videotape of plaintiffs made by news reporters following domestic violence incident in plaintiffs' home with other episodes in news magazine broadcast and sensationalizing event at plaintiffs' home, did not forfeit its "news account" protection under California law from plaintiffs' claim for appropriation of likeness for commercial purposes, where there was no claim that broadcast was false. West's Ann.Cal.Civ.Code § 3344(a, d).

[8] Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Although television news magazine program was not traditional news show, it was plainly "news or public affairs" broadcast in broad sense and was entitled to protection from plaintiff's claim under California law for appropriation of likeness for commercial purposes under "news account" exception to statute. West's Ann.Cal.Civ.Code § 3344(a, d).

[9] Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity

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379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Even if television news magazine did not fit traditional notions of news, it was protected under category of "public affairs" from plaintiffs' claim for appropriation of likeness for commercial purposes under California law arising out of use of videotape of plaintiff in her home after domestic violence incident. West's Ann.Cal.Civ.Code § 3344(d).

[10] Torts 379 ⚷393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Because television broadcaster could have substituted another victim of domestic violence for plaintiff in making its television news magazine segment on victim assistance programs did not preclude broadcaster's "public interest" defense to plaintiff's suit under California law for appropriation of likeness for commercial purposes given limits imposed by California statute creating claim of appropriation of likeness for commercial purposes and California's preference for speedy resolution of free speech cases. West's Ann.Cal.Civ.Code § 3344(a, d).

[11] Torts 379 ⚷357

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record; Newsworthiness
379k357 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Right to be let alone and to be protected from undesired publicity is not absolute but must be balanced against public interest in dissemination of news and information consistent with democratic processes under constitutional guarantees of freedom of speech and of the press; when news or public affairs publications are involved, balance must be drawn strongly in favor of dissemination. U.S.C.A. Const.Amend. 1.

[12] Torts 379 ⚷357

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record; Newsworthiness
379k357 k. In General. Most Cited Cases
(Formerly 379k8.5(7))
Matters disclosed by television news magazine segment on victim assistance program which included videotape of plaintiff in her home following domestic violence incident went far beyond disclosure of facts publicly available in police report of domestic violence incident so as to state claim by plaintiff under California law for tort of disclosure of private facts, where news magazine segment did not merely broadcast facts contained in police report but broadcast event of domestic violence as it unfolded and effectively disclosed plaintiff's emotional and personal reactions to incident as well as her comments to victim's assistance employee.

[13] Records 326 ⚷54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In General. Most Cited Cases
Disclosure of police report of domestic violence incident under California Public Records Act was proper, despite provision of Act that disallowed disclosure of name and address of victim of domestic violence, where Act allowed disclosure of location of crime which, in this case, effectively disclosed victim's address, and name of victim would be withheld under Act only if victim made formal request and victim failed to allege that she made any such request.

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West's Ann.Cal.Gov.Code §§ 6254, 6254(f)(2).

[14] Federal Civil Procedure 170A ⚿2515

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2515 k. Tort Cases in General. Most Cited Cases

Genuine issue of material fact as to whether television news segment on victim assistance program disclosed facts that were "degrading" to victim of domestic violence who was depicted in program precluded summary judgment in favor of broadcaster on victim's claim under California law for tort of disclosure of private facts.

[15] Torts 379 ⚿357

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record; Newsworthiness
379k357 k. In General. Most Cited Cases
(Formerly 379k28)

Personal involvement of plaintiff in incident of domestic violence was not newsworthy as matter of law so as to bar plaintiff's claim against broadcaster under California law for tort of disclosure of private facts arising from broadcaster's use of videotape of plaintiff following incident of domestic violence on program featuring victim assistance programs, even though issue of domestic violence and story of victim assistance programs was newsworthy.

[16] Antitrust and Trade Regulation 29T ⚿296

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk293 Defenses
29Tk296 k. Privilege or Immunity. Most Cited Cases
(Formerly 382k862.1 Trade Regulation)

Damages 115 ⚿57.49

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.49 k. Privilege or Immunity; Exercise of Legal Rights. Most Cited Cases
(Formerly 115k50.10, 115k49.10)

Torts 379 ⚿341

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k341 k. Particular Cases in General. Most Cited Cases
(Formerly 379k8.5(5.1), 379k8.5(4))

Trespass 386 ⚿12

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k12 k. Entry. Most Cited Cases

Claims brought by plaintiff, who was subject of broadcast of television news magazine segment on victim assistance programs, for intrusion on seclusion, trespass, unfair competition, and intentional and negligent infliction of emotional distress were barred under California Uniform Single Publication Act to extent that claims relied on actual broadcast of news magazine segment; however, claims remained viable to extent they relied on tortious physical intrusion into plaintiff's home by television broadcast personnel if she did not knowingly consent to entry of reporters into her home. West's Ann.Cal.Civ.Code § 3425.3.

[17] Torts 379 ⚿121

379 Torts
379I In General

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379k120 Defenses and Mitigating Circumstances
379k121 k. In General. Most Cited Cases
(Formerly 379k16)
Nothing in language of California's Uniform Single Publication Act implied that California legislature intended to grant complete protection for any tortious act committed by investigative news reporters, simply because they eventually published story based on their investigations. West's Ann.Cal.Civ.Code § 3425.3.

[18] Damages 115 ⚷57.49

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.49 k. Privilege or Immunity; Exercise of Legal Rights. Most Cited Cases
(Formerly 115k50.10, 115k49.10)
Plaintiffs could not circumvent constitutional free speech protection available to television broadcasters by recasting privacy claims as other common-law torts such as intentional and negligent infliction of emotional distress. U.S.C.A. Const.Amend. 1.

[19] Antitrust and Trade Regulation 29T ⚷296

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk293 Defenses
29Tk296 k. Privilege or Immunity. Most Cited Cases
(Formerly 382k862.1 Trade Regulation)

Constitutional Law 92 ⚷2138

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2135 Television
92k2138 k. Journalists. Most Cited Cases
(Formerly 92k90.1(9))

Damages 115 ⚷57.49

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.49 k. Privilege or Immunity; Exercise of Legal Rights. Most Cited Cases
(Formerly 115k50.10, 115k49.10)

Fraud 184 ⚷36

184 Fraud
184II Actions
184II(A) Rights of Action and Defenses
184k36 k. Defenses. Most Cited Cases

Torts 379 ⚷342

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k342 k. Defenses in General. Most Cited Cases
(Formerly 379k16)

Trespass 386 ⚷23

386 Trespass
386II Actions
386II(A) Right of Action and Defenses
386k22 Defenses
386k23 k. In General. Most Cited Cases
To extent that claims for intrusion on seclusion, trespass, unfair competition, fraud, and intentional and negligent infliction of emotional distress were based on actual publication of plaintiff's story by television broadcaster on news magazine segment, claims were barred by constitutional free speech protections; however, constitutional protections did not immunize prepublication activities by television broadcaster

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including physical intrusion into plaintiff's home by news reporters with video camera. U.S.C.A. Const.Amend. 1.

[20] Trespass 386 ⚷10

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k10 k. In General. Most Cited Cases
Even public figure is entitled to prevent news reporters from entering private home; that public figure can maintain trespass action against news reporter who climbs his fence, no matter how newsworthy ultimate story published by reporter.

[21] Trespass 386 ⚷13

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases
Allegations that television news reporters exceeded terms of consent given by plaintiff to enter her home following domestic violence incident by broadcasting videotape made in home failed to state claim for trespass under California law, where broadcasting occurred after news reporters left plaintiff's property.

[22] Trespass 386 ⚷2

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k2 k. Intent. Most Cited Cases
Under California law, trespass is strict liability tort in sense that defendant's motivation or good-faith belief is irrelevant.

[23] Trespass 386 ⚷25

386 Trespass
386II Actions
386II(A) Right of Action and Defenses
386k22 Defenses
386k25 k. Consent or License. Most Cited Cases
No trespass can be found under California law if actual consent to entry was given.

[24] Trespass 386 ⚷13

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases
Under California law, trespass claim exists where defendant exceeds scope of consent to entry given by plaintiff.

[25] Trespass 386 ⚷25

386 Trespass
386II Actions
386II(A) Right of Action and Defenses
386k22 Defenses
386k25 k. Consent or License. Most Cited Cases
Under California law, consent to entry does not have to be knowing or meaningful in order to bar action for trespass.

[26] Trespass 386 ⚷25

386 Trespass
386II Actions
386II(A) Right of Action and Defenses
386k22 Defenses
386k25 k. Consent or License. Most Cited Cases
Under California law, where consent to entry is fraudulent induced, but consent is nonetheless given, plaintiff has no claim for trespass.

[27] Torts 379 ⚷344

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k344 k. Waiver or Consent. Most Cited Cases
(Formerly 379k16)
Plaintiff who gave her consent to entry of her home by television news reporters had no remedy with re-

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gard to subsequent news broadcasts of videotape of her made in her home based upon intrusion on seclusion claim under California law.

[28] Torts 379 ⚷340

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k340 k. In General. Most Cited Cases
(Formerly 379k8.5(4))

Torts 379 ⚷344

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k344 k. Waiver or Consent. Most Cited Cases
(Formerly 379k8.5(4), 379k16)

Under California law, intrusion on seclusion requires neither publication nor existence of technical trespass; nonetheless, as with intentional tort, consent is absolute defense, even if improperly induced.

[29] Damages 115 ⚷57.12

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.12 k. Particular Cases in General. Most Cited Cases
(Formerly 382k862.1 Trade Regulation)

Plaintiffs sought damages, and not merely restitutionary relief reflecting value of what was taken from them as result of television broadcast of news magazine segment including videotape of plaintiffs in their home following incident of domestic violence so that plaintiffs could not make claim against broadcaster for unfair competition under California law, where plaintiffs were seeking remedy for embarrassment and emotional distress caused by publication of incident at home and were not arguing that they could have sold their story to another network and that broadcaster effectively misappropriated value of their story. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17203.

[30] Damages 115 ⚷149

115 Damages
115VIII Pleading
115k149 k. Mental Suffering and Emotional Distress. Most Cited Cases

Allegations that television news reporters entered plaintiffs' home and misrepresented their identities in order to gain her consent to videotaping at time of domestic violence incident, that news reporter selected plaintiff specifically because incident of domestic violence had just occurred and knew that plaintiff was vulnerable and took advantage of her position were sufficient to state claim against news reporters for intentional infliction of emotional distress under California law.

[31] Damages 115 ⚷57.18

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.13 Negligent Infliction of Emotional Distress
115k57.18 k. Particular Cases. Most Cited Cases
(Formerly 115k49.10)

No legal duty arose on part of television news reporters not to reveal embarrassing, private facts about plaintiff and her daughter after plaintiff notified news reporters that she was misled about their intentions with respect to videotaping in her home following domestic violence incident and that she did not want her privacy breached, and thus, broadcaster's decision to go ahead with broadcast including videotape of plaintiff could not be basis for negligent infliction of emotional distress claim under California law.

[32] Fraud 184 ⚷44

184 Fraud

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184II Actions
184II(C) Pleading
184k44 k. Contract, Transaction, or Circumstances Connected with Fraud. Most Cited Cases
Allegations that included time and place of news reporter's alleged misrepresentations to plaintiff, but which failed to identify person making some of the misrepresentations was sufficient to plead fraud claim by plaintiff against news reporters for allegedly misrepresenting their intentions in entering plaintiff's home with their video cameras following domestic violence incident and subsequently broadcasting videotape on television news program, where no discovery had been allowed in case.

[33] Federal Civil Procedure 170A 2515

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2515 k. Tort Cases in General. Most Cited Cases
Declaration supplied by television broadcaster's local affiliate and its owner that they merely acted as conduit for network's broadcast of television news magazine segment which included videotape of plaintiff in her home following domestic violence incident, and that none of their personnel were involved in videotaping at home was insufficient to justify grant of summary judgment to affiliate and its owner in action alleging various torts arising from broadcast of news magazine episode, where no discovery had yet been allowed in case.

[34] Alternative Dispute Resolution 25T 125

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk125 k. Compulsory Arbitration. Most Cited Cases
(Formerly 33k4.1 Arbitration)
Suit alleging various torts arising from television broadcast of episode of news magazine brought including film of plaintiff made by news reporters following domestic violence incident in her home would be removed from mandatory arbitration given complexity of issues in case. U.S.Dist.Ct.Rules N.D.Cal., Rule 500-3.

*749 Robert E. Kroll, Oakland, CA, John Douglas Moore, Stone & Moore, San Francisco, CA, for plaintiffs.
Neil L. Shapiro, Michelle D. Kahn, Brobeck Phleger & Harrison, San Francisco, CA, Douglas P. Jacobs, Los Angeles, CA, Douglas P. Jacobs, Madeleine Schachter, New York City, for defendants.

ORDER

FERN M. SMITH, District Judge.
Plaintiffs Yolanda Baugh ("Baugh") and her daughter, Donyelle Baugh, have filed suit alleging various torts arising from an episode of "STREET STORIES," a weekly news magazine produced and broadcast by Defendant Columbia Broadcasting System, Inc. ("CBS"). Plaintiffs have also named Group W Television, Inc., the owner of CBS' San Francisco affiliate KPIX-TV ("Group W"), and Dan Moguloff ("Moguloff"), field producer for STREET STORIES as Defendants. All Defendants move to dismiss the claims *750 or, in the alternative, for summary judgment. In addition, Defendant Group W moves for dismissal or summary judgment on the basis that it is merely a conduit of the network broadcast. Plaintiffs move for summary judgment on their trespass and unfair competition claim. Finally, Plaintiffs move for relief from the automatic referral to arbitration under Local Rule 500. For the reasons set forth below, the Court DISMISSES the claims for appropriation of likeness, intrusion on seclusion, trespass, unfair competition, and negligent infliction of emotional distress, but DENIES Defendants' motions with respect to the disclosure of private facts, fraud, and intentional infliction of emotional distress claims.

BACKGROUND

CBS describes STREET STORIES as a "weekly news and public affairs magazine." The segment at issue was entitled "Stand by Me" and was broadcast over the CBS Network on April 9, 1992 ("the Broadcast").

The Broadcast concerned the Mobile Crisis Intervention Team, run by the Alameda County District Attorney, which is designed to provide emergency assistance for crime victims. The Broadcast focused on the work of Elaine Lopes ("Lopes") who assists victims with emotional support, guidance through the judicial process, and other relevant services. CBS

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news correspondent Bob McKeown ("McKeown") followed Lopes and filmed several of her visits with crime victims, showing how Lopes provided needed guidance for these victims. McKeown's report also described how Lopes aided in successful prosecution of crimes because she often provided victims with the emotional support they need to testify effectively. In addition, McKeown noted that the victims assistance program is funded entirely by fines levied against criminals and that the recession had made these fines more difficult to collect.

Later in the Broadcast, the voice of a police dispatcher is heard stating, "husband beat up wife. Broke windows in the house. And she's waiting there." Broadcast Transcript ("Tr.") at 11 (Declaration of Madeleine Schachter, Exh. 1). The Broadcast then showed footage of Lopes and others inside the victim's home:

McKeown: (Voiceover)

> Minutes after the police arrive, Elaine Lopes and her team are on the scene. They're professional victims' advocates, trained to pick up the pieces of lives touched-sometimes shattered-by crime.

Unidentified Woman # 1: FN1

> FN1. In the version broadcast over KPIX and KMST (Monterey, CA), Baugh's face was obscured. Donyelle Baugh's face was not obscured, however. In addition, some Bay Area viewers with cable TV have access to CBS affiliate KXTV (Sacramento, CA) which broadcast the unobscured version of STREET STORIES. For example, one of Baugh's former employers subscribes to Multivision cable in Fairfield, CA and viewed the unobscured version over KXTV. Decl. of Helen Summers at ¶ 5.

> He started beating on me and kicking on me and hitting me in the face. And then he kept bullying at me, talking about, 'You ain't going to do nothing.' You know, just bullying me like, you know, he knew I was scared of him.

McKeown: (Voiceover)

> This time it's a report of domestic violence.

(Sounds of woman crying)

Ms. Lopes:

> I think you feel like you're-like right here on trial and you're not. OK?

(Footage of Lopes in car with McKeown)

Ms. Lopes:

> We are helping them right from the beginning. You help them put the control back-you begin to put the control back because you're there at the beginning, a-you know, right after the crime has occurred.

(Footage of Lopes and others in victim's home)

Ms. Lopes:

> It's OK. It's OK. Hey it's going to be OK. You know, hardest thing, probably is when you're having to sit here to give the officer the report, because he's going *751 to have to know every detail, everything that happened.

McKeown: (Voiceover)

> Elaine's encouragement makes it easier for the victim to make her case.

(Footage of woman # 1 and police officer in kitchen)

Woman # 1:

> He hit me.

Unidentified Police Officer # 1:

> What do you mean, hit you? Did he punch you?

Woman # 1:

> (Demonstrates attacker's stance) He was like this

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over me, doing like this. And he kicked me on the floor!

Officer # 1:

OK. That's what I was asking you ...

(Close-up of pamphlet: Victim and Witness Assistance, then footage of Lopes with woman # 1)

Ms. Lopes:

I'm Elaine. I'm the one that'll follow through today. And if I don't, you know, end up working with you through the court process-if it goes through the court process-I will assign one of my staff. But more than likely, it'll be me.

(Voiceover)

Once you've been victimized, your life will never be the same.

(Footage of Lopes and others leaving woman # 1's home)

Unidentified Woman # 2:

We'll be in touch, OK?

Woman # 1:

Yeah.

Woman # 2:

Thanks for letting us come in to talk to you.

Ms. Lopes:

And I'll talk to you tomorrow.

Woman # 2:

Bye, girls. Bye Danielle.

Tr. at 11-12.

Baugh presents the following version of the events that transpired at her home on January 21, 1992:

On January 21, 1992, I called the Oakland Police "911" emergency number to report an incident of domestic violence involving my husband and myself at our home ... The policeman and I were in the kitchen discussing the incident when I heard some people coming up the front steps and entering my home.

I ran to the front of the house, and told the intruders "Wait a minute. Who are you? Get the hell out of here." They withdrew out of the door, showing me no identification. I did not notice the video camera at that point.

The officer came out of the kitchen. In the presence of the people on my doorstep, the officer said something to the effect: "It's okay. They are from the DA's office. They are here to help you." The door was left ajar.

The officer said that the group was a mobile crisis team sent to assist victims of domestic violence.

On the strength of that assurance, made in front of the film crew and within their hearing, I allowed the people to enter my home, not realizing who they really were or what their actual purpose was.

I saw that one of the people entering my home held a video camera. I believe he was filming as he entered the home, and he might have been filming when I originally threw these people out of my home.

The people introduced themselves as members of a Victim-Witness program. A woman introduced herself as "Elaine," who turned out to be Elaine Lopes, the leader of the mobile crisis team. Elaine introduced me to another woman and a man. The others, two or three men, including the man with the camera, were not introduced.

I asked the group what the camera was for. One of the crew members said they were doing a segment on Elaine for the District Attorney's office.

The crew member did not say they were doing this

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> for CBS, KPIX, or the Street Stories program. Nor did they mention that the film would be used commercially in any way.
>
> *752 I said I had no objections to them doing some filming of Elaine for the DA's office, as long as *I* was not going to be on anyone's television. The crew member said, "Okay." If they had not agreed to my condition, I would not have permitted them to stay.

Declaration of Yolanda Baugh ("Baugh Decl."), ¶¶ 2-13.

Baugh further asserts that she did not find out that her story would be broadcast until March 23, 1992 FN2 when Lopes mentioned, "Oh by the way, the show will be aired April 9," to which Baugh responded, "What show?" *Id.* at ¶ 17. Baugh asserts that the following events occurred:

> FN2. Baugh had several conversations with Lopes between January 21 and March 23 and Lopes never mentioned the film, CBS, or STREET STORIES during any of these conversations. Baugh Decl. ¶ 16.

> I reminded her [Lopes] that I had told her and the others that I did not want to be on television. She told me, "It may be too late." She said she had no control over the situation. I told her she should do whatever necessary to prevent "Street Stories" from using me in the show. ...
>
> Elaine said she would call the CBS producer in New York to discuss the problem, and then call me back. Later, she called me back and said CBS had already cut the film and it was going to be aired with me in it. I got the name and phone number of the CBS "Street Stories" producer, Dan Moguloff, from Elaine, and immediately called him from my office.
>
> I told Mr. Moguloff who I was and reminded him I did not want any of my personal life aired on any television show. He said there was nothing he could do at that point, though he might be able to obscure my face on the screen. He was not sure he could obscure me, but there was no way to stop the show from airing. I told him that would not be sufficient. I told him that if I was on the show, I would take legal action and hung up on him ...
>
> Before I left work, I wrote a letter to Mr. Moguloff demanding that my image not be used in the program, and again threatened legal action if my request was not honored ... I never heard from Mr. Moguloff again after sending the letter.
>
> However, about a week later, I was contacted on the phone by a man who identified himself as a CBS lawyer in New York. In a rude, uncaring and arrogant tone, he told me that I had no case against CBS and there is nothing I could do.

Baugh Decl.¶¶ 18-23.

ANALYSIS

[1] A motion to dismiss may not be granted unless it appears "to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." *Plaine v. McCabe,* 797 F.2d 713, 723 (9th Cir.1986). The Court must therefore accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *NL Industries, Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir.1986). The Court, however, need not accept as true conclusory allegations, unreasonable inferences nor unwarranted deductions of fact. *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir.), *cert. denied,* 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981).

Defendants have alternatively moved for summary judgment. While no discovery has occurred because of General Order No. 34, the parties have submitted various declarations, a transcript of the Broadcast, and videotapes of the Broadcast. In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing there is a genuine issue of material fact in dispute. Fed.R.Civ.P. 56(e). Those facts must amount to "sufficient evidence favoring the [opposing] party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

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[2] Summary disposition is particularly favored in cases involving First Amendment rights. *753Okun v. Superior Court, 29 Cal.3d 442, 460, 175 Cal.Rptr. 157, 629 P.2d 1369 (1981) ("speedy resolution of cases involving free speech is desirable to avoid a chilling effect upon the exercise of First Amendment rights") (quotation omitted), *cert. denied,* 454 U.S. 1099, 102 S.Ct. 673, 70 L.Ed.2d 641 (1981); *Baker v. Los Angeles Herald Examiner,* 42 Cal.3d 254, 269, 228 Cal.Rptr. 206, 721 P.2d 87 (1986), *cert. denied,* 479 U.S. 1032, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987). In addition, some courts have imposed a heightened burden on the party opposing summary judgment. *See Wasser v. San Diego Union,* 191 Cal.App.3d 1455, 1461, 236 Cal.Rptr. 772 (1987) ("The standard for resolution of a summary judgment motion is not altered ... However, the courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. In the absence of such showing the courts are inclined to grant the motion and do not permit the case to proceed beyond the summary judgment stage.").

I. Appropriation of Likeness for Commercial Purposes

[3] Plaintiff's appropriation claim is based on Cal. Civil Code § 3344(a) which provides:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner or on or in products, merchandise, or goods, or for the purpose of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof.

[4][5][6] Such appropriation claims may present one of two theories. The first type of appropriation is the right of publicity and arises from the "commercially exploitable opportunities" embodied in the plaintiff's likeness. *Dora v. Frontline Video, Inc.,* 15 Cal.App.4th 536, 542, 18 Cal.Rptr.2d 790 (1993). This case presents the second type of appropriation in which the "appropriation of the name and likeness [ ] brings injury to the feelings, that concern's one's own peace of mind, and that is mental and subjective." *Id.* Defendants argue that they are immune from liability for either type of appropriation, unless the appropriation constitutes pure commercial exploitation and is unrelated to legitimate newsgathering and dissemination. Indeed, the statute itself provides for a "news account" exception:

> For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

Cal Civil Code § 3344(d). Moreover, the fact that STREET STORIES generates advertising revenue does not prevent CBS from claiming news account immunity. *Leidholt v. L.F.P. Inc.,* 860 F.2d 890, 895 (9th Cir.1988) ("The fact that Hustler Magazine is operated for profit does not extend a commercial purpose to every article within it."). Rather, the appropriate focus is on the use of the likeness itself; if Baugh's face was used "in connection" with a news account, then no liability may be found.

[7] Plaintiffs argue that Defendants forfeited any privilege because the STREET STORIES broadcast was "patently false, misleading and sensationalized." Plaintiffs rely on *Eastwood v. Superior Court,* 149 Cal.App.3d 409, 425, 198 Cal.Rptr. 342 (1983), in which the court noted, "we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." Plaintiff argues that by mixing this videotape with other episodes in the broadcast, STREET STORIES sensationalized the event at the Baugh's home and forfeited its news account protection.

[8] Plaintiffs' argument fails. In *Eastwood,* the publication pertained to actor Clint Eastwood's involvement in a "love triangle" that never existed. In this case, there is no dispute that the broadcast was not "false" in the sense of *Eastwood. See* *754*Maheu v. CBS, Inc.,* 201 Cal.App.3d 662, 677, 247 Cal.Rptr. 304 (1988) (characterizing the holding of *Eastwood* as "had the article not been alleged to be entirely false, it would have come within the exemption set forth in Civil Code section 3344, subdivision (d)").

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Defendants videotaped and broadcast an actual event that occurred at Plaintiffs' home. In addition, while STREET STORIES is not a traditional news show, it is plainly a "news or public affairs" broadcast in the broad sense and is therefore entitled to protection.

Plaintiffs would like the issue of "newsworthiness" submitted to a jury because it depends on community standards. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir.1975). While a jury question may arise in many cases, it does not arise in this case. In the age of "channel-surfing," FN3 news organizations are hard-pressed to disseminate information in a manner that will capture the viewers attention. STREET STORIES is simply one attempt at presenting news in a more compelling fashion. Subjecting news organizations to a jury trial every time they develop a new program format and style would place on unreasonable burden on the exercise on free speech. *See Wasser*, 191 Cal.App.3d at 1461, 236 Cal.Rptr. 772 (summary disposition "has become an approved method of resolving privacy cases, since protracted litigation would have a chilling effect on the exercise of free speech in the public forum").

> FN3. Since many viewers have remote controls, they can quickly switch among stations. TV programming faces increasing pressure to find ways to maintain viewers' attention.

[9] Moreover, California courts have indicated that § 3344(d) should be interpreted to cover a broad range of material. Even if the Court assumes that STREET STORIES does not fit the traditional notion of news, it undoubtedly is protected under the category of public affairs:

> Section 3344, subdivision (d) distinguishes between news and public affairs. We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news ... We also presume that the term "public affairs" was intended to mean something less important than news ... As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it.

Dora, 15 Cal.App. 4th 536, 546, 18 Cal.Rptr.2d 790 (1993 Cal.App. Lexis 473, *13).

[10][11] Finally, Plaintiffs argue that Defendants "public interest" defense evaporates when there is no need to use Plaintiffs' likeness. Since Defendants could have substituted another victim of domestic violence for Baugh, Plaintiffs argue that California courts would tilt the scales in favor of the Plaintiffs privacy interest, citing *Gill v. Curtis*, 38 Cal.2d 273, 239 P.2d 630 (1952) and *Gill v. Hearst Publishing Co.*, 40 Cal.2d 224, 253 P.2d 441 (1953). The *Gill* cases involved a picture of a couple in a romantic pose in an ice cream store and was used to illustrate an article entitled, "Love" in Ladies' Home Journal. In the first case, the California Supreme Court held that plaintiffs had stated a plausible claim for invasion of privacy because there was no pressing need for the use of plaintiffs' likeness. *Curtis* 38 Cal.2d at 281, 239 P.2d 630. In the second case, the California Supreme Court relied on the constitutional protection accorded to publications, "whether it be a news report or an entertainment feature" and concluded that "the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of the occurrence." *Hearst*, 40 Cal.2d at 230, 253 P.2d 441. The key element that emerges from the *Curtis* cases is that "the right 'to be let alone' and to be protected from undesired publicity is not absolute but must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press." *Hearst*, 40 Cal.2d at 228, 253 P.2d 441. § 3344(d) makes clear, however, that when news or public affairs publications are involved, the balance must be drawn strongly in favor of dissemination. Given the limits imposed by § 3344(d) and California's preference for speedy resolution *755 of free speech cases, the Court finds that Plaintiffs have failed to state a claim for appropriation of likeness and therefore this claim is DISMISSED.

II. Disclosure of Private Facts

[12][13] Defendants argue that this claim must be dismissed for three independent reasons. First, Defendants contend that the matters disclosed were not private facts because they were contained in a publicly available police report of the incident. This ar-

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gument fails, however, because STREET STORIES did not merely broadcast the *facts* contained in the police report. STREET STORIES broadcast the event as it unfolded and effectively disclosed Yolanda Baugh's emotional and personal reactions to the incident as well as her comments to Lopes. The broadcast went far beyond disclosure of facts publicly available in the police report.FN4

FN4. In addition, it is not completely clear that the police report itself was publicly available. Defendants' counsel requested a copy of the police report pursuant to the California Public Records Act, Cal.Gov.Code §§ 6254*et seq.* While that request was approved, Plaintiffs contend that under § 6254(f)(2) the request should have been denied. § 6254(f)(2) exempts from disclosure the name and address of a victim of domestic violence. This subsection does allow disclosure of the location of the crime which, in this case, effectively discloses the victim's address. In addition, the name of the victim is withheld *only* if the victim makes a formal request and Plaintiffs have not alleged that Baugh made any such request. At this stage of the proceedings, it appears that disclosure of the record was proper.

[14] Defendants next argue that the facts disclosed were not "degrading." Domestic violence is an exceedingly complex area, and both Yolanda and Donyelle have a legitimate interest in maintaining the integrity and dignity of their family unit. The STREET STORIES broadcast undoubtedly disclosed matters which reasonable people might not want disclosed. At a minimum, this issue presents a question of fact which cannot be resolved at this stage of the proceedings.

[15] Finally, Defendants argue that the broadcast is absolutely privileged because it disclosed "newsworthy matters of legitimate public interest." Plaintiffs respond that whether the broadcast was newsworthy must be determined by a jury. For purposes of this tort, "a truthful publication is constitutionally protected if (1) it is newsworthy and (2) it does not reveal facts so offensive as to shock the community's notions of decency." *Briscoe v. Reader's Digest Association, Inc.,* 4 Cal.3d 529, 541, 93 Cal.Rptr. 866, 483 P.2d 34 (1971).

The Ninth Circuit has explained that "the function of the court is to ascertain whether a jury question [regarding community mores] is presented." *Virgil,* 527 F.2d at 1130. In considering this issue, "the line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake." *Id.* at 1129. In general, California courts are deferential to news stories regarding crime victims. *See Briscoe,* 4 Cal.2d at 536, 93 Cal.Rptr. 866, 483 P.2d 34 ("The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims-these are vital bits of information for people coping with the exigencies of modern life."). While the Court finds the issue of domestic violence and Lopes' story to be newsworthy, the Court is not yet convinced that Plaintiffs' personal involvement in an incident of domestic violence is newsworthy as a matter of law. The Court therefore DENIES the motion to dismiss the claim for disclosure of private facts.

III. Uniform Single Publication Act

[16] Defendants contend that Plaintiffs' remaining claims are barred under the Uniform Single Publication Act, Cal.Civil Code § 3425.3 which provides:

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition.

*756 California courts have given this section broad preclusive effect:

> The enactment of section 3425.3 of the Uniform Single Publication Act by the California Legislature reflected great deference to the First Amendment and sought to alleviate many problems presented in respect to tort actions where mass communications are involved. When the Legislature inserted the clause "*or any other tort* " it is presumed to have meant exactly what it said.

Strick v. Superior Court, 143 Cal.App.3d 916, 924,

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192 Cal.Rptr. 314 (1983).

[17][18][19][20] This section bars any claims based on the *broadcast* of Plaintiffs' story. The Court therefore DISMISSES Plaintiffs' claims for intrusion on seclusion, trespass, unfair competition, fraud, and intentional and negligent infliction of emotional distress to the extent they rely on the actual broadcast of STREET STORIES. The claims remain viable, however, to the extent they rely on a tortious *physical* intrusion into Plaintiffs' home. At this stage of the proceedings, the Court must assume the truth of Plaintiffs' assertion that she did not knowingly consent to Defendants' entry into her home. While the publication of Plaintiffs' story may be privileged under § 3425.3, the initial intrusion, if an intrusion occurred, may not be. Any other interpretation would grant complete protection for any tortious act committed by investigative news reporters, simply because they eventually published a story based on their investigations. Nothing in the language of § 3425.3 implies that the California legislature intended such a result.FN5

FN5. This same argument applies to Defendants' constitutional arguments. Defendants correctly contend Plaintiffs cannot circumvent constitutional free speech protections by recasting privacy claims as other common law torts, such as intentional and negligent infliction of emotional distress. *See Blatty v. New York Times Co.,* 42 Cal.3d 1033, 1042-43, 232 Cal.Rptr. 542, 728 P.2d 1177 (1986). As a result, to the extent the remaining claims are based on the actual publication of Plaintiffs' story, they are barred. At the same time, these constitutional protections do not immunize prepublication activities. For example, even a public figure is entitled to prevent news reporters from entering a private home. That public figure can maintain a trespass action against a news reporter who climbs his fence, no matter how newsworthy the ultimate story published by the reporter.

IV. Trespass and Intrusion on Seclusion

[21] Baugh admits that she consented to the entry of the camera crew into her home and that she consented to their videotaping her discussions with Lopes, but argues that she did so only because she was led to believe that the crew was making the film for the District Attorney's office and that it would not be used commercially. Baugh Decl.¶¶ 11-13. Baugh further asserts that she explicitly informed the crew that she had no objections "to them doing some filming of Elaine for the DA's office, as long as I was not going to be on anyone's television" and that a crew member said "Okay." Baugh Decl. ¶ 13. Plaintiffs therefore argue that Baugh's consent was effectively rendered meaningless by the crew member's explicit misrepresentation of their purposes in filming her story.

[22][23] Trespass is a strict liability tort in the sense that the defendant's motivation or good faith belief is irrelevant. *Miller v. NBC,* 187 Cal.App.3d 1463, 1480-81, 232 Cal.Rptr. 668 ("The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong."). At the same time, no trespass can be found if actual consent to entry was given. *Id.* at 1480, 232 Cal.Rptr. 668 ("Where there is a consensual entry, there is no tort, because lack of consent is an element of the [theory underlying the tort].").

[24] Plaintiffs argue that the consent was not effective because Defendants exceeded the terms of the consent given by Baugh. In general, California does recognize a trespass claim where the defendant exceeds the scope of the consent. Those cases involve defendants *whose intrusion on the land* exceeds the scope of the consent given, however. In this case, the camera crew acted within the scope of Baugh's consent while they were on the premises. If they exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after *757 they left Baugh's property and which cannot support a trespass claim. *See Mangini v. Aerojet-General Corp.,* 230 Cal.App.3d 1125, 1141, 281 Cal.Rptr. 827 (1991) ("A trespass may occur if the party, entering land pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct *on the land* of another.") (citations omitted).FN6

FN6. The case cited by Plaintiffs, *Civic Western Corp. v. Zila Industries, Inc.,* 66 Cal.App.3d 1, 17, 135 Cal.Rptr. 915 (1977) essentially reaches the same conclusion. In

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> *Civic Western*, the defendant was a repossessor who entered the premises with plaintiff's consent but then proceeded to exceed the scope of the consent by unlawfully ejecting plaintiff's employees from the premises. These activities exceeded the limits of the consent "by divergent conduct *on the land* of another." *Id.* (emphasis added). Plaintiff has not cited any case in which the divergent conduct occurred after the defendant left the plaintiff's property.

[25][26] No California cases indicate that the consent must be knowing or meaningful and the Court does not find any reason to add that requirement to the tort. In a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass. Of course, a plaintiff in this predicament may still have a remedy based on fraud or intentional misrepresentation.

In pursuing this claim, Plaintiff largely relies on *Miller*, in which an NBC news camera crew followed a paramedic team into the plaintiff's home after plaintiff suffered a heart attack. Under these circumstances, the court held that the victim's wife could maintain an action based on trespass, intrusion, and intentional infliction of emotional distress. In *Miller*, however, no member of the camera crew attempted to obtain plaintiff's consent; they simply barged in with the paramedics. *Id.* 187 Cal.App.3d at 1475, 232 Cal.Rptr. 668. *Miller* does not stand for the proposition that consent must be knowing.[FN7] The Court therefore DISMISSES Plaintiff's trespass claim.[FN8]

> FN7. Nor does *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir.1971). In *Dietemann*, the defendants gained consensual entry to plaintiff's home by misrepresenting their identity. Defendants then surreptitiously used a hidden camera to photograph plaintiff and a hidden microphone to record their conversation. In these circumstances, the Ninth Circuit found an invasion of privacy, but implied that no "technical" trespass had occurred. *Id.* at 247. In addition, plaintiff never consented in any way to the use of the camera or microphone, a key distinction between *Dietemann* and the present case.

> FN8. Plaintiffs' motion for summary judgment on the trespass claim is therefore DENIED.

[27][28] Plaintiffs' intrusion on seclusion claim suffers from the same defect. Intrusion on seclusion is shown when "one [ ] intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private concerns ... if the intrusion would be highly offensive to a reasonable person." *Miller*, 187 Cal.App.3d at 1482, 232 Cal.Rptr. 668 (citation omitted). Intrusion on seclusion requires neither publication nor "the existence of a technical trespass." *Dietemann v. Time, Inc.*, 449 F.2d 245, 247 (9th Cir.1971). Nonetheless, as with any intentional tort, consent is an absolute defense, even if improperly induced. *See e.g.* *Cobbs v. Grant*, 8 Cal.3d 229, 104 Cal.Rptr. 505, 502 P.2d 1 (1972) (where patient's consent to operation is not fully informed, but consent was nonetheless given, any damages from the operation must be recovered under a negligence theory not a battery theory). Baugh gave her consent and she therefore has no remedy under this theory. The Court DISMISSES the claim for intrusion on seclusion.

V. Unlawful Business Practices

[29] Plaintiffs' claim is based on Cal.Bus. & Prof.Code § 17200 and § 17203. There are two independent problems fatal to Plaintiffs' claim. First, Plaintiffs contend that the unlawful act giving rise to liability under § 17200 is the original trespass at Plaintiffs' home. Since the Court has not found that no trespass occurred, this basis for liability has been eliminated.

Second, § 17203 authorizes injunctions and restitutionary relief, but not damages. Plaintiffs argue that they are not seeking damages but are merely seeking restitutionary relief reflecting the value of what was taken from them. This theory is not plausible.*758 Plaintiffs are seeking a remedy for the embarrassment and emotional distress caused by Defendants' publication of the incident at her home. Plaintiff is not arguing that she could have sold her story to another network and that the CBS broadcast effectively misappropriated the value of her story. Under Plaintiffs' approach, any damage claim could be converted into an argument for restitution. § 17203 plainly did not intend such a result.[FN9] The Court DISMISSES Plaintiffs' claim for relief under this section.[FN10]

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FN9. § 17203 merely authorizes the court to makes orders "necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

FN10. Plaintiffs motion for summary judgment on the unfair business practices claim is therefore DENIED.

VI. Intentional and Negligent Infliction of Emotional Distress

[30] Both parties agree that a claim for intentional infliction of emotional distress must be based on "outrageous" conduct. Baugh has alleged that Defendants' personnel entered her home, and misrepresented their identity in order to gain her consent to videotaping, all at a time of extreme emotional vulnerability. Moreover, Defendants selected Baugh specifically because an incident of domestic violence has just occurred; they therefore must have known that Baugh was vulnerable and took advantage of her position. These allegations adequately state a claim for intentional infliction of emotional distress. *See* *Miller*, 187 Cal.App.3d at 1487, 232 Cal.Rptr. 668 (emotional distress claim viable even if camera crew did not have a "specific malicious or evil purpose"); *Bogard v. Employers Casualty Co.*, 164 Cal.App.3d 602, 616, 210 Cal.Rptr. 578 (1985) ("behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress"). At this stage of the proceedings, the Court cannot say that Defendants' behavior was not outrageous as a matter of law. *See* *Miller*, 187 Cal.App.3d at 1488, 232 Cal.Rptr. 668 (jury question of outrageousness presented where camera crew followed paramedics into heart attack victim's home). The motion to dismiss the intentional infliction of emotional distress claim is DENIED.

[31] Plaintiffs' negligence claim is based on the argument that "once Plaintiff notified Defendants that she was misled about their intentions with respect to the videotaping in her home and that she did not want her privacy breached, Defendants had a legal duty not to reveal the embarrassing, private facts about Plaintiff and her daughter." Plaintiff's Opposition at 22. There are two problems with this argument. First, Plaintiffs provide no authority for the proposition that a legal duty arises in this situation and the Court is not aware of any such authority. In the absence of a special duty, the decision to go ahead with the broadcast cannot be the basis for a negligence claim. The Court therefore DISMISSES the claim for negligent infliction of emotional distress.

VII. Fraud

[32] Defendants move for a more definite statement of Plaintiffs' fraud claim, as required by Fed.R.Civ.P. 9(b). Plaintiff has described the time and place of the alleged misrepresentations, but has failed to identify the persons making some of the misrepresentations. This omission is excusable, however, because the camera crew at Plaintiffs' home failed to provide their names. Since this case is governed by General Order No. 34, no discovery has been allowed. The Court finds that Plaintiffs have sufficiently pleaded their fraud claim at this stage of the proceedings. As discovery proceeds, Plaintiffs shall amend their complaint to specifically identify each individual alleged to have made a misrepresentation to Plaintiffs. The Court DENIES Defendants' motion for a more definite statement.

VIII. KPIX and Group W's Independent Grounds for Dismissal

[33] Group W and KPIX argue that they merely acted as a conduit for the network's *759 broadcast and that none of their personnel were involved in the videotaping at Plaintiffs' home. Under their theory, since they do not edit, review, or in any way control the network's production of STREET STORIES or its broadcast, they lack the requisite scienter for liability.

Group W and KPIX are liable only if their employees were directly involved in the incident at Plaintiffs' home or, in some way, prepared the STREET STORIES segment on Plaintiffs. Defendants have submitted several declarations, all asserting that no KPIX or Group W employees appeared at Plaintiffs' home. *See* Declaration of Stephen Hildebrant, ¶ 6; Supplemental Declaration of Rosemary Roach, ¶ 4 ("Lest there be any lingering doubt on this issue, I wish to

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clarify that no KPIX-TV cameraman, soundman, or other employee was involved in any way in the videotaping, writing, editing, or other production efforts for the STREET STORIES 1993."). Plaintiff has responded with a declaration from Donald Dunkel, a former journalism professor and currently news manager at an ABC affiliate, asserting that "from personal experience, I am familiar with the various arrangements that are made between CBS, Inc. and its local affiliates ... I believe that in the majority of situations when CBS needs a local video camera crew to assist the preparation of a "Street Stories" segment in a major market like San Francisco, someone from the network calls the local affiliate, in this case KPIX, and schedules the use of an affiliate crew and equipment." Declaration of Donald Dunkel, ¶ 6, ¶ 10.

If this evidence had been submitted after full discovery, the Court would find it wholly insufficient to defeat summary judgment. It is not enough to show that CBS sometimes, or even usually, uses a camera crew supplied by the local affiliate; Plaintiffs cannot pin liability on Group W and KPIX unless they can identify specific employees who appeared at Plaintiffs' home. Because of restrictions imposed by General Order No. 34, however, no discovery has been allowed. The Court is therefore reluctant to grant summary judgment simply on the basis of declarations supplied by KPIX and Group W executives. Plaintiff is entitled to sufficient discovery to determine who supplied the camera crew and to determine the identity of each person who appeared at Plaintiffs' home on the evening of January 21, 1992.

The Court DENIES Group W and KPIX's independent motion for dismissal or summary judgment. The Court further ORDERS the parties to pursue immediate and inexpensive discovery sufficient to determine the identity of each member of the crew that appeared at the Baugh home. Unless this discovery shows involvement by Group W or KPIX employees, Plaintiffs shall dismiss Group W and KPIX within sixty (60) days after the identity of the camera crew is disclosed.

IX. Motion for Relief from Arbitration

[34] Plaintiffs move for relief from arbitration pursuant to local rule 500-3. Defendants oppose this motion but both parties agree that referral to the ENE program or to a settlement conference would be productive. Given the complexity of the issues surviving the motions to dismiss, arbitration is unlikely to resolve this case. The Court REMOVES this matter from mandatory arbitration.

CONCLUSION

For the reasons set forth above, the Court issues the following orders:

(1) The Court DISMISSES the claims for appropriation of likeness, intrusion on seclusion, trespass, unfair competition, and negligent infliction of emotional distress.

(2) The Court DENIES Defendants' motions with respect to the disclosure of private facts, fraud, and intentional infliction of emotional distress claims.

(3) The parties are ORDERED to pursue immediate and inexpensive discovery to determine the identity of the news crew that appeared at Baugh's home on January 21, 1992.

(4) The Court REMOVES this matter from the Court's mandatory arbitration program.

(5) The Court REFERS this matter to the Honorable Claudia Wilken for the purpose of *760 conducting an early settlement conference and designing a discovery schedule, if necessary. The parties shall contact Magistrate Judge Wilken's chambers forthwith to arrange the settlement conference.

SO ORDERED.

N.D.Cal.,1993.
Baugh v. CBS, Inc.
828 F.Supp. 745, 21 Media L. Rep. 2065

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SEAN PATRICK DELANEY et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ROXANA KOPETMAN et al., Real Parties in Interest
No. S006866.

Supreme Court of California
May 3, 1990.

SUMMARY

Defendant, who was charged in a misdemeanor complaint with possession of brass knuckles in violation of Pen. Code, § 12020, subd. (a), moved to suppress evidence of the brass knuckles on the ground that he had not consented to the patdown search of his jacket that led to the seizure of the knuckles. Two reporters had been accompanying the members of a police task force who had seized the knuckles, and defendant subpoenaed them to testify at the suppression hearing. The reporters moved to quash the subpoenas, contending that their eyewitness observations constituted "unpublished information" protected by the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070). The municipal court denied the motions, and the reporters refused to testify as to whether defendant had consented to the search. The municipal court concluded that the shield law did not apply to the reporters' eyewitness observations and that, even if it did apply, the need for the reporters' presumably disinterested testimony outweighed their claim of immunity. The court cited both reporters for contempt. The reporters filed petitions for writs of habeas corpus in the superior court, and that court granted their petitions, finding that the shield law provided them with immunity from contempt. (Superior Court of Los Angeles County, Nos. HC206320 and HC206321, Aurelio Munoz, Judge.) Both defendant and the People then filed a joint petition in the Court of Appeal seeking to vacate the orders of the superior court granting the habeas corpus petitions. The Court of Appeal, Second Dist., Div. One, No. B032695, found that the shield law does not give a newsperson the right to refuse to testify as to his observations of a public event and ordered the superior court to vacate its orders granting the petitions for writs of habeas corpus.

The Supreme Court affirmed the judgment of the Court of Appeal and directed the Court of Appeal to issue a peremptory writ of mandate compelling the superior court to vacate its orders granting the habeas corpus petitions and to make new and different orders denying the habeas corpus petitions. The court held that the definition of "unpublished information" in the shield law includes a newsperson's unpublished, nonconfidential eyewitness observations of an occurrence in a public place. It held that the municipal court struck the proper balance in determining that if the shield law did apply, the reporters' presumably disinterested testimony on the consent issue outweighed their claim of immunity. It also held that defendant met and surpassed the required threshold showing for disclosure, since there was not just a reasonable possibility, but rather a substantial certainty, that the testimony would assist him in his defense. Further, the reporters' observations were not made in confidence and were not sensitive, their testimony would not impinge on their future newsgathering ability, and they were the only two possible disinterested witnesses. (Opinion by Eagleson, J., with Lucas, C. J. (as to part III), Panelli, Kennard, JJ., and Kremer (Daniel J.), J., [FN*] concurring. Separate concurring opinions by Mosk, J., and by Broussard, J., with Lucas, C. J., concurring as to part I only.)

FN* Presiding Justice, Court of Appeal, Fourth Appellate District, Division One, assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Nature of Protection.

Cal. Const., art. I, § 2, subd. (b), and Evid. Code, § 1070, California's shield law, protects a newsperson from being adjudged in contempt for refusing to disclose either (1) unpublished information, or (2) the source of information, whether published or unpublished. The protection provided by these provisions is

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not a privilege but only an immunity. (Disapproving, to the extent they suggest the contrary, *Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388 [153 Cal.Rptr. 608], and *CBS, Inc. v. Superior Court* (1978) 85 Cal.App.3d 241 [149 Cal.Rptr. 421].) The shield law prohibits only a judgment of contempt and, unlike a privilege, it does not protect against other sanctions.

[Privilege of news-gatherer against disclosure of confidential sources or information, note, 99 A.L.R.3d 37. See also **Cal.Jur.3d**, Evidence, § 473; **Am.Jur.2d**, Witnesses, § 297.]

(2a, 2b, 2c, 2d, 2e, 2f, 2g) Witnesses § 11--Privileged Relationships and Communications--Newsperson's Shield Law--Unpublished Information as Including Reporter's Eyewitness Observations.

In the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070), the definition of "unpublished information" includes a newsperson's unpublished, nonconfidential eyewitness observations of an occurrence in a public place. The shield law states plainly that a newsperson is not to be adjudged in contempt for refusing to disclose any unpublished information. In the context of the shield law, "any" means without limit and no matter what kind. Nowhere in the definition of unpublished information is there an explicit or implied restriction to confidential information. Although a possible inference from the ballot argument in favor of Proposition 5 in 1980, the measure that adopted the constitutional provision, was that only confidential information was meant to be protected, a possible inference in an extrinsic source may not be given more weight than a clear statement in the Constitution itself. (Disapproving, to the extent that they hold or suggest that the shield law protects only confidential information, *CBS, Inc. v. Superior Court* (1978) 85 Cal.App.3d 241 [149 Cal.Rptr. 421], and *Liggett v. Superior Court* (1989) 211 Cal.App.3d 1461 [260 Cal.Rptr. 161], review granted Oct. 12, 1989 (S011581).)

(3) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Nature of Protection--Information Gathered Outside Scope of Employment as Reporter.

The newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070), provides no protection for information obtained by a journalist not directly engaged in gathering, receiving, or processing news.

(4) Statutes § 21--Construction--Legislative Intent.

In construing a law, a court's primary task is to determine the lawmakers' intent. In the case of a constitutional provision enacted by the voters, their intent governs. To determine intent, the court turns first to the words themselves for the answer. If the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).

(5) Constitutional Law § 13--Construction of Constitutions--Ordinary Meaning.

Words used in a constitutional provision should be given the meaning they bear in ordinary use.

(6) Statutes § 38--Construction--Giving Effect to Statute--Construing Every Word.

In construing a statute, significance should be given, if possible, to every word of the act. Conversely, a construction that renders a word surplusage should be avoided.

(7) Constitutional Law § 13--Construction of Constitutions--Language of Enactment.

The Constitution is to interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions.

(8) Words, Phrases, and Maxims--Information.

"Information" includes "reception of knowledge" and "knowledge obtained from reading, observation, or instruction."

(9) Constitutional Law § 24--Constitutionality of Legislation--Rules of Interpretation--Conflict Between Statute and Constitution.

Wherever statutes conflict with constitutional provisions, the constitutional provisions must prevail.

(10) Constitutional Law § 12--Construction of Constitutions--Background, Purpose, and Intent of Enactment--Legislative Materials Not Before Voters.

In construing constitutional language, legislative materials not before the voters are not relevant to determining the voters' intent.

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(11) Statutes § 42--Construction--Aids--Motives or Understandings of Author.
In construing legislation, the motives or understandings of an individual legislator are not considered, even if he or she authored the statute.

(12) Constitutional Law § 12--Construction of Constitutions--Background, Purpose, and Intent of Enactment--Ballot Arguments.
Ballot arguments are accepted sources from which to ascertain the voters' intent in adopting a constitutional provision. As with the legislative history of a statute, however, a court need not look beyond the language of the enactment when the language is unambiguous.

(13) Statutes § 31--Construction--Language--Definitions.
If the lawmaker has provided an express definition, the courts must take it as they find it.

(14) Constitutional Law § 10--Construction of Constitutions--Inconveniences Involved in Application.
Courts, in construing the Constitution, are bound to suppose that any inconveniences involved in the application of its provisions, according to their plain terms and import, were considered in its formation, and voluntarily accepted as less intolerable than those which are thereby avoided, or as fully compensated by countervailing advantages.

(15) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Application in Criminal Proceedings.
The protection of the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070), is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial. The incorporation of the shield law into the California Constitution cannot restrict a criminal defendant's federal constitutional right to a fair trial. Such a result would violate the supremacy clauses of the federal and state Constitutions (U.S. Const., art. VI, cl. 2; Cal. Const., art. III, § 1).

(16) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Application in Criminal Proceedings--Burden of Proof.
A person claiming a privilege bears the burden of proving he is entitled to the privilege. Pursuant to its terms, the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070) provides only an immunity from contempt, not a privilege. This distinction, however, is not relevant to assigning the burden. Regardless of the label used, the purpose of the shield law is the same-to protect a newsperson's ability to gather and report the news. The newsperson seeking immunity must prove all the requirements of the shield law have been met. The burden then shifts to the criminal defendant seeking discovery to make the showing required to overcome the shield law.

(17a, 17b, 17c) Witnesses § 11--Privileged Relationships and Communications--Newsperson's Shield Law--Application in Criminal Proceedings-- Procedure for Overcoming Immunity.
To overcome a claim of immunity under the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070), a criminal defendant must make a threshold showing that there exists a reasonable possibility that the information will materially assist his defense. The court must then consider the defendant's and newsperson's respective, and perhaps conflicting, interests, taking into account: whether the unpublished information is confidential or sensitive; whether the policy of the shield law will be thwarted by disclosure (if the defendant is himself the source of the information, it cannot seriously be argued that the source will feel that his confidence has been breached); the importance of the evidence to the defendant's case; and, in the appropriate case, whether there is an alternative source for the unpublished information. The court must then balance these factors. An in camera hearing will not be required in every case. The court has discretion in the first instance to determine whether a newsperson's claim of confidentiality or sensitivity is colorable. If the court determines the claim is colorable, it must then receive the newsperson's testimony in camera. (Disapproving *Hallissy v. Superior Court* (1988) 200 Cal.App.3d 1038 [248 Cal.Rptr. 635], to the extent it did not consider the fact that the party seeking disclosure was the source of the unpublished information.)

(18) Criminal Law § 140--Discovery--Right to Compulsory Process.
A criminal defendant's constitutional right to compulsory process was intended to permit him to request governmental assistance in obtaining likely helpful evidence, not just evidence that he can show beforehand will go to the heart of his case. The need to de-

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velop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

(19a, 19b) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Application in Criminal Proceedings--Procedure for Overcoming Immunity--Nature of Threshold Showing.
A criminal defendant, in order to overcome the immunity created by the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070), must make a threshold showing. This showing need not be detailed or specific, but it must rest on more than mere speculation. The defendant need not show a reasonable possibility that the information sought will lead to his exoneration; he need only show a reasonable possibility that the information will materially assist his defense. Evidence may be critical to a defense even if it will not lead to exoneration. For example, evidence may establish an "imperfect defense," a lesser included offense, a lesser related offense, or a lesser degree of the same crime; impeach the credibility of a prosecution witness; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination. A criminal defendant's constitutional right to a fair trial includes these aspects of his defense.

(20) Words, Phrases, and Maxims--Exoneration.
"Exoneration" means "the removal of a burden, charge, responsibility, or duty." Stated more simply, in criminal proceedings, "exoneration" is generally understood to mean an acquittal or dismissal of charges.

(21) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Application in Criminal Proceedings--Procedure for Overcoming Immunity--Alternative-source Requirement.
In a proceeding in which a criminal defendant attempts to overcome the immunity provided by the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070), a universal and inflexible requirement, that the defendant show that he has no alternative source for the information sought, is inappropriate. In considering whether the requirement is appropriate in a given case, the trial court should consider the type of information being sought (e.g., names of potential witnesses, documents, a reporter's eyewitness observations), the quality of the alternative source, and the practicality of obtaining the information from the alternative source. The trial court must also consider whether the information is confidential or sensitive, the interest sought to be protected by the shield law, and the importance of the information to the criminal defendant. (Disapproving, to the extent they suggest that a criminal defendant must in every case show the lack of an alternative source regardless of the circumstances, *Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388 [153 Cal.Rptr. 608], and *Hallissy v. Superior Court* (1988) 200 Cal.App.3d 1038 [248 Cal.Rptr. 635].)

(22) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Application in Criminal Proceedings--Reporters' Eyewitness Observations of Search and Seizure.
In a prosecution for possession of brass knuckles (Pen. Code, § 12020, subd. (a)), in which defendant moved to suppress evidence of the brass knuckles on the ground that he had not consented to the patdown search of his jacket that led to the seizure of the knuckles, the municipal court did not err in determining that if the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070) applied to the eyewitness observations by two reporters of the nonconfidential, public circumstances of the search and seizure, the reporters' presumably disinterested testimony on the consent issue outweighed their claim of immunity. The reporters had been accompanying members of the police task force that encountered defendant and seized the knuckles. Defendant met and surpassed the required threshold showing for disclosure, since there was not just a reasonable possibility, but rather a substantial certainty, that the reporter's testimony would assist him in his defense. Further, the reporters' observations were not made in confidence and were not sensitive, their testimony would not impinge on their future news-gathering ability, and they were the only two possible disinterested witnesses.

(23) Witnesses § 11--Privileged Relationships and Communications-- Newsperson's Shield Law--Application in Criminal Proceedings--Reporters'

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Eyewitness Observations of Search and Seizure--Sufficiency of Evidence to Support Finding.
In a prosecution for possession of brass knuckles (Pen. Code, § 12020, subd. (a)), in which defendant moved to suppress evidence of the brass knuckles on the ground that he had not consented to the patdown search of his jacket that led to the seizure of the knuckles, the municipal court's order citing two reporters for contempt, on the ground of their refusal to testify as to their observations of the search and seizure incident, was supported by substantial evidence. The reporters had been accompanying members of a police task force at the time of the encounter. They contended that they were entitled to the immunity provided by the newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070). However, the trial court correctly determined that if the law applied, the need for the reporters' presumably disinterested testimony on the consent issue outweighed their claim of immunity under the shield law.

COUNSEL
Wilbur F. Littlefield, Public Defender, Laurence M. Sarnoff, Michael Updike and Albert J. Menaster, Deputy Public Defenders, John A. Vander Lans, City Prosecutor, Robert R. Recknagel, Assistant City Prosecutor, Steven Shaw and Gerry L. Ensley, Deputy City Prosecutors, for Petitioners.
No appearance for Respondent.
Gibson, Dunn & Crutcher, Rex S. Heinke, Kelli L. Sager, Sheila R. Caudle, William A. Niese and Glen A. Smith for Real Parties in Interest.

EAGLESON, J.
The issues in this case are: (1) whether the term "unpublished information" in the California newsperson's shield law (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070) includes a newsperson's nonconfidential, eyewitness observations of an occurrence in a public place; and, (2) if so, whether a newsperson can nevertheless be held in contempt for refusing to disclose such information in a criminal proceeding. *793

As we shall explain, we hold the shield law's broad definition of "unpublished information" does not require a showing by the newsperson that the information was obtained in confidence. We further hold, however, that a newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right. In this case, the trial court correctly determined that the balance between the rights of the newspersons and the defendant weighs in favor of compelled disclosure. We affirm the judgment of the Court of Appeal.

Facts

Underlying Facts

Real parties in interest, Los Angeles Times reporter Roxana Kopetman and photographer Roberto Santiago Bertero, were accompanying members of a Long Beach Police Department task force on patrol. (For convenience we will sometimes refer collectively to Kopetman and Bertero as the reporters.) The officers observed Sean Patrick Delaney and a companion seated on a bench in the Long Beach Plaza Mall. A plastic bag of a type often used to store narcotics was protruding from Delaney's shirt pocket. The officers inquired about the contents of the bag, and Delaney removed it from his pocket to show that it contained a piece of gold and a piece of jewelry. He told the officers he intended to pawn the items at the mall. Because no pawnshops were in the mall, the officers became suspicious and asked Delaney for his identification. Delaney reached for a jacket lying next to him on the bench as if to get his wallet. According to the officers, they asked Delaney before he picked up the jacket if they could check it for weapons. *He allegedly consented to the search.* An officer ran his fingers along the outside of the jacket and felt a hard object in its pocket. He reached inside and retrieved a set of brass knuckles, which Delaney claimed was a key chain.

Four days later, the Los Angeles Times (hereafter the Times) published an article about the police task force. The article included information regarding the police contact with Delaney but did not refer to whether he had consented to the search of his jacket pocket.

Procedural History

Delaney was charged in a misdemeanor complaint with possession of brass knuckles in violation of Penal Code section 12020, subdivision (a). He moved to suppress evidence of the brass knuckles, arguing that he had not consented to the patdown search of

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his jacket and that the resulting seizure *794 of the brass knuckles was therefore illegal because the officers had lacked a reasonable suspicion that he was armed. Delaney subpoenaed the reporters to testify at the suppression hearing in municipal court. The reporters moved to quash the subpoenas, contending they could not be compelled to testify because their eyewitness observations of the public search and seizure constituted "unpublished information" protected by the newspersons' shield law from disclosure. The motions were denied.

Following testimony by the officers at the suppression hearing, the reporters were called to testify by the prosecution to demonstrate the legality of the seizure. Their testimony established that each of them observed the events leading to the seizure and that each was situated in a position to observe whether Delaney had consented to the search of his jacket. The reporters, however, refused to answer any questions relating to whether Delaney had consented. The municipal court concluded that the shield law did not apply to the reporters' eyewitness observations of the nonconfidential, public circumstances of the search and seizure. The court further found that, even if the shield law applied, the need for the reporters' presumably disinterested testimony on the consent issue outweighed their claim of immunity under the shield law. The court cited both reporters for contempt.

The reporters filed petitions for writs of habeas corpus in the superior court. That court found the shield law provided the reporters with immunity from contempt and granted their petitions.

Delaney and the People of the State of California (through the Long Beach City Prosecutor) filed a joint petition in the Court of Appeal seeking to vacate the orders of the superior court that granted the reporters' habeas corpus petitions. (Delaney's misdemeanor prosecution has been suspended pending final resolution of the reporters' contempt citations.) The Court of Appeal held the shield law does not give a newsperson the right to refuse to testify as to his observations of a public event and ordered the superior court to vacate its orders granting the petitions for writs of habeas corpus. The Court of Appeal's decision was initially unanimous but, after real parties petitioned for rehearing, one justice changed her position and filed a dissenting opinion.

Discussion

I. *History of California's Shield Law*

Newspersons had no privilege or immunity under common law to refuse to disclose the identity of their confidential sources. (*Ex Parte* *795*Lawrence and Levings* (1897) 116 Cal. 298, 300 [48 P. 124] [upholding contempt citations issued to a newspaper reporter and editor for refusing to disclose confidential sources to the state Senate]; *Mitchell* v. *Superior Court* (1984) 37 Cal.3d 268, 274, fn. 3 [208 Cal.Rptr. 152, 690 P.2d 625] [noting prohibition in Evidence Code section 911 of common law privileges]; Tent. Recommendation and Study Relating to the Uniform Rules of Evidence, art. V, Privileges (Feb. 1964) 6 Cal. Law Revision Com. Rep. (1964) p. 488 [noting that "the newsmen's privilege is entirely alien to the common law"].) FN1

FN1 We use the term "newsperson" for convenience to refer to all the categories of persons identified in the shield law. (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070.)

In 1935 the Legislature passed the first shield law. (Stats. 1935, ch. 532, § 1, pp. 1608-1610.) The statute, which was codified as Code of Civil Procedure section 1881, subdivision 6, provided that newspaper employees could not be adjudged in contempt for refusal to disclose their sources to courts or legislative or administrative bodies. Subsequent amendments extended the immunity to employees of radio and television stations, press associations, and wire services. (Stats. 1961, ch. 629, § 1, pp. 1797-1798.) In 1965 the Legislature transferred these statutory provisions to Evidence Code section 1070, which became effective in 1967. (Stats. 1965, ch. 299, § 2, pp. 1297, 1323-1335; Evid. Code, § 12.) FN2

FN2 In the remainder of this opinion we refer to Evidence Code section 1070 for convenience merely as section 1070.

In 1972, a plurality of the United States Supreme Court concluded that the First Amendment to the federal Constitution does not provide newspersons with even a qualified privilege against appearing before a grand jury and being compelled to answer questions as to either the identity of news sources or

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information received from those sources. (*Branzburg v. Hayes* (1972) 408 U.S. 665 [33 L.Ed.2d 626, 92 S.Ct. 2646].) The high court made clear, however, that state legislatures are "free, within First Amendment limits, to fashion their own standards." (*Id.*, at p. 706.) FN3 *796

FN3 There has been considerable debate as to whether the court as a whole in *Branzburg v. Hayes, supra*, 408 U.S. 665, recognized a qualified privilege. Four justices dissented from the plurality opinion. Three of them (Justices Brennan, Marshall, and Stewart) would have recognized a qualified privilege; the fourth (Justice Douglas) advocated an absolute privilege. Justice Powell joined the plurality in finding no privilege on the facts before the court but stated his view that the question of privilege should be determined on a case-by-case basis. Justice Stewart subsequently observed that, in light of Justice Powell's concurring opinion, the decision was "perhaps by a vote of four and a half to four and a half." (Stewart, *Or of the Press* (1975) 26 Hastings L.J. 631, 635.)Similarly, counsel for the New York Times in one of the consolidated cases decided in *Branzburg* ,later acknowledged that "... Justice Powell's opinion is singularly opaque ...." (Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen* (1975) 26 Hastings L.J. 709.)Despite this lack of clear guidance, "... lower federal courts have consistently read the case to support some kind of qualified privilege for reporters." (Tribe, American Constitutional Law (2d ed. 1988) § 12-22, p. 972.) Several state courts have done likewise. In *Mitchell v. Superior Court, supra*, 37 Cal.3d 268, 277, we concurred in the observation by some other courts that Justice Powell's position was the "minimum common denominator" of *Branzburg* and that the decision therefore does not *preclude* a qualified privilege. We did not decide the question of whether *Branzburg requires* a privilege in some cases. Because *Branzburg* is not dispositive of the present case, we need not linger over the troublesome question of its scope and meaning.

In 1974 the California Legislature amended section 1070 to its present form, apparently in response to *Branzburg, supra*, 408 U.S. 665.(Stats. 1974, ch. 1323, § 1, p. 2877; Stats. 1974, ch. 1456, § 2, p. 3184.) That amendment expanded the scope of the shield law to protect against the compelled disclosure of "unpublished information" as well as sources.

In June 1980, California voters approved Proposition 5, a state constitutional amendment proposed by the Assembly. (Assem. Const. Amend. No. 4, Stats. 1978 (1977-1978 Reg. Sess.) res. ch. 77, pp. 4819-4820.) The proposition incorporated language virtually identical to section 1070 into the California Constitution, as article I, section 2, subdivision (b). FN4

FN4 For convenience and brevity we refer in the remainder of this opinion to the constitutional provision as article I, section 2(b). It states in its entirety: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

"Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

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"As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated."

II. *Scope of the Shield Law*

Article I, section 2(b) provides that a newsperson "shall not be adjudged in contempt ... for refusing to disclose the *source of any information* procured while so connected or employed [as a newsperson] ... *or* for refusing to disclose *any unpublished information* obtained or prepared in gathering, receiving or processing of information for communication to the public." (Italics added.) [FN5](1) Stated more simply, article I, section 2(b)*797 protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished information, or (2) the source of information, whether published or unpublished. [FN6]

FN5 Because section 1070 and article I, section 2(b) are identical except for minor and insignificant differences in wording, we will discuss only the constitutional provision. Our discussion of article I, section 2(b), however, applies with equal force to section 1070. (*Union Pacific R.R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 146, fn. 4 [260 Cal.Rptr. 565, 776 P.2d 267] [noting that our discussion of a state constitutional provision applied with equal force to its substantially identical statutory counterpart].)

FN6 As a preliminary matter, we think it necessary to note the occasional mischaracterization of the shield law by the Courts of Appeal. More specifically, the protection provided by the shield law has sometimes been referred to as a privilege. Article I, section 2(b), however, states only that newspersons "shall not be adjudged in contempt." On its face, the shield law does no more than prohibit a newsperson from being held in contempt. Moreover, the Legislature has stressed in reference to identical language in section 1070 that, "It should be noted that Section 1070, like the existing law, provides an immunity from being adjudged in contempt; *it does not create a privilege.*" (Assem. Committee on Judiciary com., 29B West's Annot. Evid. Code (1966 ed.) § 1070, p. 655, italics added.) The California Law Revision Commission has also characterized section 1070 as creating only an immunity, not a privilege. (7 Cal. Law Revision Com. Rep. (Jan. 1965) p. 208.) Likewise, we have recognized that the shield law prohibits only a judgment of contempt and that, unlike a privilege, the shield law does not protect against other sanctions. (*Mitchell v. Superior Court, supra,* 37 Cal.3d 268, 274.)

The immunity-privilege distinction has been observed in most cases. For example, in *KSDO v. Superior Court* (1982) 136 Cal.App.3d 375 [186 Cal.Rptr. 211], the court stated, "The California shield law ... is unique in that it affords only limited protection. *It does not create a privilege* for newspeople, rather it provides an immunity from being adjudged in contempt. This rather basic distinction has been misstated and apparently misunderstood by members of the news media and our courts as well." (*Id.,* at pp. 379-380, italics added.) We agree with the *KSDO* court and the others who have correctly noted that the shield law provides only an immunity from contempt, not a privilege. (*Hallissy v. Superior Court* (1988) 200 Cal.App.3d 1038, 1045 [248 Cal.Rptr. 635]; *Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 26 [201 Cal.Rptr. 207].) We disapprove of occasional suggestions, perhaps inadvertent, to the contrary. (*Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388, 396-398 [153 Cal.Rptr. 608]; *CBS, Inc. v. Superior Court* (1978) 85 Cal.App.3d 241, 250 [149 Cal.Rptr. 421].)

The parties agree there is no attempt to compel the reporters to reveal the identity of a source. Delaney

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was the source of whatever information the reporters may have as to whether he consented to the police search of his jacket, and his identity is of course already known. [FN7] Rather, Delaney seeks only the reporters' testimony as to whether he consented to the search. The reporters do not contend they promised to keep confidential any information they obtained or observations they made while preparing their article on the Long Beach Police Department's task force. (2a) The question therefore is whether the shield law's definition of "unpublished information" includes a newsperson's unpublished, nonconfidential eyewitness observations of an occurrence in a public place. (3) **(See fn. 8.)** We conclude that it does. [FN8] *798

FN7. One might also view the police as being a source of this information, but, as with Delaney, their identities are already known.

FN8 There is no dispute in this case that the reporters were acting as newspersons and were directly engaged in the process of "gathering, receiving or processing of information for communication to the public" within the meaning of the shield law when they observed the events as to which their testimony is sought. We emphasize, however, the importance of this requirement. As the Times itself recently recognized, the shield law provides no protection for information obtained by a journalist not directly engaged in "gathering, receiving or processing" news. In an editorial criticizing the Court of Appeal decision in this case, the Times correctly observed that "A reporter who, say, wanders into a liquor store on his way home from work and witnesses a holdup could not invoke the shield law and refuse to testify. *Off the job, a journalist is no different from any other citizen.*" (*Breaking the Shield,* L.A. Times (July 20, 1988) Metro Section, pt. 2, p. 6, col. 1, italics added.) We agree.

A. *Language of the shield law*

(4) We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724 [257 Cal.Rptr. 708, 771 P.2d 406].) In the case of a constitutional provision adopted by the voters, their intent governs. (*Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538 [58 P.2d 1278]; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 618 [194 Cal.Rptr. 294].) To determine intent, '"The court turns first to the words themselves for the answer."' (*Brown v. Kelly Broadcasting Co., supra,* 48 Cal.3d 711, 724, quoting *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

(2b) The language of article I, section 2(b) is clear and unambiguous as to the question presented in this case. The section states plainly that a newsperson shall not be adjudged in contempt for "refusing to disclose *any* unpublished information." (Italics added.) The parties seeking discovery in this case (Delaney and the prosecutor) contend article I, section 2(b) applies only to unpublished information obtained *in confidence* by a newsperson. Such a construction might be possible if the voters had used the phrase "unpublished information" without the modifier "any." They did not do so. The use of the word "any" makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence. (5) Words used in a constitutional provision "should be given the meaning they bear in ordinary use." (*Lungren v. Deukmejian, supra,* 45 Cal.3d 727, 735; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal. Rptr. 239, 583 P.2d 1281].) (2c) In the context of article I, section 2(b), the word "any" means without limit and no matter what kind. (Webster's New World Dict. (2d college ed. 1982) p. 62.) To restrict the scope of article I, section 2(b) to confidential information would be to read the word "any" out of the section. We decline to do so. (6) Significance should be given, if possible, to every word of an act.*799 (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112 [65 Cal.Rptr. 315, 436 P.2d 315].) Conversely, a construction that renders a word surplusage should be avoided. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 [184 Cal.Rptr. 713, 648 P.2d 935]; *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].) [FN9]

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FN9 Faced with statutes that, like our shield law, protect against forced disclosure of "any information," a clear majority of other states' appellate courts have also found such language to be unambiguous and have held the statutes apply to nonconfidential information. (*Austin* v. *Memphis Pub. Co.* (Tenn. 1983) 655 S.W.2d 146, 149-150 [court declined to insert the word "confidential" into the statute]; *Grand Forks Herald v. District Court, etc.*(N.D. 1982) 322 N.W.2d 850, 854 [court found no intent in the the wording of the statute that it be limited to confidential sources]; *Lightman v. State* (1972) 15 Md.App. 713 [294 A.2d 149, 156],affd. (Md. 1972) 295 A.2d 212 [language broad enough to emcompass all sources of information].) Although we are not bound by those cases, they do reflect that our decision is in the mainstream of statutory construction. Two state high court decisions to the contrary are plainly distinguishable. (*Knight-Ridder v. Greenberg* (1987) 70 N.Y.2d 151 [518 N.Y.S.2d 595, 598-599, 511 N.E.2d 1116] [decision based not on statute's language but on long history of contrary interpretation by the state's lower courts and the state Legislature's not having amended the statute to supersede the lower courts' view]; *Hatchard* v. *Westinghouse Broadcasting* (1987) 516 Pa. 184 [532 A.2d 346, 348-351] [stressing the need for narrow privilege in defamation actions so as not to restrict unduly the plaintiff's ability to recover].)

(2d) We need not rely solely on the voters' use of the word "any." Article I, section 2(b) further states: "As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated." Nowhere in this broad definition is there an explicit or implied restriction of article I, section 2(b) to confidential information. (7) To so limit the section, we would have to insert into it the word "confidential" and thus violate the cardinal rule that "The constitution is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions." (*People v. Campbell* (1902) 138 Cal. 11, 15 [70 P. 918]; *Ross* v. *City of Long Beach* (1944) 24 Cal.2d 258, 260 [148 P.2d 649].)

Delaney contends a reporter's percipient observations of a nonconfidential occurrence are not "information" within the meaning of shield law. This attempted distinction between observations and information is unpersuasive. Under Delaney's strained interpretation, a reporter or any other eyewitness to an automobile accident would have no "information" as *800 to the accident. This flies in the face of reason and plain English. (8) "Information" includes "reception of knowledge" and "knowledge obtained from reading, *observation*, or instruction." (Webster's New Internat. Dict. (2d ed. 1958) p. 1276, italics added.) When a reporter or other person is called on to testify as to his observations of an event, he is being asked to disclose information. Moreover, if the distinction between observations and information were logical, the result would be that even a newsperson's *confidential* observations would not be protected. That result would be contrary to the manifest purpose and language of article I, section 2(b).

(2e) In short, the plain language of article I, section 2(b) leads to only one tenable conclusion. We hold that the shield law's definition of "unpublished information" is not restricted to information obtained in confidence by a newsperson.

B. *Legislative and constitutional history*

The reporters rely on the legislative history of section 1070 to support their view. Delaney and the prosecutor disagree with the reporters' interpretation of that history. It is, however, beside the point for two reasons. First, as we have explained, article I, section 2(b) and section 1070 are virtually identical. In light of our determination that the language of article I, section 2(b) is unambiguous, simple logic compels the same conclusion as to the statute. Thus, we need not go beyond the words of the statute to extrinsic aids such as legislative history. (*Lungren v. Deuk-*

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mejian, supra, 45 Cal.3d 727, 735.) To do so would violate the principle that, "When statutory language is thus clear and unambiguous there is no need for construction, and *courts should not indulge in it.*" (Solberg v. Superior Court (1977) 19 Cal.3d 182, 198 [137 Cal.Rptr. 460, 561 P.2d 1148], italics added.) This rule is deeply rooted in our jurisprudence. (Sturges v. Crowninshield (1819) 17 U.S. 122, 202 [4 L.Ed. 529, 550].) [FN10]

FN10 The dissenting Court of Appeal justice in this case also noted the well-established principle of not going beyond clear and unambiguous language to determine the intent of the Legislature or voters.

(9)(See fn. 11.)Second, in light of the voters' incorporation of the statutory language into the California Constitution, we need construe only article I, section 2(b). [FN11] The legislative history of section 1070 would be *801 relevant only if it shed some light on the meaning of its constitutional counterpart, article I, section 2(b). The history, however, is of no help in that regard. Article I, section 2(b) is plain on its face, and we need not - indeed, should not - search for external indicia of the voters' intent. (Lungren v. Deukmejian, supra, 45 Cal.3d 727, 735.) Moreover, the *legislative* history of section 1070 could, as a matter of logic, reflect only the *Legislature's* intent. (10, 11) (See fn. 12.)That history would not provide us with any guidance as to *the voters'* subsequent intent because none of the indicia of the Legislature's possible intent (committee analysis and digest and letters from the statute's author) were before the voters. (People v. Castro (1985) 38 Cal.3d 301, 311-312 [211 Cal.Rptr. 719, 696 P.2d 111]; Lungren v. Deukmejian, supra, 45 Cal.3d 727, 742.) [FN12]

FN11 There are only three possible conclusions as to the relationship between section 1070 and article I, section 2(b): (1) they have the same scope; (2) the statute is narrower; or (3) the statute is broader. Each conclusion effectively moots the statute. If section 1070 and article I, section 2(b) have the same scope, the statute serves no practical purpose. If section 1070 were *narrower* than article I, section 2(b) - that is, if the statute applied only to confidential information - the statute would have to yield to the broader constitutional provision. The Legislature could not restrict the shield law placed by the voters into the Constitution because, "Wherever statutes conflict with constitutional provisions, the latter must prevail." (People v. Navarro (1972) 7 Cal.3d 248, 260 [102 Cal.Rptr. 137, 497 P.2d 481].) The third conclusion - that the statute is *broader* than the Constitution - is not a logical possibility. Because we construe article I, section 2(b) as applying to both confidential and nonconfidential information, there is nothing more the statute could include. In short, the result mandated by article I, section 2(b) renders moot the scope of section 1070. Use of legislative history to determine the scope of the statute would therefore serve no purpose.

FN12 Justice Broussard's concurring opinion contends we should rely on the legislative history of section 1070 to find the meaning of its constitutional counterpart, article I, section 2(b). The concurrence does not take issue, however, with our explanation that such history could have no practical effect on our decision. Moreover, the concurrence's reliance on County of Sacramento v. Hickman (1967) 66 Cal.2d 841, 847-851 [59 Cal.Rptr. 609, 428 P.2d 593], is misplaced. In that case, we considered a lengthy history of judicial decisions consistently construing the statutory (and virtually identical) predecessor of a constitutional provision. There is no similar history for section 1070. Indeed, we have never before construed the substantive scope of section 1070. (*Post*, at p. 803, fn. 16.)

The concurrence does not identify any sources of legislative history. The only sources we know are an analysis by the Senate Committee on the Judiciary of a 1974 amendment (Sen. Bill No. 1858) to section 1070, a digest of the amendment by the Assembly Committee on the Judiciary, and letters written by Senator Al Song, the amendment's sponsor. In *City of Sacramento* v. *State of California, ante,* 51 [266 Cal.Rptr. 139, 785 P.2d 522], on which the concurrence also relies, we noted a prior decision in which we had relied on the history

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of the statutory forerunner of a constitutional provision. (*Id.*, at p. 67, fn. 11.)In that prior decision - County of Los Angeles v. State of California (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] - we made clear, as we do in the present case, that legislative materials not before the voters are not relevant to determining *the voters'* intent. (Id., at p. 54, fn. 6 and p. 56.)We also explained that the constitutional language before us was quite vague. (Id., at p. 57.)Resort to extrinsic sources of meaning was thus appropriate. Justice Broussard agrees that article I, section 2(b) is unambiguous.

To the extent the concurrence suggests we should rely on letters from Senator Song, we decline for the further reason that we do not consider the motives or understandings of an individual legislator even if he or she authored the statute. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589 [128 Cal.Rptr. 427, 546 P.2d 1371].)

Delaney also relies on the ballot argument in favor of Proposition 5 in 1980, the measure that created article I, section 2(b). (12) Ballot arguments are accepted sources from which to ascertain the voters' intent. (*In *802 re* Lance W. (1985) 37 Cal.3d 873, 888, fn. 8 [210 Cal.Rptr. 631, 694 P.2d 744]; *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11 [120 Cal.Rptr. 94, 533 P.2d 222].) As with the legislative history of section 1070, however, we need not look beyond the language of the enactment (article I, section 2(b)) when its language is unambiguous. (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d 727, 735.) The ballot argument (unlike the legislative history) is, however, at least relevant to determining *the voters'* intent. (2f) We therefore consider the ballot argument (set forth in full in the margin) to determine if it demonstrates the voters did not mean what they said. [FN13]The repeated references in the argument to confidentiality and the like permit the inference the proponents of the measure intended to protect only confidential information. The same inference may be drawn from the Legislative Analyst's statement. [FN14]The inference, however, is far from compelling. The ballot materials emphasized the need for confidentiality but did not state that *only* confidential matters would be protected. The most reasonable inference is that the proponents chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need. We cannot conclude that, by emphasizing one purpose, perhaps the primary purpose of the measure, the argument misled voters into thinking confidentiality was *803 the only purpose, especially when the measure itself made clear that all unpublished information would be protected. Moreover, a possible inference based on the ballot argument is an insufficient basis on which to ignore the unrestricted and unambiguous language of the measure itself. It would be a strained approach to constitutional analysis if we were to give more weight to a possible inference in an extrinsic source (a ballot argument) than to a clear statement in the Constitution itself. We decline to do so. [FN15]

FN13 The ballot argument stated: "The free flow of information to the public is one of the most fundamental cornerstones assuring freedom in America. Guarantees must be provided so that information to the people is not inhibited. However, that flow is currently being threatened by actions of some members of the California Judiciary. They have created exceptions to the current Newsman's Shield Law, which protects the confidentiality of reporters' news sources. And the use of confidential sources is critical to the gathering of news. *Unfortunately, if this right is not protected, the real losers will be all Californians who rely on the unrestrained dissemination of information by the news media.* [¶] This amendment merely places into the state's Constitution protection already afforded journalists by statute. That law [section 1070], enacted in 1935, in clear and straightforward language, provides that reporters cannot be held in contempt of court for refusing to reveal confidential sources of information. At least six reporters in California in recent years have spent time in jail rather than disclose their sources to a judge. By giving existing law constitutional status, judges will have to give the protection greater weight before attempting to compel reporters to breach their pledges of confidentiality. [¶] A reporter's job, of course, is not to withhold information, but to convey it to the public. In most cases, a reporter is able to reveal corruption and malfeasance within government only with the help of an honest employee. If such an indi-

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vidual feels that a reporter's pledge of confidentiality may be broken under the threat of jail, that person simply will not come forward with his or her information. [¶] If our democratic form of government - of the people, by the people, for the people - is to survive, citizens must be informed. *A free press protects our basic liberties by serving as the watchdogs of our nation.* Citizens may agree or disagree with reports in the media, but they have been informed, and the final choice is made by the individual. [¶] To jail a journalist because he protected his source is an assault not only on the press but on all Californians as well." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec. (June 3, 1980) p. 19, italics in original.)

FN14 The Legislative Analyst's statement read: "Since 1935, laws enacted by the California Legislature have protected the confidential information sources of persons employed by or connected with the news media .... [¶] This measure would place in the California Constitution provisions of existing law enacted by the Legislature to protect news sources ...." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec., *supra*, p. 18.)

FN15 We requested the parties to submit supplemental briefs on the issue of whether section 1070 is an unconstitutional usurpation of the California judiciary's inherent power to punish contempt. Because the scope of section 1070 is rendered moot as a practical matter by our construction of article I, section 2(b) (ante, pp. 800-801, fn. 11), we need not and do not decide this issue, which would arise only if section 1070 were amended so that it were somehow broader than article I, section 2(b).

C. *Prior California decisions*

Although the relevant amendment to section 1070 was enacted in 1974 and article I, section 2(b) was adopted in 1980, this court has never determined the substantive scope of either provision. [FN16] The Courts of Appeal, however, have often done so. Initially, the clear majority view in published decisions was that the shield law applies equally to nonconfidential as well as confidential information. (*Hammarley v. Superior Court, supra,* 89 Cal.App.3d 388, 395-398; *Playboy Enterprises, Inc. v. Superior Court, supra,* 154 Cal.App.3d 14, 20-22; *Hallissy v. Superior Court, supra,* 200 Cal.App.3d 1038.) Only one court had restricted the shield law's application to confidential information. (*CBS, Inc. v. Superior Court, supra,* 85 Cal.App.3d 241, 250.)

FN16 Indeed, we have never construed the substantive scope of section 1070 in any of its previous forms, even though it was enacted more than 50 years ago. We briefly considered the procedural scope of section 1070 and article I, section 2(b) in *Mitchell v. Superior Court, supra,* 37 Cal.3d 268, 274, in which we observed that neither provision protects a newsperson who is a party to an action from sanctions other than contempt.

More recently, however, the conflict began to sharpen. In an opinion certified for publication, the Court of Appeal in this case held the shield law applies only to confidential information. Only two weeks earlier, however, a different division of the same district reached a contrary conclusion in an opinion also certified for publication, holding that the shield law protects against the compelled disclosure of any unpublished information, regardless of whether it is confidential. (*New York Times Co. v. Superior Court* (1988) 215 Cal.App.3d 672 [248 Cal.Rptr. 426], review granted Oct. 27, 1988 (S006709).) We granted review in both cases to resolve the growing conflict. A third Court of Appeal panel thereafter certified for publication an opinion noting the conflict and agreeing with the Court of Appeal decision in this case, holding that a reporter's eyewitness observations of a public event are *804 not protected by the shield law. (*Liggett* v. *Superior Court* (1989) 211 Cal.App.3d 1461 [260 Cal.Rptr. 161], review granted Oct. 12, 1989 (S011581).)

In light of the conflict that has emerged, the Court of Appeal decisions provide little clear guidance for our decision, and little would be gained by our reviewing them in detail. We note, however, two general themes that appear in the conflict. As we have done in this case, the courts that have applied the shield law to all information have relied on the explicit language of

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the shield law. (Playboy Enterprises, Inc. v. Superior Court, supra, 154 Cal.App.3d 14, 20-22; Hammarley v. Superior Court, supra, 89 Cal.App.3d 388, 395-398.)

By contrast, the courts that have restricted the shield law to confidential information have paid insufficient attention to the shield law's language. For example, in CBS, Inc. v. Superior Court, supra, 85 Cal.App.3d 241, 250, the court seemed to conclude that no purpose would be served by protecting nonconfidential information. The court did not explain how it found in the shield law a purpose to protect only confidential information. In this case and in Liggett v. Superior Court, supra, 211 Cal.App.3d 1461, review granted October 12, 1989 (S011581), the courts relied extensively on the legislative history of section 1070 and the ballot argument for article I, section 2(b). As we have already explained (ante, pp. 800-803), there is no need to resort to extrinsic aids when a provision is unambiguous and, in any event, the ballot argument and legislative history in this case are too equivocal to overcome the clear definition of "unpublished information" in article I, section 2(b)'s language. We disapprove of those Court of Appeal decisions that hold or suggest the shield law protects only confidential information.

D. *Public policy*

The parties correctly approach this case as being one of application of a specific constitutional provision. Implicit in their respective arguments, however, are conflicting notions as to appropriate public policy in protecting a newsperson's unpublished information. We need not consider this issue. As we have explained, article I, section 2(b) contains an unambiguous definition of "unpublished information." (13) It is bedrock law that if "the law-maker gives us an express definition, we must take it as we find it ...." (Bird v. Dennison (1857) 7 Cal. 297, 307.) (14) "[C]ourts, in construing the constitution, are bound to suppose that any inconveniences involved in the application of its provisions, according to their plain terms and import, were considered in its formation, and voluntarily accepted as less intolerable than those which are thereby avoided, or as fully compensated by countervailing advantages." (*805People v. Pendegast (1892) 96 Cal. 289, 294 [31 P. 103]; Sturges v. Crowninshield, supra, 17 U.S. 122, 202 [4 L.Ed. 529, 550].) Our proper function is not to judge the wisdom of article I, section 2(b) or the way in which it is written.

E. *Conclusion as to scope of shield law*

(2g) We hold that article I, section 2(b) is not contingent on a showing that a newsperson's unpublished information was obtained in confidence.Article I, section 2(b)'s definition of "unpublished information" includes a newsperson's nonconfidential, eyewitness observations of an occurrence in a public place. FN17

FN17 Of course, a person claiming the protection of the shield law must meet all its other requirements. He must show that he is one of the types of persons enumerated in the law, that the information was "obtained or prepared in gathering, receiving or processing of information for communication to the public," and that the information has not been "disseminated to the public by the person from whom disclosure is sought." (Art. I, § 2(b).)

III. *Delaney's Constitutional Rights*

Our determination that the reporters' observations of the police search are "unpublished information" within the scope of article I, section 2(b) does not decide the issue of whether the municipal court properly held the reporters in contempt for refusing to disclose that information. (15) The reporters themselves concede, as they must, that the shield law's protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial. Although this court has not decided a case involving the application of the shield law in a criminal prosecution, the principle is beyond question. (CBS, Inc. v. Superior Court, supra, 85 Cal.App.3d 241, 251; Hallissy v. Superior Court, supra, 200 Cal.App.3d 1038; Playboy Enterprises, Inc. v. Superior Court, supra, 154 Cal.App.3d 14, 24-25; Hammarley v. Superior Court, supra, 89 Cal.App.3d 388, 402; cf. People v. Borunda (1974) 11 Cal.3d 523, 527 [113 Cal.Rptr. 825, 522 P.2d 1] [defendant seeking identity of anonymous informant].) FN18 The incorporation of the shield law into the California *806 Constitution cannot restrict a criminal defendant's *federal* constitutional right to a fair trial. (Mulkey v. Reitman (1966) 64 Cal.2d 529,

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533 [50 Cal.Rptr. 881, 413 P.2d 825], affd. (1967) 387 U.S. 369 [18 L.Ed.2d 830, 87 S.Ct. 1627] [explaining that California constitutional amendment adopted by ballot must conform to the United States Constitution].) Such result would violate the supremacy clauses of the federal and state Constitutions. (U.S. Const., art. VI, cl. 2; Cal. Const., art. III, § 1; *Hammarley v. Superior Court, supra*, 89 Cal.App.3d 388, 399, fn. 4.) [FN19]

FN18 Courts have stated almost without exception that a criminal defendant's right to information arises at least in part from the Sixth Amendment to the United States Constitution. (See, e.g., *Hammarley v. Superior Court, supra*, 89 Cal.App.3d 388, 398.) For the most part, they explicitly or implicitly refer to the compulsory process and confrontation clauses. In light of recent Supreme Court authority, the reference to the Sixth Amendment may be incorrect in a couple of respects. In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [94 L.Ed.2d 40, 107 S.Ct. 989], the Pennsylvania Supreme Court had ruled that a lower court's refusal to order the disclosure of a state agency's confidential files in a child abuse investigation violated the confrontation and compulsory process clauses of the Sixth Amendment. A plurality of the high court concluded that the confrontation clause does not apply to pretrial discovery. (*Id.*, at pp. 52-53 [94 L.Ed.2d at pp. 54-55].) As in this case, the shield law is often raised as a pretrial issue, e.g., at a preliminary hearing. Under *Ritchie*, it may no longer be accurate to refer to a defendant's Sixth Amendment right in such circumstances. (But see *Kentucky v. Stincer* (1987) 482 U.S. 730, 738-739, fn. 9 [96 L.Ed.2d 631, 642-644, 107 S.Ct. 2658] [suggesting in dictum that confrontation clause might in some cases apply to pretrial discovery].) The better practice may be to refer to the right as arising under the due process clause of the Fourteenth Amendment. Similarly, a majority of the *Ritchie* court also found considerable doubt as to whether the compulsory process clause gives a defendant a right to discover the identity of witnesses or to require the state to produce exculpatory evidence. (480 U.S. at p. 56 [94 L.Ed.2d at pp. 56-57].) The court concluded that the better analysis is under the due process clause of the Fourteenth Amendment. Although we note the high court's distinctions for the purpose of accuracy, we find no suggestion in *Ritchie* that the scope of a defendant's right to a fair trial is affected by the label attached to it.

FN19 We need not and do not decide whether a newsperson's rights under article I, section 2(b) could be outweighed by a criminal defendant's rights under article I, section 15 of the California Constitution.

(16)(See **fn. 20.**), (17a) The parties disagree, however, as to the nature of the showing a criminal defendant must make to overcome a claim of immunity under the shield law. [FN20]Delaney contends he need establish only a reasonable possibility that the evidence sought to be discovered might result in his exoneration. The reporters propose a more complex, four-part test under which a defendant would have to show the following: (1) The information must go to the heart of defendant's case. (2) The information must have a significant effect on the outcome of the case. (This proposed element seems to be the same as the "heart-of-the-case" element.) (3) The information is not available from alternative sources. (4) The infringement on the defendant's rights caused by nondisclosure must outweigh the newsperson's interests. (This element seems to be the conclusion a court would reach under the test rather than an element of the test.) As we will *807 explain, precedent and principle lead us to conclude that neither test is entirely warranted.

FN20 We think it helpful to note the proper procedure for resolving a claim of immunity under the shield law. It is hornbook law that a person claiming a privilege bears the burden of proving he is entitled to the privilege. (*Sharon* v. *Sharon* (1889) 79 Cal. 633, 677-678 [22 P. 26]; *Mahoney* v. *Superior Court* (1983) 142 Cal.App.3d 937, 940-941 [191 Cal.Rptr. 425]; 2 Witkin, Cal. Evidence (2d ed. 1986) § 1086, pp. 1030-1031.) Pursuant to its terms, the shield law provides only an immunity from contempt, not a privilege. (*Ante*, at p. 797, fn. 6.) This distinction, however, is not relevant to assigning the burden. Regardless of the label used (privilege or

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immunity), the shield law's purpose is the same - to protect a newsperson's ability to gather and report the news. The newsperson seeking immunity must prove all the requirements of the shield law have been met. The burden then shifts to the criminal defendant seeking discovery to make the showing required to overcome the shield law. (Hammarley v. Superior Court, supra, 89 Cal.App.3d 388, 399.) It is the nature of a defendant's showing that we address in the remainder of this opinion.

A. *The proper test for accommodating conflicting constitutional rights*

To formulate the proper test we begin with our decision in Mitchell v. Superior Court, supra, 37 Cal.3d 268, in which we set forth a balancing test to determine when a reporter must disclose confidential information. We identified four relevant factors for a trial court to consider when making that determination. First, we noted the nature of the proceeding and observed that, "In general, disclosure is appropriate in civil cases, especially when a reporter is a party to the litigation." (*Id.*, at p. 279.)Second, the *Mitchell* court stated the information must be more than merely relevant and that it must go to "the heart of the case" for the party seeking discovery.(*Id.*, at pp. 280-282.)Third, the court stated that discovery should generally be denied unless it is shown that all alternative sources of the information have been exhausted. (*Id.*, at p. 282.)Fourth, *Mitchell* stated that the trial court should consider the importance of protecting confidentiality in the case at hand. (*Id.*, at pp. 282-283.)

Although *Mitchell*, a defamation action, helps to illustrate the competing concerns that arise when a litigant seeks information from a newsperson, an identical approach is not entirely appropriate in a criminal proceeding. We were careful to emphasize in *Mitchell* that "In criminal proceedings, both the interest of the state in law enforcement, recognized as a compelling interest in *Branzburg* (see 408 U.S. 665, 700 [33 L.Ed.2d 626, 650]), and the interest of the defendant in discovering exonerating evidence outweigh any interest asserted in ordinary civil litigation." (Mitchell, supra, 37 Cal.3d at p. 278.) We did not consider the factors a court should consider in a criminal case.

1. *Threshold showing required*

In now deciding the issue, we must first consider the threshold showing a criminal defendant must make. The reporters' claim Delaney must show their testimony would go to the "heart of his case." He contends he need show only a reasonable possibility the evidence might result in his exoneration. On this point, Delaney has the better view. In CBS, Inc. v. Superior Court, supra, 85 Cal.App.3d 241, the court explained, "Against this right [of a free press] we are obliged to measure the threat to defendants' right to a fair trial. The existence of such a right is clear .... [I]t has resulted in the rule that, where a criminal defendant has demonstrated a *reasonable possibility* that evidence sought to be discovered might result in his exoneration, *808 he is entitled to its discovery." (*Id.*, at p. 251, italics in original; Hallissy v. Superior Court, supra, 200 Cal.App.3d 1038, 1045.) Similarly, in Hammarley v. Superior Court, supra, 89 Cal.App.3d 388, the court stated, "'Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of *all relevant* and reasonably accessible information.'" (*Id.*, at pp. 398-399, quoting Pitchess v. Superior Court (1974) 11 Cal.3d 531, 535 [113 Cal.Rptr. 897, 522 P.2d 305], italics added.)

We hold that, to overcome a prima facie showing by a newsperson that he is entitled to withhold information under the shield law, a criminal defendant must show a *reasonable possibility* the information will materially assist his defense. A criminal defendant is not required to show that the information goes to the heart of his case. [FN21]

FN21 It has been stated that the information must be relevant. (Hallissy v. Superior Court, supra, 200 Cal.App.3d 1038, 1046.) This observation is correct but potentially misleading to the extent it suggests the relevancy requirement arises from the shield law. It does not. The requirement applies to all evidence, whatever its source. (Evid. Code, § 350.)Thus, it is superfluous to state that relevancy is required in shield law cases.

(18) A criminal defendant's constitutional right to

compulsory process was intended to permit him to request governmental assistance in obtaining likely helpful evidence, not just evidence that he can show beforehand will go to the heart of his case. "The need to develop *all relevant facts* in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of *all the facts*, within the framework of the rules of evidence." (United States v. Nixon (1974) 418 U.S. 683, 709 [41 L.Ed.2d 1039, 1064, 94 S.Ct. 3090], italics added [claim of presidential privilege].) [FN22]

FN22 In *Hammarley v. Superior Court, supra*, 89 Cal.App.3d 388, 399, and *Hallissy v. Superior Court, supra*, 200 Cal.App.3d 1038, 1045-1046, the Courts of Appeal stated that a criminal defendant must also show the evidence is "necessary" to his defense. This restriction might appear to be inconsistent with those courts' concurrent observations that a defendant is entitled to all relevant evidence. Properly understood, however, there is no inconsistency. The *Hammarley* and *Hallissy* courts were referring to two separate factors - the threshold showing required and whether the reporter's information was necessary in the sense that it was unobtainable from another source. Those courts' references to "necessary" information cannot be fairly read to mean information that goes to the heart of a criminal defendant's case, especially in light of their observations as to the need for all relevant evidence. Indeed, neither court determined that the information at issue went to the "heart of the case." Nor did they even use the term. As to the threshold showing required, the decisions are consistent with the test we adopt in this case.

The "reasonable possibility" requirement is also far more workable than the "heart of the case" test proposed by the reporters. It would be impractical *809 to require a trial court to attempt to divine whether the evidence sought from the newsperson would cause a jury to exonerate a criminal defendant. A court cannot be expected to have that degree of prescience. Moreover, if applied literally, the "heart of the case" requirement would allow a defendant to obtain only evidence that would support a directed verdict in his favor.

(19a) To provide guidance to the trial courts, we believe it helpful to make clear how the threshold requirement must be applied in practice. First, the burden is on the criminal defendant to make the required showing. (*Hallissy v. Superior Court, supra*, 200 Cal.App.3d 1038, 1045.) Second, the defendant's showing need not be detailed or specific, but it must rest on more than mere speculation. Third, the defendant need not show a reasonable possibility the information will lead *to his exoneration*. He need show only a reasonable possibility the information will materially *assist his defense*. The distinction between exoneration and assisting the defense is significant. (20) "Exoneration" means "the removal of a burden, charge, responsibility, or duty." (Black's Law Dict. (5th ed. 1979) p. 516, col. 2.) Stated more simply, in criminal proceedings, "exoneration" is generally understood to mean an acquittal or dismissal of charges. (19b) Evidence, however, may be critical to a defense even if it will not lead to exoneration. For example, evidence may establish an "imperfect defense," a lesser included offense, a lesser related offense, or a lesser degree of the same crime; impeach the credibility of a prosecution witness; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination. A criminal defendant's constitutional right to a fair trial includes these aspects of his defense. [FN23]

FN23 We need not and do not in this case attempt to enumerate all the ways in which evidence might materially assist a defense. We also need not and do not decide or suggest that traditional testimonial privileges (e.g., attorney-client privilege) should in some circumstances yield to a criminal defendant's federal constitutional right to a fair trial. As Justice Mosk's concurring opinion notes, such privileges may be entitled to greater deference than a newsperson's immunity. (Conc. opn., *post*, at p. 819, fn. 2.)

2. *Factors to consider*

(17b) By meeting the threshold requirement, a defendant is not necessarily entitled to a newsperson's un-

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published information. The trial court must then consider the importance of protecting the unpublished information. (*Mitchell, supra*, 37 Cal.3d at pp. 282-283.) This determination may properly be characterized as a balancing of the defendant's and newsperson's respective, perhaps conflicting, interests. [FN24]The factors to be considered in making this determination are as follows: *810

FN24 Justice Mosk's concurrence rejects a balancing approach in favor of a rigid two-part determination. (Conc. opn., *post*, at p. 818.)He agrees a defendant must show a reasonable possibility the information will materially assist his defense. The concurrence, however, states that, once this showing has been made, the defendant is absolutely entitled to the information if there are no "alternative sources of substantially similar information." This approach would provide scant protection to the newsperson, certainly far less than provided by the balancing approach. Under the concurrence, a newsperson could be compelled to disclose highly confidential information, e.g., the name of a witness whose life would be endangered by disclosure. Our balancing approach, however, allows the trial court to consider the importance of keeping information confidential. The concurrence would mandate disclosure no matter how harmful it would be. The concurrence also considers only the defendant's federal constitutional rights and ignores the newsperson's state constitutional rights under the shield law. Rather than merely ignoring our shield law, we think it appropriate to attempt to apply it consistently with the federal Constitution.

(a) *Whether the unpublished information is confidential or sensitive*

If the information is not confidential, the court should consider whether it is nevertheless sensitive, that is, whether its disclosure would somehow unduly restrict the newsperson's access to future sources and information. (We hereafter refer to this type of nonconfidential information as "sensitive information.") [FN25] Generally, nonconfidential or nonsensitive information will be less worthy of protection than confidential or sensitive information. Disclosure of the latter types of information will more likely have a significant effect on the newsperson's future ability to gather news. (*U.S. v. LaRouche Campaign* (1st Cir. 1988) 841 F.2d 1176, 1180-1182 [noting slight deference due nonconfidential information].) The protection of that ability is the primary purpose of the shield law. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec., *supra*, p. 19; see *ante*, at p. 802, fn. 13.) [FN26]

FN25 To illustrate this type of nonconfidential but sensitive information, we use an example. Assume a reporter is investigating corruption in city government. He obtains information from a city employee who agrees to be quoted and identified. Even so, disclosure of this information in some circumstances might unduly restrict the reporter's ability to complete the story. If he were forced to disclose the source's identity before the articles were published and the source's employment was terminated as a result, other sources might cease to cooperate. That the information sought is not confidential does not necessarily mean it is not sensitive and equally worthy of protection from disclosure.

FN26 By emphasizing the need to be especially cautious in ordering disclosure of confidential or sensitive information, we do not suggest that nonconfidential information is entitled to no protection. As we have held above (*ante*, at p. 805), the plain language of the shield law includes nonconfidential information.

(b) *The interests sought to be protected by the shield law*

Even if the information was sensitive or obtained in confidence, other circumstances may, as a practical matter, render moot the need to avoid disclosure. If, as in this case, the criminal defendant seeking disclosure is himself the source of the information, it cannot be seriously argued that the source (the defendant) will feel that his confidence has been breached. [FN27]The ***811** reporter's news-gathering ability will not be prejudiced. Other circumstances may also mitigate or eliminate the adverse consequences of disclosure. We do not purport to decide the signifi-

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cance to be given to any future set of facts before a trial court. The point is simply that a trial court must determine whether the policy of the shield law will in fact be thwarted by disclosure.

FN27 Such was the situation in Hallissy v. Superior Court, supra, 200 Cal.App.3d 1038. A reporter published a story based on an interview with a criminal defendant that led to additional charges being filed against him. He sought to question the reporter to show the published statements were inconsistent with other statements the defendant had made to the reporter. The trial court correctly noted that "The source of the information is the very person who is seeking the full disclosure." (*Id.*, at p. 1042.)The Court of Appeal, however, paid no heed to this circumstance in reversing an order of contempt against the reporter. As explained above, such circumstance is significant. We disapprove of *Hallissy* to the extent it did not consider the fact that the party seeking disclosure was the source of the unpublished information.

(c) *The importance of the information to the criminal defendant*

A defendant in a given case may be able not only to meet but to exceed the threshold "reasonable possibility" requirement. For example, he may be able to show that the evidence would be dispositive in his favor, i.e., to use the reporters' phrase, that it goes to "the heart of defendant's case." If so, the balance will weigh more heavily in favor of disclosure than if he could show only a reasonable possibility the evidence would assist his defense.

(d) *Whether there is an alternative source for the unpublished information*

We stated in Mitchell, supra, 37 Cal.3d 268, 282, that discovery of a reporter's confidential information should be denied unless the party seeking it "has exhausted all alternative sources of obtaining the needed information." This requirement has also been imposed on criminal defendants. (Hammarley v. Superior Court, supra, 89 Cal.App.3d 388, 399; Hallissy v. Superior Court, supra, 200 Cal.App.3d 1038, 1045-1046.) Whether there is an alternative source is indeed a factor for the trial court to consider in a criminal proceeding. In light of a defendant's constitutional right to a fair trial, however, *Mitchell*, a civil case, does not mandate a rigid alternative-source requirement in criminal proceedings.

The facts in Mitchell, supra, 37 Cal.3d 268, also suggest the alternative-source requirement may not always be appropriate. In *Mitchell*, the plaintiff sought documents that would reveal confidential sources of information.(*Id.*, at p. 272.) [FN28]The obvious purpose of the alternative-source requirement ***812** is to protect against unnecessary disclosure of a newsperson's confidential or sensitive information. Where the information is shown to be not confidential or sensitive, the primary basis for the requirement is not present and imposing a rigid requirement would be to sustain a rule without a reason. As we have explained above, the proper balancing in a criminal case must take into account whether the unpublished information is confidential or sensitive and, if so, the importance of protecting the information in a given case. (*Ante*, at pp. 810-811.) For the same reason, a trial court should consider the nature of the information in determining whether to impose an absolute alternative-source requirement in a given case.

FN28 In the other cases cited by the reporters as support for a rigid alternative-source requirement, there was no indication that the information was not confidential. (*United States v. Burke* (2d Cir. 1983) 700 F.2d 70, 76-77; *United States v. Hubbard* (D.D.C. 1979) 493 F.Supp. 202, 205; *State v. Boiardo* (1980) 82 N.J. 446 [414 A.2d 14, 18-19].)

We also note that in Mitchell, supra, 37 Cal.3d 268, the information request was for documents that would reveal the identity of possible witnesses. We noted that the names of these persons likely could be obtained from sources other than the newsperson. Objective evidence of that nature is likely unaffected by its source. The contents of a document do not depend on the source of the document (assuming no alteration). Similarly, the name of a witness is the same regardless of who provides the name. The evidence sought by Delaney in this case, however, is qualitatively different from that sought in *Mitchell*.Delaney seeks the reporters' testimony as to

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their percipient observations of the events leading to his search and arrest. Two witnesses to an act may - indeed, likely do - see it differently, and even when their perceptions are substantially the same, their recollection of the event may differ. Moreover, even if their testimony is substantively similar, one witness may have more credibility with a jury. Likewise, two witnesses may convince the jury of a fact where one witness by himself would not do so.

Finally, we note a significant practical difference between this case and *Mitchell, supra,* 37 Cal.3d 268. That case arose out of a pretrial discovery order in a civil case. In light of the wide range of procedures available for pretrial discovery in civil litigation, it is not unreasonable to require a party seeking information from a newsperson to look elsewhere first. There are no similar procedures available to a criminal defendant. For example, he cannot compel a witness's attendance at a deposition and, if unsuccessful in obtaining information, subpoena a different witness. Moreover, the economic reality of the criminal justice system is such that a criminal defendant will generally have less opportunity than a civil litigant to obtain information before trial.

(21) For all the foregoing reasons, we conclude that a universal and inflexible alternative-source requirement is inappropriate in a criminal proceeding. In considering whether the requirement is appropriate in a given case, the trial court should consider the type of information being sought ***813** (e.g., names of potential witnesses, documents, a reporter's eyewitness observations), the quality of the alternative source, and the practicality of obtaining the information from the alternative source. The trial court must also consider the other balancing factors set forth above: whether the information is confidential or sensitive, the interests sought to be protected by the shield law, and the importance of the information to the criminal defendant. In short, whether an alternative-source requirement applies will depend on the facts of each case. [FN29]

> FN29 We disapprove of suggestions by the Courts of Appeal that a criminal defendant must in every case show the lack of an alternative source regardless of the circumstances. (*Hammarley v. Superior Court, supra,* 89 Cal.App.3d 388, 399; *Hallissy v. Superior Court, supra,* 200 Cal.App.3d 1038, 1046.)

3. *Balancing the factors*

(17c) Although a trial court must consider the foregoing factors, their relative importance will likely vary from case to case. In some cases, as in the present one, all the factors may weigh strongly in favor of disclosure. In others, the balance may be more even, and in some cases one factor may be so compelling as to outweigh all the others. We decline to hold in the abstract that any factor or combination of factors must be determinative. A mechanistic, checklist approach would not in the long run (nor perhaps even in a particular case) serve the best interests of either newspersons or criminal defendants.

4. *Whether an in camera hearing is required*

The reporters contend an in camera hearing must be held in every case before a newsperson can be forced to disclose unpublished information. The contention is overbroad. The purpose of an in camera hearing is to protect against unnecessary disclosure of confidential or sensitive information. The reporters fail to explain what purpose an in camera hearing would serve when the information, as in this case, is admittedly not confidential or sensitive. [FN30] In the cases cited by the reporters, the information was at least arguably confidential. For example, in *CBS, Inc. v. Superior Court, supra,* 85 Cal.App.3d 241, the Court of Appeal remanded to the trial court for an in camera hearing but noted the newspersons' "claimed pledge of secrecy." (*Id.*, at p. 254.)The reporters' reliance on *Hammarley v. Superior Court, supra,* 89 Cal.App.3d 388, in which the court affirmed a contempt judgment, is even more misplaced. In *Hammarley*, the newsperson argued that the shield law immunity was absolute and that an in camera hearing should ***814** not have been allowed. The Court of Appeal concluded to the contrary. (*Id.*, at pp. 402-403.)The decision in no way supports the view that an in camera hearing is required in every case. [FN31]

> FN30 Aside from the lack of a need to protect secrets, there is no practical difference in terms of inconvenience to the newsperson. Whether he testifies in open court or in camera, the same amount of his time ordinarily will be required.

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FN31 In the other decisions on which the reporters rely, the information also appears to have been confidential. The precise nature of the information is not explained in each of those decisions, but the courts emphasized the need to protect confidential information, and there were no allegations that the information was not confidential. (*United States v. Cuthbertson* (3d Cir. 1981) 651 F.2d 189, 195-196; *United States v. Burke, supra,* 700 F.2d 70, 76-77; *United States* v. *Hubbard, supra,* 493 F.Supp. 202, 205; *Green Bay Newspaper v. Circuit Court* (1983) 113 Wis.2d 411 [335 N.W.2d 367].)

When a criminal defendant, however, seeks confidential or sensitive information, the practical need for an in camera hearing is obvious. The shield law would be illusory if a reporter had to publicly disclose confidential or sensitive information in order for a court to determine whether it should remain confidential or sensitive. We emphasize, however, that a trial court need not waste its valuable resources for an in camera hearing based on a specious claim of confidentiality or sensitivity. [FN32] The court has discretion in the first instance to determine whether a newsperson's claim of confidentiality or sensitivity is colorable. If the court determines the claim is colorable, it must then receive the newsperson's testimony in camera.

FN32 For example, a newsperson cannot create confidentiality or sensitivity where there is none. Assume that a reporter covering a hockey game witnesses, together with everyone else present, a brawl on the ice that results in criminal charges against a player. If the shield law applied in such circumstance, a trial court would not be required to proceed in camera based on the reporter's assertion that he viewed the game or the fight in confidence.

B. *Application of the proper test to this case*

(22) Under the proper balancing test set forth above, Delaney was clearly entitled to the reporters' testimony as to whether he consented to the police search of his jacket.

Threshold showing - Even under the test advocated by the reporters (heart of the case), Delaney would be entitled to their testimony. The municipal court explained to the reporters' counsel the lack of probable cause for the search: "If there were probable cause for the search, I guarantee you the prosecutor would not be introducing the matter of [Delaney's] consent." The court explained that if there was no consent the search was therefore illegal, and the charge against Delaney would have to be dismissed. Conversely, if he consented to the search, it was legal, the brass knuckles would be admitted into evidence, and Delaney would have little chance of an acquittal. As the court put it, the case "will rise or fall on the admission or not of those metal knuckles." We agree. It is an understatement to say, in the words of the test we adopt, that there is a reasonable ***815** possibility the reporters' testimony will assist Delaney in his defense. There is a substantial certainty that the reporters' testimony will materially affect the outcome of the criminal proceeding. Delaney has met and surpassed the required threshold showing.

Balancing factors - The balance weighs overwhelmingly in favor of requiring the reporters to testify. A brief review of the factors to be balanced makes this clear.

(1) Whether the unpublished information is confidential or senstitive - As we have already noted, the reporters do not claim their percipient observations of Delaney's search and arrest in a public place were made in confidence or were sensitive.

(2) The interests sought to be protected by the shield law - There is not even a suggestion in this case that the reporters' testimony would impinge on their future news-gathering ability or other interest, if any, sought to be protected by the shield law. Both parties who were observed by the reporters (Delaney and the police) are seeking their testimony. Thus, it cannot be said the parties or anyone else would be reluctant to provide these reporters with future information based on a belief that the reporters had breached a confidence or divulged sensitive information.

(3) The importance of the information to the criminal defendant - As explained above, the reporters' testimony will likely be determinative of the outcome of this case.

(4) Whether there is an alternative source for the unpublished information - We have explained that a

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criminal defendant need not always show the lack of an alternative source for a newsperson's unpublished information. We need not consider whether such a showing was required in this case because the municipal court implicitly assumed that it was required, and Delaney made a satisfactory showing. At the hearing on the motion to suppress, the reporters' counsel suggested that Delaney be required to take the stand and testify as to whether he had consented to the search. The court promptly advised counsel as to a defendant's constitutional right not to do so. [FN33]Counsel also urged as alternative sources Delaney's companion, who was present at the time of the search, and four other officers who might have been within hearing distance of the search. The court correctly explained that neither the companion nor the other officers would be *disinterested* witnesses. The *only* two persons fitting that description are the two *816 reporters. Thus, contrary to their assertion, their testimony would not be merely cumulative to that of the other potential witnesses. We concur in the municipal court's determination that there was no meaningful alternative source for the reporters' testimony.

FN33 The reporters' appellate counsel also incorrectly suggest in their brief to this court that Delaney should be required to testify.

In short, the court struck the correct balance. Delaney's personal liberty is at stake. The reporters are not being asked to breach a confidence or to disclose sensitive information that would in any way even remotely restrict their news-gathering ability. All that is being required of them is to accept the civic responsibility imposed on all persons who witness alleged criminal conduct.

C. *Standard of appellate review*

(23) Finally, the reporters contend almost in passing that we are not bound by the municipal court's decision, which they characterize as being comprised of legal conclusions rather than factual findings. The reporters attack the decision on two grounds. First, they contend it is not supported by substantial evidence. We disagree. We have reviewed the record and, as set forth above, we find the municipal court's decision to be amply supported.

Second, the reporters contend we are required to exercise our independent judgment as to the correctness of the municipal court's order of contempt because important constitutional interests are at stake. Apparently, the reporters would have us hold that independent appellate judgment is mandated in all cases under the shield law. Article I, section 2(b) makes no provision for such a standard of review. Nor do the reporters cite authority from any jurisdiction requiring such review under a shield law. We need not and do not decide the issue, however, because, as noted above, we have reviewed the record, and we independently conclude without difficulty that it fully supports the municipal court's thoughtful decision. [FN34]*817

FN34 This case is somewhat unusual in that both Delaney and the prosecutor are seeking the reporters' testimony. (This fact further supports the municipal court's decision that the testimony is pivotal.) Although the reporters concede that a criminal defendant has a constitutional right to a fair trial, they contend, without citing any authority, that the prosecution does not have a similar right to obtain information subject to the shield law. Of course, the prosecutor vigorously disagrees. There is authority which *suggests* that a state may have a right sufficient to overcome a claim of immunity under the shield law. (*Mitchell, supra,* 37 Cal.3d 268, 278; *Branzburg, supra,* 408 U.S. 665, 700 [33 L.Ed.2d 626, 650-651]; *United States v. Nixon, supra,* 418 U.S. 683, 709 [41 L.Ed.2d 1039, 1064-1065].) In light of our determination, however, that Delaney is entitled to the reporters' testimony, the question as to the state's right to the same evidence is rendered moot. We therefore need not, and do not, decide whether the prosecution in a criminal proceeding can have a constitutional interest sufficient to require the disclosure of information otherwise protected by the shield law.

Disposition

The judgment of the Court of Appeal is affirmed. The Court of Appeal is directed to issue a peremptory writ of mandate compelling respondent Los Angeles Superior Court: (1) to vacate its orders entered December 16, 1987, in case numbers HC 206320 and HC

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206321, entitled In re Roxana Kopetman and In re Roberto Santiago Bertero, respectively, which orders granted their petitions for writs of habeas corpus; and (2) to simultaneously make new and different orders denying the petitions for writs of habeas corpus.

Lucas, C. J. (as to part III), Panelli, J., Kennard, J., and Kremer (Daniel J.), J., [FN*] concurred.

> FN* Presiding Justice, Court of Appeal, Fourth Appellate District, Division One, assigned by the Chairperson of the Judicial Council.

MOSK, J.,
Concurring.

While I concur that Sean Patrick Delaney is entitled to the reporters' testimony concerning their eyewitness observations of the police search of his jacket, I do not agree with the balancing test proposed by the majority. Since federal constitutional rights are supreme, and since the reporter's constitutional immunity is absolute on its face in protecting *all* unpublished information obtained during the course of news gathering, it is not for us to balance competing state and federal interests. Rather, our sole task is to determine how far the state constitutional immunity can be extended before it trespasses on the Fifth and Sixth Amendment rights of criminal defendants. If invocation of the constitutional immunity deprives the defendant of information necessary to exercise those rights, then he is entitled to that information in spite of the reporter's constitutional immunity. If the information is not necessary to exercise those rights, he is not so entitled.

Instead, the majority propose a complicated four-factor test to be used by courts in weighing the relative merits of reporters' and defendants' claims. Two of the factors - (a) and (b) - consider the importance of the information from the reporter's viewpoint. Factor (c) would consider the information's importance to the defendant. The fourth factor allows the trial court to consider the ease of obtaining the information from alternative sources. No single factor is to be determinative.

This balancing test harbors a basic conceptual flaw. [FN1] If our role is to determine whether the defendant can obtain a fair trial when confronted *818 with the reporter's claim of immunity, then the significance of the information from the reporter's viewpoint is irrelevant. All that matters is the importance of the information from the *defendant's* viewpoint. Instead of delineating the boundary of the defendant's rights and permitting the reporter's immunity to apply to all information outside that boundary, as the federal and state Constitutions dictate, the majority substitute their concept of the optimal balancing of reporters' and defendants' interests. Thus, the majority favor confidential and "sensitive" information over nonconfidential, nonsensitive information, despite their earlier recognition that article I, section 2(b) makes no such distinctions.

> FN1 Part of the problem with a balancing test may stem from the fact that a similar balancing approach is used in the First Amendment qualified-privilege cases, the progeny of *Branzburg v. Hayes* (1972) 408 U.S. 665 [33 L.Ed.2d 626, 92 S.Ct. 2646]. In those cases, courts, following Justice Powell's concurrence in *Branzburg*, have inquired into the impact a disclosure of information will have on the reporter's newsgathering ability. Courts had to determine at the threshold whether revelation of the information would burden reporters sufficiently to raise a First Amendment claim. (See, e.g., *U.S. v. LaRouche Campaign* (1st Cir. 1988) 841 F.2d 1176.)
>
> In this case, the claim is not based on the First Amendment but on a specific state constitutional provision (Cal. Const., art. I, § 2, subd. (b) (hereafter article I, section 2(b)) that covers all unpublished information gathered by journalists in the course of their duties. Inquiry into the importance of the information to the reporter and the burden it would impose on him or her is not needed to determine whether the information falls within the scope of article I, section 2(b). Nor, indeed, does that provision permit such an inquiry.

For the reasons elaborated below, I would require that a defendant make two threshold showings, both of which relate to the defendant's demonstration of need for the information. First, as the majority hold, the defendant must show a reasonable possibility

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exists that the information will assist the truth-seeking process. Second, he must show that alternative sources of substantially similar information are unavailable. Once the defendant carries his burden of making these two showings, he will be entitled to the information. Because I conclude that information obtained by a reporter as a percipient witness of a transitory event is by its very nature unavailable from alternative sources, I concur in the majority's judgment that the defendant in this case is entitled to the reporters' testimony.

I. The Scope of Fifth and Sixth Amendment Rights and the Alternative-source Rule

The rights of confrontation and compulsory process under the Sixth Amendment, and the more general right to a fair trial under the Fifth Amendment, are not absolute. Rather, they are exercised in a framework of state law privileges, immunities, and rules of evidence that sometime block access to information needed by the defendant. (See *Chambers* v. *Mississippi* (1973) 410 U.S. 284, 302-303 [35 L.Ed.2d 297, 309, 93 S.Ct. 1038] [a holding that strikes down an unreasonable hearsay rule on due process grounds does not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own *819 criminal trial rules and procedures"]; *Washington v. Texas* (1967) 388 U.S. 14, 23, fn. 21 [18 L.Ed.2d 1019, 1025, 87 S.Ct. 1920] [a ruling that strikes down on compulsory process grounds a state law prohibiting coconspirators from testifying on each other's behalf does not invalidate traditional testimonial privileges].) While consistency has not been a hallmark in this area, courts have been extremely reluctant to make incursions into state law testimonial privileges - e.g., the attorney/client, priest/penitent, or marital communications privileges - on Sixth Amendment grounds. (See Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges* (1978) 30 Stan.L.Rev. 935 (hereafter *Defendant v. Witness*).)

Recognizing the peaceful coexistence between the Sixth Amendment and traditional testimonial privileges, courts have tended to employ a functional, pragmatic approach in reconciling fair trial rights with the less traditional state law privileges, such as the reporter's privilege. FN2 Such a functional approach was typified by the New Jersey Supreme Court in *State v. Boiardo* (1980) 82 N.J. 446 [414 A.2d 14]. As the court reasoned, the Sixth Amendment rights of confrontation and compulsory process are necessary to ensure that our adversary system results in "'full disclosure of all the facts and a fair trial, within the framework of the rules of evidence."' (414 A.2d at p. 19, quoting *United States v. Nixon* (1974) 418 U.S. 683, 709 [41 L.Ed.2d 1039, 1064, 94 S.Ct. 3090].) When full disclosure can be accomplished without interfering with the reporter's privilege, the defendant will be able to receive as fair a trial as the state can ensure, without having to resort to a breach of the reporter's privilege. As Chief Justice Wilentz wrote: "[I]f substantially similar material can be obtained from other sources, both the confidentiality needed by the press and the interests of the defendants are protected." (414 A.2d at p. 21.)

FN2 The majority's holding in this opinion, of course, does not apply to the traditional testimonial privileges. It may be that those privileges should be accorded more protection than the reporter's immunity, because they are consistent with a fair trial as that concept was understood in 1791, when the Fifth and Sixth Amendments were adopted. It may also be that violation of certain privileges implicate federal constitutional rights of their own, such as the right to counsel or the right to free exercise of religion. A more comprehensive treatment of the conflict between testimonial privileges and fair trial rights awaits further development when these matters are properly before us.

Unlike the majority's approach, the court in *Boiardo* did not attempt to balance the respective importance of the information for the reporter and the defendant. Rather, the New Jersey Supreme Court sought to determine, at the threshold, whether defendant would be deprived of a fair trial if information necessary to his defense was withheld. In that case the defendant sought a copy of a letter that a reporter possessed and the defendant believed would assist him in impeaching a key prosecution witness. The *820 court concluded that the defendant had not carried his burden of showing that the information was unavailable from an alternative source, and therefore upheld the reporter's privilege.

The requirement of a threshold showing that no alternative source of information is available (hereinafter called the alternative-source rule) can, therefore, reconcile reporter's immunity and defendant's rights so as to give effect to both. Unlike the majority's multi-factored approach, the alternative-source rule remains focused on the single decisive question: does the defendant need the information to obtain a fair trial? The alternative-source rule also incorporates a functional approach to the defendant's fair trial rights, based on the recognition that these rights exist within a framework of state law privileges and immunities. What one commentator stated of the communications privilege applies at least equally to the reporter's immunity: "A communications privilege would be of little value if a [criminal] defendant could override it whenever its invocation concealed evidence of *some* probative value. Courts must respect the legislative judgment that in some situations the social policy underlying a privilege should require that litigants be denied access to otherwise admissible evidence. The legislative establishment of a privilege should make the privilege-holder a *disfavored source of information.*" (*Defendant v. Witness, supra*,30 Stan.L.Rev. at p. 966, italics added.)

It is no surprise that a number of courts, state and federal, have employed an alternative source rule at the threshold when weighing criminal defendants' rights against reporters' statutory or qualified First Amendment privileges. (See *United States v. Burke* (2d Cir. 1983) 700 F.2d 70, 77, fn. 8; *United States v. Cuthbertson* (3d Cir. 1981) 651 F.2d 189, 195-196; *United States v. Hubbard* (D.D.C. 1979) 493 F.Supp. 202, 205;*State* v. *Rinaldo* (1984) 102 Wn.2d 749 [689 P.2d 392, 395-396]; *State v. St. Peter* (1974) 132 Vt. 266 [315 A.2d 254, 256];*Brown* v. *Commonwealth* (1974) 214 Va. 755 [204 S.E.2d 429, 431],cert. den. 419 U.S. 966 [42 L.Ed.2d 182, 95 S.Ct. 229]; *Matter of Farber* (1978) 78 N.J. 259 [394 A.2d 330, 338, 99 A.L.R.3d 1] [interpreting earlier, less comprehensive shield law]; *State v. Boiardo, supra*, 414 A.2d 14, 21 [interpreting recent, more comprehensive shield law]; *Hallissy v. Superior Court* (1988) 200 Cal.App.3d 1038, 1046 [248 Cal.Rptr. 635]; *Hammarley* v. *Superior Court* (1979) 89 Cal.App.3d 388, 399 [153 Cal.Rptr. 608].)

II. *Policy Considerations: Ensuring Press Autonomy*

The enforcement of an alternative-source rule is desirable for policy as well as doctrinal reasons. A comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of ***821** safeguarding "[t]he autonomy of the press." (*O'Neill v. Oakgrove Constr.* (1988) 71 N.Y.2d 521, 526 [528 N.Y.S.2d 1, 3 [523 N.E.2d 277, 279] [construing a similar state constitutional provision].) As the New York Court of Appeals recognized, press autonomy "would be jeopardized if resort to its resource materials by litigants seeking to utilize the news gathering efforts of journalists for their private purposes were routinely permitted [citations] .... The practical burden on time and resources as well as the consequent diversion of journalistic effort and disruption of news gathering activity, would be particularly inimical to the vigor of a free press." (528 N.Y.S.2d at p. 3.)

The threat to press autonomy is particularly clear in light of the press's unique role in society. As the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. (See *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 572-573 [65 L.Ed.2d 973, 986-987, 100 S.Ct. 2814]; *Houchins v. KQED, Inc.* (1978) 438 U.S. 1, 17-18 [57 L.Ed.2d 553, 566-567, 98 S.Ct. 2588] (Stewart, J., conc.).) Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information. Carte blanche access to the journalist's files would give litigants a free ride on news organizations' information-gathering efforts.

To require a threshold showing of no alternative source would discourage this misuse of the press. Our constitutional system does not ensure the exercise of a criminal defendant's rights in the least costly manner. The alternative-source rule would compel litigants to expend a reasonable amount of effort to obtain the information from nonpress sources. Only when a defendant is unable to obtain the information through these means, or when the cost of obtaining the information is prohibitive, would he be able to pierce the shield of journalistic immunity. Such a rule would maximally preserve press autonomy, as the reporter's constitutional immunity is designed to do, while still recognizing that press autonomy must ultimately give way to the criminal defendant's fair trial rights.

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III. *Alternative-source Rule and the Percipient Witness*

I concur, nonetheless, in the court's judgment because I find that the alternative-source rule is inapplicable when the information sought is the reporter's own observations as a percipient witness of a transitory event. The alternative-source rule arose in cases, such as those cited *ante*, in which the information in question had been gathered from documents, interviews, public meetings, and the like. In such cases the content of the information existed in some objective and stable form, capable of independent verification - the documents could be independently inspected, the interviewees *822 could be contacted, etc. What the defendants in those cases were primarily interested in was not the reporters' perceptions but the content of these independent information sources.

In the case of eyewitnessed transitory events, however, no such independent, stable information source exists. Equally significant is the well-established fact that there are often major discrepancies between different eyewitness accounts of the same event, owing to distortions and biases in both perception and memory. (See People v. McDonald (1984) 37 Cal.3d 351, 363-365 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011], and authorities cited; Note, *Did Your Eyes Deceive You: Expert Psychological Testimony on the Unreliability of Eyewitness Identification* (1977) 29 Stan.L.Rev. 969, 971-989.)Thus, two percipient witnesses of the same event are not in any sense fungible. And unlike the document or the interview, the transitory unrecorded event is not subject to subsequent independent verification.

Accordingly, the reporter as a percipient witness is not an "exception" to the alternative-source rule. Rather, in such situations the rule simply does not apply: in a real sense, two eyewitnesses to the same event are not alternative sources of the same information, but sources of *different* information.

In the present case, defendant was able to show a reasonable possibility that the information would assist in ascertaining the truth. Because the information he seeks from the reporters is their contemporaneous observations of a transitory event, he has met the second threshold by showing that no real alternative source of the information exists. He is therefore entitled to the reporters' testimony.

BROUSSARD, J.,
Concurring.

I.

I agree with the majority opinion's conclusion that the information that defendant sought to elicit from the reporters in this case was "unpublished information" within the meaning of the California reporter's shield provision. (Cal. Const., art. I, § 2, subd. (b).) I cannot join, however, in the opinion's suggestion that it is either necessary or appropriate for the court, in reaching this conclusion, to rely solely on the "plain language" of the constitutional provision, without reference to the background or history of the constitutional provision or to the legislative history of the preceding statutory shield provision on which the constitutional provision was deliberately modeled. *823

In *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841 [59 Cal.Rptr. 609, 428 P.2d 593], the defendant relied on an argument virtually identical to that embraced by the majority opinion, asserting that because the constitutional provision at issue in that case was "clear and unambiguous," the court was required to confine itself to the "plain language" of the provision and could not consider the legislative history or judicial interpretation of a related statutory provision. (*Id.* at pp. 846-847.)In *Hickman*, this court - in a unanimous opinion - explicitly rejected the argument (*id.* at pp. 847-851), explaining that "'[i]n the absence of contrary indication in a constitutional amendment, terms used therein must be construed in light of their statutory meaning or interpretation in effect at the time of its adoption.'" (*Id.* at p. 850 [quoting *Michels v. Watson* (1964) 229 Cal.App.2d 404 (40 Cal.Rptr. 464)].) Thus, contrary to the suggestion of the majority opinion, *Hickman* as well as many other, more recent, cases (see, e.g., *City of Sacramento* v. *State of California, ante*, 51, 67, fn. 11 [266 Cal.Rptr. 139, 785 P.2d 522]) make it clear that a court, in interpreting an initiative measure, may properly consider the statutory antecedents of the measure for any guidance those statutes may shed on the proper interpretation of the initiative provision.

In light of these authorities, I believe that it is clearly appropriate, in interpreting the constitutional re-

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porter's shield provision, to consider the entire background of the provision, including the legislative history and judicial interpretation of Evidence Code section 1070, the statutory provision on which the constitutional shield provision was based. In my view, both the language and history of the shield provision fully support the conclusion that the provision is not limited to an undefined category of "confidential" information, but rather applies to all "unpublished information."

II.

Although the state constitutional shield provision extends to the information elicited from the reporters in this case, I agree with all of my colleagues that, under the facts of this case, application of the shield provision to afford the reporters a state-granted immunity from contempt would improperly infringe on the defendant's federal constitutional rights. In light of the different approaches to the federal constitutional issue reflected in the majority opinion and Justice Mosk's concurring opinion, however, I thought it appropriate briefly to explain my own views on this point.

The majority opinion and Justice Mosk's concurring opinion are on common ground in concluding that, in a criminal case, a defendant's federal constitutional right to a fair trial is implicated whenever a defendant demonstrates ***824** that there is a reasonable possibility that information that would assist his defense is being withheld by a reporter under the aegis of the shield provision. I, too, agree with that proposition.

The majority opinion and Justice Mosk's concurring opinion diverge, however, with respect to the proper constitutional analysis that follows such a showing by the defendant. Justice Mosk's concurring opinion concludes that once a defendant makes such a showing and demonstrates that no alternative sources for the information are available, the federal Constitution always requires the state shield provision to give way. The majority opinion, by contrast, concludes that when a defendant makes the threshold showing, the federal Constitution calls for a case-by-case weighing of the defendant's relative need for disclosure of the information, on the one hand, against the relative strength of the state's interest in permitting the reporter to withhold the information, on the other.

In general, I agree with the majority's conclusion that, in determining whether the California shield provision may be constitutionally applied in a given case, it is appropriate to weigh a defendant's relative need for the information in the particular case against the relative strength of the state's interest in affording immunity under the circumstances of that case. [FN1] In determining the proper scope of federal constitutional rights in other contexts, numerous cases establish that federal constitutional guaranties are generally not absolute, and may, in appropriate circumstances, accommodate state laws which further a sufficiently compelling or important state interest. (See, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [35 L.Ed.2d 297, 309, 93 S.Ct. 1038] ["Of course, the right to confront ... is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."]; *Konigsberg v. State Bar* (1961) 366 U.S. 36, 49-51 [6 L.Ed.2d 105, 116-117, 81 S.Ct. 997] ["[W]e reject the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are 'absolutes' .... [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. ..."].) Particularly in view of a state's traditional authority to establish evidentiary privileges ***825** to serve interests external to the adjudicatory process, it is difficult for me to see why the general principle permitting consideration of compelling state interests in the application of federal constitutional safeguards should not apply in this context as well. (Cf., e.g., *United States v. Nixon* (1974) 418 U.S. 683, 711-712 [41 L.Ed.2d 1039, 1066, 94 S.Ct. 3090] ["In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."].)

FN1 Although in my view it would be wiser at this point to refrain from attempting to set forth an exhaustive list of specific "factors" that must be considered by a court in every case (see maj. opn., *ante*, at p. 813), the "factors" discussed in the majority opinion

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> appear broad enough to permit a court to take into account all relevant considerations in "balancing ... the defendant's and newsperson's respective ... interests." (See maj. opn., *ante*, at p. 809.)

Accordingly, in light of the important role a reporter shield provision may play in furthering a state's compelling interest in fostering and preserving a free and vigilant press, I believe that even if a reporter's "unpublished information" in a particular case may be of some assistance to the defense and there are no available alternative sources of the information, if a court finds that the defendant's need for the information is not particularly great while the state's interest in affording a reporter immunity under the circumstances is compelling, the court could properly conclude that the defendant's federal constitutional right to a fair trial would not require the state shield provision to give way.

As the majority opinion demonstrates, however, on the facts of the present case it is clear that no such overriding, compelling state interest is present. Consequently, I concur fully in the majority opinion's affirmance of the Court of Appeal judgment.

Lucas, J., concurred as to part I only.
The petition of real parties in interest for a rehearing was denied July 11, 1990. *826

Cal.
Delaney v. Superior Court
50 Cal.3d 785, 789 P.2d 934, 268 Cal.Rptr. 753, 58 USLW 2670, 17 Media L. Rep. 1817

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FREEDOM NEWSPAPERS, INC., Plaintiff and Appellant,
v.
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM BOARD OF DIRECTORS, Defendant and Respondent.
No. S029178.

Supreme Court of California
Dec 23, 1993.

SUMMARY

A newspaper publisher sought a writ of mandate to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory in nature and was composed of four members of the nine-member board. The trial court denied the petition and entered judgment in favor of the board. (Superior Court of Orange County, No. 660703, Greer Stroud, Referee.) The Court of Appeal, Fourth Dist., Div. Three, No. G011490, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that, since the operations committee was an advisory committee composed solely of board members numbering less than a quorum of the board, the committee was not a "legislative body" pursuant to the provisions of Gov. Code, § 54952.3, and was therefore excluded from the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.). (Opinion by Panelli, J., with Lucas, C. J., Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Counties § 1--Open Meeting Requirements--Advisory Committee of County Employees Retirement System Board--Committee Composed of Less Than Quorum of Board:Pensions and Retirement Systems § 3--Administration.
The trial court did not err in denying a petition for a writ of mandate brought by a newspaper publisher that was seeking to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory and was composed of four members of the nine-member board. Gov. Code, § 54952.3, exempts from the definition of "legislative bodies" that are subject to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) advisory committees composed of less than a quorum of the governing body. Although Gov. Code, § 54952.3, could be read to mean that less-than-quorum committees are merely exempt from the formal requirements of that specific statute, the legislative history of the act, including the Legislature's response to court decisions, demonstrates an intent to exempt less-than-quorum advisory committees from all open meeting requirements. Since the committee was an advisory committee composed solely of board members numbering less than a quorum of the board, the committee was not a "legislative body" and was therefore excluded from the open meeting requirements of the act.
[Validity, construction, and application of statutes making public proceedings open to the public, note, 38 A.L.R.3d 1070. See also 7 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 579.]
(2) State of California § 10--Attorney General--Opinions.
While the opinions of the Attorney General are not binding on the courts, they are entitled to great weight.

COUNSEL

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PANELLI, J.

The Ralph M. Brown Act (Stats. 1953, ch. 1588, § 1, p. 3269, codified as Gov. Code, § 54950 et seq. [hereafter the Brown Act or the Act]) [FN1] provides that all meetings of "the legislative body of a local agency shall be open and public," except as otherwise provided in the Act. (§ 54953.) At all times relevant to this case the Act contained four separate definitions of "legislative body." [FN2] We granted review to determine whether the Operations Committee of the Retirement Board of Orange County Employees Retirement System (hereafter Board) is a "legislative body" within the meaning of the Brown Act and, therefore, subject to the Act's *824 open meeting requirements. Because the Operations Committee is an advisory committee composed solely of Board members numbering less than a quorum of the Board, we hold that the committee is not a "legislative body" pursuant to the provisions of section 54952.3 and is thereby excluded from the open meeting requirements of the Act.

FN1 All statutory references are to the Government Code unless otherwise noted.

A new law changing the relevant provisions of the Government Code was enacted while this case was pending. (Sen. Bill No. 1140 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1138, eff. Apr. 1, 1994.) The impact of the new law is addressed in footnote 11, *post*. Except in that footnote, all references to the Government Code in this opinion are to the current version, i.e., the law as it will be until Senate Bill No. 1140 takes effect on April 1, 1994.

FN2 Section 54952: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation."

Section 54952.2: "As used in this chapter, 'legislative body' also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Section 54952.3: "As used in this chapter[,] 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. [¶] Meetings of such advisory commissions, committees or bodies concerning subjects which do not require an examination of facts and data outside the territory of the local agency shall be held within the territory of the local agency and shall be open and public, and notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting. [¶] If the advisory commission, committee or body elects to provide for the holding of regular meetings, it shall provide by bylaws, or by whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. No other notice of regular meetings is required. [¶] 'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body. [¶] The provisions of Sections 54954, 54955, 54955.1, and 54956 shall not apply to meetings under this section."

Section 54952.5: "As used in this chapter[,] 'legislative body' also includes, but is not limited to, planning commissions, library

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boards, recreation commissions, and other permanent boards or commissions of a local agency."

I. Facts

The Orange County Employees Retirement System is governed by a nine-member Board. Five members of the Board constitute a quorum. The Board is a "local agency" and a "legislative body" under sections 54951 and 54952 respectively. The Board is therefore subject to the open meeting requirements of the Brown Act. The chairman of the Board has created five advisory [FN3] committees-operations, benefit, investment, real estate, and liaison-each composed of four members of the Board. Some members serve on more than one committee. The committees' function is to review various matters related to the business of the Board and to make recommendations to the full Board for action. The Board considers the committees' recommendations in public meetings, at which time there is an opportunity for full public discussion and debate. The committees do not have any decisionmaking authority and act only in an "advisory" capacity. [FN4]

FN3 The parties do not dispute that these committees are properly described as "advisory."

FN4 The only evidence concerning the composition and function of the committees is a declaration by the administrator of the retirement system. The declaration states:

"[¶] 4.... All of the committees of the Board of Retirement, including the Operations Committee, are comprised solely of members of the Board of Retirement. The Board of Retirement has nine members, and a quorum is five. However, none of the committees of the Board of Retirement are comprised of more than four members, and all committee members are also members of the Board of Retirement.... [¶] 5. The function of such committees is to review various matters related to the business of the Board of Retirement, and make recommendations to the full Board for action. The committees have not been delegated any decision-making authority. The committees act in an advisory capacity, and make recommendations to the full Board of Retirement. The full Board considers those recommendations in public meetings, at which time there is an opportunity for full public discussion and debate on those recommendations. [¶] 6. The committees are formed by the Chairman of the Board of Retirement. The Chairman determines what committees shall operate, and which members of the Board of Retirement shall serve on such committees. The Chairman has the authority to form new committees, abolish existing committees, or combine existing committees. There is no Board rule or regulation which prescribes the number of Board committees, or the duties of any such committee; it is up to the Chairman of the Board of Retirement to decide what committees shall be formed, and who will serve on them."

On June 18, 1991, the Operations Committee met to formulate a list of recommended changes to the Board's travel policy. Freedom Newspapers sought to attend the meeting but the committee denied permission on the ground that it was not subject to the open meeting requirements of the ***825** Brown Act. The next day, June 19, the full Board met in a public session at which the chairman of the Operations Committee read and explained the committee's recommendations. The press was in attendance, and there was public discussion among the Board's members about the recommendations. The Board ultimately voted eight to one in public session to accept the recommendations.

On the same day, Freedom Newspapers petitioned the trial court for a writ of mandate alleging that the Operations Committee is subject to the open meeting requirements of the Brown Act. The trial court denied the petition and entered judgment in favor of the Board. Freedom Newspapers appealed from that judgment, and the Court of Appeal reversed. We granted the Board's petition for review.

II. Discussion

The Brown Act was adopted to ensure the public's right to attend the meetings of public agencies. (§ 54950.) [FN5] The Act provides that "[a]ll meetings of the legislative body of a local agency shall be open

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and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953.) As already noted, "legislative body" is defined in four sections of the Act, two of which pertain to the case before us. (§§ 54952, 54952.3.)Section 54952 provides that any committee or body on which officers of a local agency serve in their official capacity and which is supported by its appointing local agency is a "legislative body." (§ 54952.) FN6 6Section 54952.3 more specifically addresses "advisory" bodies: "As used in this chapter[,] 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. [¶] ... [¶] *'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of *826 a local agency which are less than aquorum of such governing body.*" (§ 54952.3, FN7 7 italics added.)

FN5 Section 54950 provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

FN6 For the full text of section 54952, see *ante*, footnote 2.

FN7 For the full text of section 54952.3, see *ante*, footnote 2.

(1a) The parties in this case disagree over the meaning of the explicit less-than-a-quorum exception contained in section 54952.3. The Board and its amici curiae, including the Attorney General, argue that an advisory committee that is excluded from the definition of "legislative body" under the exception is completely exempt from the open meeting requirements of the Act. FN8

FN8 Like the Brown Act, the 1972 Federal Advisory Committee Act generally subjects advisory committees to open meeting requirements. (86 Stat. 770, as amended, 5 U.S.C.S. Appen. §§ 1-15.) However, the same act, as amended, also specifically exempts "any [advisory] committee which is composed wholly of full-time officers or employees of the Federal Government" from the open meeting requirements. (5 U.S.C.S. Appen. § 3(2)(C)(iii).)

In opposition, Freedom Newspapers and its amici curiae contend that the less-than-a-quorum exception in section 54952.3 merely exempts less-than-a-quorum committees from the special, relaxed procedural requirements of section 54952.3. According to Freedom, such committees remain subject to the stricter open meeting requirements that are generally applicable to "legislative bodies" under section 54952.

When interpreting a statute our primary task is to determine the Legislature's intent. (*Brown v. KellyBroadcasting Co.* (1989) 48 Cal.3d 711, 724 [257 Cal.Rptr. 708, 771 P.2d 406].) In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

Each party asserts that the language of section 54952.3 supports its view. Freedom reasons that, had the Legislature intended to exempt less-than-a-quorum advisory committees from the Act's open meeting requirements, it would have used language such as this: " 'legislative bodies' as defined in *this chapter* shall not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." Because the Legislature used the words "in this section," instead of "in this chapter," the effect of the less-than-a-quorum exception, according to Freedom, is simply to exclude less-than-a-quorum committees from the terms of section 54952.3 rather than from other definitions of "legislative body"

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within the Act.

In contrast, the Board argues that, because section 54952.3 specifically refers to "any ... advisory committee," that section alone governs advisory *827 committees for the purposes of the Act. To support its interpretation the Board relies, in part, on the traditional rules of statutory construction that specific statutes govern general statutes (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577 [7 Cal.Rptr.2d 245, 828 P.2d 147]; see also *Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 750-753 [238 Cal.Rptr. 502]; *Kennedy v. City of Ukiah* (1977) 69 Cal.App.3d 545, 552 [138 Cal.Rptr. 207]) and that, to the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 [261 Cal.Rptr. 574, 777 P.2d 610]; *Yoffie v. Marin Hospital Dist., supra,* 193 Cal.App.3d at p. 751). According to the Board, an advisory committee that is excluded from the definition of "legislative body" contained in section 54952.3 is not subject to the Act's open meeting requirements, even if it might otherwise satisfy the more general definition of "legislative body" contained in section 54952.

The Board also argues that Freedom's interpretation of section 54952 would deprive sections 54952.2 and 54952.5, as well as the less-than-a-quorum exception in 54952.3, of meaning. To explain, sections 54952.2 and 54952.5 purport to include only certain bodies within the definition of "legislative body." For the Legislature to have enacted those statutes would have made no sense if the governmental bodies described therein had already been included in the more general definition of "legislative body" contained in section 54952.

To be sure, one could argue that section 54952.3 might still have some meaning under Freedom's interpretation. Because section 54952.3 gives certain advisory bodies the benefit of procedural requirements that are less stringent than the requirements applicable to "legislative bodies" under section 54952, under Freedom's interpretation the exception contained in section 54952.3 for less-than-a-quorum advisory committees would have the effect of subjecting such committees to the stricter, generally applicable procedural requirements.

But Freedom's interpretation of section 54952.3 would also result in absurdity. If we construed section 54952.3 merely as exempting less-than-a-quorum advisory committees from the less rigid procedural requirements in that section, even a temporary, ad hoc advisory committee composed solely of less than a quorum of the governing body would be subject to all of the Brown Act's generally applicable procedural requirements, including the requirement that committees hold "regular" meetings. (§ 54954.) Yet a *828 temporary, ad hoc committee, by definition, does not hold "regular" meetings. We will not give a statute an absurd interpretation. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Gage v. Jordan* (1944) 23 Cal.2d 794, 800 [147 P.2d 387]; *Lynch v. State Bd. of Equalization* (1985) 164 Cal.App.3d 94, 114 [210 Cal.Rptr. 335].)

Freedom attempts to avoid the absurdity by characterizing the Operations Committee as a standing committee. However, neither section 54952 nor section 54952.3 distinguishes between ad hoc advisory committees and standing advisory committees. We will not add to a statute a distinction that has been omitted. (Code Civ. Proc., § 1858; see, e.g., *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998 [275 Cal.Rptr. 201, 800 P.2d 557].)

When a statute is ambiguous, as in this case, we typically consider evidence of the Legislature's intent beyond the words of the statute (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323]) and look both to the legislative history of the statute and to the wider historical circumstances of its enactment (*ibid.*). An examination of the history of the Brown Act, both prior to and after the enactment of section 54952.3, shows that committees comprised of less than a quorum of the legislative body have generally been considered exempt from the Act's open meeting requirements.

In 1958 the Attorney General, interpreting the original version of section 54952, [FN9] concluded that "meetings of committees of local agencies where such committees consist of less than a quorum of the legislative body are not covered by the act." (*Secret Meeting Law*, 32 Ops.Cal.Atty.Gen. 240, 242

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(1958).) The Attorney General reasoned that, "[i]n those cases the findings of such a committee have not been deliberated upon by a quorum of the legislative body and the necessity, as well as the opportunity, for full public deliberation by the legislative body still remains." (*Ibid.*)

FN9 In 1958 section 54952 provided: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof." (Stats. 1953, ch. 1588, § 1, p. 3270.)

Successive Attorneys General have consistently adhered to the view stated in the 1958 opinion. In 1968 the Attorney General wrote that "[w]e have consistently concluded that committees composed of less than a quorum of the legislative body creating them and not established on a permanent basis for a continuing function are not subject to the open meeting requirements of *829 that Act. In view of the lack of any pronouncements on the parts of either the courts or the Legislature which would compel a different conclusion, our opinion remains unchanged." (Cal. Atty. Gen., Indexed Letter No. IL 68-106 (Apr. 29, 1968).)

More specifically, since the enactment of section 54952.3 the Attorney General has continuously recognized that advisory committees falling within the express less-than-a-quorum exception in section 54952.3 are not "legislative bodies" within the meaning of the Brown Act. (See, e.g., Cal. Atty. Gen., Indexed Letter No. IL 69-131 (June 30, 1969); Secret Meetings Laws Applicable to Public Agencies (Cal.Atty.Gen., 1972) pp. 6-8; *Closed Meetings*, 63 Ops.Cal.Atty.Gen. 820, 823 (1980); *Open Meeting Requirements*, 64 Ops.Cal.Atty.Gen. 856, 857 (1981).) The Attorney General's brief in this case supports the long-standing view of his office. (2) While the Attorney General's views do not bind us (*Unger v. Superior Court* (1980) 102 Cal.App.3d 681, 688 [162 Cal.Rptr. 611]), they are entitled to considerable weight (*Meyer v. Board of Trustees* (1961) 195 Cal.App.2d 420, 431 [15 Cal.Rptr. 717]). (1b) This is especially true here since the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements. (See, e.g., Open Meeting Laws (Cal.Atty.Gen., 1989).)

In 1961 the Legislature amended the Brown Act, not in response to the Attorney General's recognition of an implicit less-than-a-quorum exception, but in response to a judicial opinion that essentially eviscerated the Act by restrictively defining the terms "meeting" and "legislative body." The court in *Adler v. City Council* (1960) 184 Cal.App.2d 763 [7 Cal.Rptr. 805] (*Adler*) held that a city's planning commission did not violate the Brown Act when all but one of its members attended a dinner given a few days before the host's application to the commission for an amendment to the zoning law. The court held that "the Brown Act was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies." (*Id.* at p. 770.)Misconstruing the Attorney General's 1958 opinion (*Secret Meeting Law*, *supra*, 32 Ops.Cal.Atty.Gen. 240), which addressed committees composed of less than a quorum of the governing body, the court also held that the Act did not apply to any committee of an advisory nature, whether or not composed of a quorum of the governing body. (*Adler*, *supra*, 184 Cal.App.2d at p. 771.)

In response to the *Adler* decision, the Legislature broadened the scope of the Brown Act the very next year. (Stats. 1961, ch. 1671, § 1, p. 3637, *830 amending §§ 54952 and 54957, and adding §§ 54952.5, 54952.6, and 54960.) Shortly after the 1961 amendments took effect, the Attorney General construed them as disapproving *Adler* on several points. (*Secret Meeting Law*, 42 Ops.Cal.Atty.Gen. 61 (1963).) Specifically, the Attorney General concluded that the 1961 amendments "disapproved *Adler's* restrictive interpretation of the word 'meeting' by recognizing that criminally prohibited legislative action may be taken at gatherings that fall far short of the ' " formal assemblages of the council sitting as a joint deliberative body " ' " and "repudiated that portion of the *Adler* decision which held that the act was not meant to apply to planning commissions or other bodies of an 'advisory' nature." (*Secret Meeting Law*, *supra*, 42 Ops.Cal.Atty.Gen., at pp. 64-65.)

In addition to the history set out above, the history of the Brown Act in the Legislature reflects a recognition of the implicit less-than-a-quorum exception and, after the consistent failure of proposals to abolish it,

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the codification of a limited version of that exception.

A 1963 bill would have abolished the exception by providing that "[a]ll meetings of any committee or subcommittee of a legislative body, *whether or not composedof a quorum of the members of the legislative body*, shall be open and public, and all persons shall be permitted to attend any meeting of such committee or subcommittee, except during consideration of the matters set forth in Section 54957." (Assem. Bill No. 2334 (1963 Reg. Sess.) § 2, italics added.) The bill did not pass.

The legislative history of section 54952.3, the provision at issue in this case, reveals another unsuccessful attempt to abolish the implicit less-than-a-quorum exception. Section 54952.3, enacted in 1968 (Stats. 1968, ch. 1297, § 1, p. 2444), extended the coverage of the Brown Act to certain advisory committees that were not previously covered. However, at the same time the Legislature rejected an alternative bill that would have abolished the implicit less-than-a-quorum exception by making all advisory committees subject to the full procedural requirements applicable to governing bodies. (Sen. Bill No. 717 (1968 Reg. Sess.).) [FN10] The bill that did pass (Assem. Bill No. 202 (1968 Reg. Sess.), codified as § 54952.3) thus appears to be a compromise, incorporating into the open meeting requirements of the Brown *831 Act advisory committees that were not previously included within the Act, but relaxing the procedural requirements applicable to those committees and codifying a limited version of the implicit less-than-a-quorum exception.

FN10 Senate Bill No. 717 would have amended section 54952 by adding the italicized words: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board, commission, *committee, advisory committee, or subcommittee* thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Sen. Bill No. 717 (1968 Reg. Sess.), italics in original.)

To support its view that the committees excluded from the definition of "legislative body" in section 54952.3 were included in another definition of "legislative body," Freedom Newspapers relies on a communication by Assemblyman Hayes to the members of the Assembly discussing his reasons for drafting the less-than-a-quorum exception. Assemblyman Hayes claimed that " '[t]he reason [for enacting the less-than-a-quorum exception in section 54952.3] was that such committees of the governing body of a local agency are covered by another section of the Ralph M. Brown Act, Government Code Sec. 54952.' " (4 Assem. J. (1968 Reg. Sess.) p. 7163.) However, these comments offer little assistance in the interpretation of section 54952.3 because they do not necessarily reflect the views of other members of the assembly who voted for section 54952.3. (Cf. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801, fn. 12 [268 Cal.Rptr. 753, 789 P.2d 934]; see also *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700-701 [170 Cal.Rptr. 817, 621 P.2d 856]; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590 [128 Cal.Rptr. 427, 546 P.2d 1371].)

Indeed, the Legislature's action in two respects since the 1968 enactment of section 54952.3 indicates its continuing understanding that advisory committees comprised solely of less than a quorum of the governing body are exempt from the open meeting requirements of the Act.

First, although legislative acquiescence is a weak indication of legislative intent (*People v. Escobar* (1992) 3 Cal.4th 740, 751 [12 Cal.Rptr.2d 586, 837 P.2d 1100]), we note that the Legislature has allowed the Court of Appeal's opinion in *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875 [144 Cal.Rptr. 568] to govern meetings of less-than-a-quorum advisory committees for the past 14 years.

The *Henderson* court squarely addressed the issue of whether an advisory committee consisting solely of governing board members, constituting less than a quorum of the board, was exempt from the open meeting requirements of the Act. (78 Cal.App.3d at pp. 880-883.) In *Henderson*, ad hoc advisory committees had been created for the purpose of advising the board of education about the qualifications of candidates for appointment to a vacant position. Each

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of the advisory committees was composed solely of members *832 of the governing body of the school district numbering less than a quorum of the governing body. The court considered whether the advisory committees had violated the Brown Act when they evaluated the candidates' qualifications and interviewed candidates in private sessions. (*Id.* at p. 877.)Finding that section 54952.3 provided an express exemption from the open meeting requirements of the Brown Act for advisory committees comprised solely of less than a quorum of the governing body, the *Henderson* court held that the advisory committees in that case were not subject to the Act. (78 Cal.App.3d at pp. 880-881.)

Secondly, and more importantly, the Legislature in 1992 attempted to extend the coverage of the Brown Act by limiting the coverage of the express less-than-a-quorum exception in section 54952.3 to ad hoc advisory committees. This legislation is the strongest indication that the current version of section 54952.3 excludes less-than-a-quorum advisory committees from the Act's open meeting requirements, rather than merely from the less-stringent procedural requirements in section 54952.3. On August 31, 1992, the California Legislature passed and sent to the Governor a bill amending the explicit less-than-a-quorum exception as follows: " 'Legislative body' as defined in this section does not include a *limited duration ad hoc committee* composed solely of members of the governing body of a local agency which are less than a quorum of the governing body *but does include any standing committee* of a governing body irrespective of its composition. For purposes of this section, 'standing committee' means a permanent body created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency and which holds regularly scheduled meetings." (Assem. Bill. No. 3476 (1991-92 Reg. Sess.) § 3, italics added.) The Governor vetoed this bill, reasoning that its economic impact would be too great in view of the state's fiscal outlook. In his veto message the Governor stated: "This bill would make a number of changes in the Ralph M. Brown Act relating to open meetings. It would *expand the number of local agencies subject to the law*, and expand notice, recordation, and recordkeeping requirements.... [¶] I cannot approve mandating expensive new requirements while we are unable to afford the ones on the books today." (Governor's veto message to Assem. on Assem. Bill No. 3476 (Sept. 20, 1992) Recess J. No. 24 (1991-1992 Reg. Sess.) p. 10271, italics added.) [FN11]

FN11 On October 10, 1993, the Governor signed into law Senate Bill No. 1140 (Stats. 1993, ch. 1138), which changes, as of April 1, 1994, the Brown Act's definition of "legislative body." Among other things, the new law amends section 54952 and repeals sections 54952.2, 54952.3, and 54952.5.

The newly amended section 54952 codifies an exception for less-than-a-quorum advisory committees in these words: "[A]dvisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter." (§ 54952, subd. (b), as amended by Sen. Bill No. 1140 (1993-1994 Reg. Sess.), 1993 Stats., ch. 1138, eff. Apr. 1, 1994.)

This case does not present the issue whether the Operations Committee would be a "legislative body" under the new law. Accordingly, we express no opinion on the issue.

The Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute. (See *833*Eu v. Chacon* (1976) 16 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289]; see also *Irvine v. California Emp. Com.* (1946) 27 Cal.2d 570, 578 [165 P.2d 908].) The 1992 legislation reflects the Legislature's understanding that the current version of the explicit less-than-a-quorum exception in section 54952.3 excludes advisory committees, whether ad hoc or standing, composed solely of less than a quorum of the members of the governing body from the open meeting requirements of the Act.

The 1992 legislation "would [have] exclude[d] a limited duration ad hoc committee from the definition of legislative body but would [have] include[d] any

standing committee, as defined, of a governing body irrespective of its composition." (See Legis. Counsel's Dig., Assem. Bill No. 3476 (1991-1992 Reg. Sess.).) Because the 1992 legislation retained the "in this section" language (§ 54952.3) and made no amendment to the general language in section 54952, the legislation would only make sense if the Legislature gave the words "in this section" the same meaning that the Board attributes to them in the current statute. If the Legislature had intended "in this section" to be interpreted as narrowly as Freedom suggests, the 1992 legislation would have had this bizarre result: Limited duration, ad hoc, advisory committees would have been subject to the full set of procedural requirements applicable to governing bodies, including the requirement of holding "regular meetings," but standing advisory committees would have received the benefit of the relaxed procedural requirements described in section 54952.3. This clearly could not have been the intended effect of the 1992 bill.

In view of these considerations, we find it more consistent with the legislative intent to construe the less-than-a-quorum exception contained in section 54952.3 as an exception to the definition of "legislative body," and thus one of several exceptions to the Brown Act's open meeting requirements, [FN12] rather than merely as an exception to the special procedural requirements of section 54952.3. This interpretation is consistent with the Act's ***834** purpose of ensuring that the "actions [of public agencies] be taken openly and that their deliberations be conducted openly." (§ 54950.)By definition, the exception applies only to an advisory committee that consists solely of members of the legislative body that created it but not enough members to constitute a quorum or, thus, to act as the legislative body. Accordingly, before any action can be taken on such a committee's recommendations the entire legislative body, which includes the members of the advisory committee, must conduct further, public deliberations. (§ 54952.)In this way the Act reasonably accommodates the practical needs of governmental organizations while still protecting the public's right to know.

FN12 Compare section 54956.9 (legislative body may hold closed sessions to confer with legal counsel regarding pending litigation); section 54957 (legislative body may hold closed sessions to confer with Attorney General, district attorney, sheriff, chief of police, or their respective deputies, on matters posing a threat to the security of public buildings); section 54957.6 (legislative body may hold closed sessions to discuss matters related to employee compensation and collective bargaining).

III. Disposition

Since the Operations Committee is composed solely of members of the governing body of a local agency numbering less than a quorum of the governing body, the committee's meeting on June 18, 1991, was not subject to the open meeting requirements of the Brown Act. Accordingly, the judgment of the Court of Appeal is reversed.

Lucas, C. J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.,
Concurring and Dissenting.-Although I have no quarrel with the result reached by the majority, I find that virtually all their reasoning has been rendered moot by the enactment of the 1993 legislation quoted in footnote 11 of the majority opinion. (Stats. 1993, ch. 1138.)

That legislation answers the question we took this case to resolve, i.e., whether advisory committees composed solely of members of a legislative body are themselves "legislative bodies" for purposes of the Ralph M. Brown Act. (Gov. Code, § 54950 et seq.) The 1993 legislation plainly declares they are not, unless they qualify as "standing committees" therein defined.

In light of this development the majority opinion has become an anachronism; indeed, the 1993 legislation repeals the very statute discussed by the majority at length. (Gov. Code, § 54952.3.)Because it is not our responsibility to offer advisory opinions on repealed statutes, I would dismiss review in this case as improvidently granted. ***835**

KENNARD, J.
I dissent.

California's Open Meeting Law [FN1] requires legisla-

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tive bodies to give notice of the time and place of their meetings and to make such meetings open and accessible to the public. The stated purpose of this law is to assure that Californians can be fully informed about the legislative decisionmaking process of elected and appointed officials. Under the majority opinion, however, a legislative body is entirely free to conduct the public's business in private session, shielding its decisionmaking process from scrutiny by the press or public, simply by dividing itself into various "standing committees" whose membership does not comprise a quorum of the full legislative body. [FN2] The majority reaches this result by interpreting the Brown Act to exempt such committees from compliance with *any* of the Act's requirements. The majority's interpretation contorts the statutory language and contravenes the goal of this state's Open Meeting Law.

FN1 This law, which is codified in Government Code section 54950 et seq., is also known as the Ralph M. Brown Act, and will hereafter be referred to alternatively as the "Brown Act" or the "Act."

FN2 Of course, in the case of a "committee" whose members make up a quorum or more-than-a-quorum of the membership of the full governing body, the committee would not be a "committee" at all; it would be *the* governing body.

I

This case arose out of the June 18, 1991, meeting of the "Operations Committee" of the Board of Directors of the Orange County Employees Retirement System. The Board administers $1.5 billion, consisting of moneys derived from the county's general fund as well as those contributed by employees. The "Operations Committee" is one of five standing committees that report to the full Board. The membership of the Operations Committee (and of each of the other standing committees) consists of four of the nine Board members-one person less than a quorum of the Board.

The purpose of the June 18, 1991, meeting was to reevaluate the Board's travel policy-a policy that had engendered substantial controversy after it was reported that some Board members had used public funds to tour Europe, assertedly in connection with Board investments. A reporter for the Orange County Register, a daily newspaper, tried to attend the meeting but was refused entry.

The next day, the newspaper's parent company, Freedom Newspapers, Inc., petitioned the superior court for a writ of mandate, seeking access to future meetings of the Operations Committee. The superior court denied the *836 petition. The Court of Appeal reversed, however, concluding that the Operations Committee was a "legislative body of a local agency" whose meetings were consequently required by the Brown Act to be "open and public." (Gov. Code, § 54953.) [FN3]

FN3 Further undesignated statutory references are to the Government Code.

This court granted the Board's petition for review and now reverses the judgment of the Court of Appeal.

As I shall explain, the Court of Appeal reached the correct result.

II

In the preamble to the Brown Act, the Legislature expressed the intent underlying the Act: "[T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

Consistent with this stated legislative intent, the Act requires that all meetings of legislative bodies of local agencies "be open and public" and that all persons "be permitted to attend" such meetings. (§ 54953.)The Act does, however, permit legislative bodies to discuss in "closed session" certain sensitive topics, such as pending litigation and personnel mat-

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ters. [FN4]

FN4 The Act permits closed session meetings when an agency discusses a license application by someone with a criminal record (§ 54956.7), or meets with its negotiator regarding the price and terms acceptable to the agency in a real property transaction (§ 54956.8), or discusses pending litigation with legal counsel (§ 54956.9), or participates in a joint agency meeting about insurance pooling, tort liability losses, or workers' compensation liability (§ 54956.95), or discusses employee wages and benefits with its labor negotiator (§ 54957.6), or participates in meetings regarding multijurisdictional drug law enforcement (§ 54957.8).

The Act also requires "legislative bodies" to conduct "regular" meetings (§ 54954) and abide by certain rules pertaining to adjournment or continuance of such meetings (§§ 54955, 54955.1). Additional requirements are posting the agenda of each regular meeting, acting only on items listed on the posted agenda (§ 54954.2), and giving written notice one week before *837 each regular meeting to anyone requesting such notice (§ 54954.1). The Act does allow for special meetings, but only if they are preceded by a 24-hour written notice. (§ 54956.)

The Act defines "legislative bodies" broadly. The term includes "the governing board, commission, directors or body of a local agency, or any board or commission thereof" as well as "any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency ...." (§ 54952.)The term also applies to "any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency" (§ 54952.2), as well as to "planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency" (§ 54952.5).

The "Operations Committee" of the Board of Directors of the Orange County Employees Retirement System, as a "committee ... on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency," qualifies as a "legislative body" within the meaning of section 54952, thus making it subject to the Brown Act's "open meeting" requirements. The issue in this case is whether the Operations Committee is exempted by another, more specific, provision of the Act, section 54952.3, from holding meetings open to the public.

Section 54952.3 provides for less stringent notice requirements for meetings of "any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency." Under this section, an advisory commission, committee or body is a "legislative body" for purposes of the *open meeting* requirements of the Act. Such a legislative body can, however, elect between giving 24-hour written notice of its meetings or providing by rule or bylaw for its meetings to be held at a regular time; "[n]o other notice of regular meetings is required." (§ 54952.3.)

Section 54952.3 further provides that a " '[l]egislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are *less than a quorum* of such governing body." (Italics added.) It is on this italicized phrase that the majority rests its conclusion that advisory committees made up only of members of the full governing body but "less than a quorum" of that body *838 are exempt from any of the requirements of the Brown Act. Thus, under the majority's interpretation, the Operations Committee was free to conduct its business in private.

I disagree with the majority's interpretation of section 54952.3's "less-than-a-quorum" provision. In my view, this provision by its express terms excludes those advisory committees composed solely of members of the full governing body of the local agency only from the "relaxed" notice requirements of section 54952.3, thereby making such advisory bodies subject to the more rigid requirements that govern legislative bodies generally.

My interpretation of the "less-than-a-quorum" provision is compelled by the plain language of section 54952.3, which must be the starting point for this statutory interpretation. (Adoption of Kelsey S. (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823

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P.2d 1216].) After specifying that advisory commissions or committees are "legislative bodies" for purposes of the Brown Act, section 54952.3 next describes the less stringent procedural requirements for the meetings of such advisory bodies. It then states that "'[l]egislative body' *as defined in this section* does not include a committee composed solely of members of the governing body of the local agency which are less than of quorum of such governing body." By the limiting language, "as defined in this section," the provision carves out an exception from section 54952.3's definition of "legislative body" (and thus from the section's less stringent notice requirements) for an advisory committee composed solely of members of the governing body of the local agency who comprise less than a quorum of the local agency's full membership.

Therefore, in this case the Operations Committee of the Board of Directors of the Orange County Employees Retirement System, as an advisory committee composed solely of members of the full governing body of the local agency (the Board), is not a "legislative body" for purposes of the relaxed notice requirements of section 54952.3. Rather, as I explained earlier, the Operations Committee meets section 54952's definition of "legislative body" as being a "committee ... on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency ...." As such, the Operations Committee is subject to the full force of the Brown Act. Most important, the committee must conduct its business in public.

To require an advisory committee that, as here, is comprised of individuals who are members of the governing body to which the committee reports to conduct public meetings would further the Legislature's stated intent that *839 "the people's business" be conducted openly, and that both the "actions" and the "deliberations" of government be open to the press and public. Even though the Operations Committee cannot itself bind the full Board by "actions" such as adopting a proposal or enacting a rule (which would require a majority vote of the full Board), it can and does "deliberate." "Deliberation" is defined as "the process ... of thoughtful and lengthy consideration" or as "formal discussion and debate on all sides of an issue." (American Heritage Dict. of the English Language (1980) p. 349.) Indeed, to best assure that government decisions follow thoughtful and lengthy consideration or debate of all sides of an issue, the Brown Act invites the public to witness that whole process.

A standing committee's reconsideration of a significant policy that affects the public's trust and confidence in its government officials-such as the Board's travel policy here-necessarily involves deliberation. Yet, under the majority's interpretation of section 54952.3, this deliberation can take place in private session outside the scrutiny of the public. And when, as in this case, the makeup of the standing committee recommending a policy change is just one member short of a quorum of the full governing body, and only one additional vote is needed to make the recommended change, there may be little further debate or deliberation on the issue by the full Board. In that event, the public is deprived of its right to witness the deliberative processes of government. Indeed, under the majority's reading of section 54952.3, any local agency wishing to keep its deliberative processes from the public can effectively do so by referring controversial issues to standing committees comprised of one member less than a quorum.

The majority's interpretation of section 54952.3 rests first on its conclusion that construing section 54952.3 to exempt from the less stringent procedural requirements specified by that section *all* less-than-a-quorum advisory committees composed solely of members of the governing body would "result in absurdity" by making even temporary, ad hoc advisory committees subject to the Brown Act's "generally applicable procedural requirements," including that set out in section 54954 of holding "regular" meetings. (Maj. opn., *ante*, at p. 827.) But to require a temporary, ad hoc advisory committee to conduct its meetings at a regular time seems far less absurd than to permit, as the majority does here, a local agency to use standing committees to shield discussion and deliberation on controversial issues from public scrutiny. [FN5]

FN5 Fortunately, the majority's opinion, though misguided, will be short-lived. New legislation (Stats. 1993, ch. 1138), which changes the Brown Act's definition of "legislative body" effective April 1, 1994, draws a distinction between "ad hoc" and "standing" advisory committees, and specifies that

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> the latter, to the extent they "have a continuing subject matter jurisdiction," are covered by the Brown Act's "open meeting" requirements. (§ 54942, subd. (b), as amended by Sen. Bill No. 1140 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1138, § 3, eff. Apr. 1, 1994.)

The majority relies also on opinions by the Attorney General (which the majority admits do not bind this court) and on a series of failed legislative ***840** efforts to amend the Brown Act. But we need not turn to unpassed or vetoed legislation to discern the Legislature's intent. The Legislature has made its intent plain in the preamble to the Brown Act, which expressly states that to ensure that Californians can remain informed and "retain control" over their own government, legislative deliberations must be conducted openly. "Vital" to the functioning of any democratic society is "an informed citizenry." (*John Doe Agency v. John Doe Corp.* (1989) 493 U.S. 146, 152 [107 L.Ed.2d 462, 110 S.Ct. 471].) Consistent with our Legislature's intent, I would affirm the Court of Appeal's judgment directing that the Board allow members of the press and the public to attend "its regular committee meetings," including those of its Operations Committee. ***841**

Cal. 1993.
Freedom Newspapers, Inc. v. Orange County Employees Retirement System
6 Cal.4th 821, 863 P.2d 218, 25 Cal.Rptr.2d 148

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H

Court of Appeal, Third District, California.
The PEOPLE, Plaintiff and Respondent,
v.
Lisa Marie MITCHELL, Defendant and Appellant.
No. C052649.

June 26, 2008.
Certified for Partial Publication.[FN*]

FN* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts I, II, V, VI, and X through XVI of the Discussion.

Review Denied Oct. 1, 2008.

Background: Defendant was convicted following a jury trial in the Superior Court, Shasta County, Nos. 04F9309 and 02F9882, Bradley L. Boeckman, J., of 51 offenses, including forgery, receiving stolen property, wrongful use of personal identifying information, and drug related offenses following her employment as a caregiver for an elderly and dependent adult, and was sentenced to an aggregate term of 24 years in prison. Defendant appealed.

Holdings: The Court of Appeal, Hull, J., held that:
(1) initial fraudulent use of victim's personal identifying information did not immunize defendant from punishment for subsequent fraudulent uses;
(2) misdemeanor forgery of an access card transaction is not a necessarily included offense of forgery;
(3) state was required only to prove that defendant withheld or concealed the property from its rightful owner on the dates alleged in order to prove receipt of stolen property;
(4) defendant possessed both checks and credit card on same date such that she could not be convicted of separate counts of receiving stolen property based on possession;
(5) jury instruction on unanimity did not affect defendant's substantial rights and thus failure to object resulted in waiver of any error; and
(6) argument on appeal was insufficient to support ineffective assistance of counsel claim.

Reversed in part; otherwise affirmed.

West Headnotes

[1] Criminal Law 110 29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases

Defendant's initial fraudulent use of victim's personal identifying information did not immunize her from punishment for subsequent fraudulent uses; rather, defendant committed a violation each time she used the information for an unlawful purpose. West's Ann.Cal.Penal Code § 530.5.

[2] Criminal Law 110 29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases

False Pretenses 170 4

170 False Pretenses
170k3 Elements of Offenses
170k4 k. In General. Most Cited Cases

In order to violate statute prohibiting the unlawful use or transfer of personal identifying information, a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose; thus, it is the use of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime. West's Ann.Cal.Penal Code § 530.5.

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[3] Criminal Law 110 ⚿29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases

Where the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representations which were still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person.

[4] Criminal Law 110 ⚿29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases

A single theft of personal identifying information and use of that information to obtain property will not immunize the thief from prosecution for subsequent uses of the information to obtain other property. West's Ann.Cal.Penal Code § 530.5.

[5] Criminal Law 110 ⚿29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases

Misdemeanor forgery of an access card transaction is not a necessarily included offense of forgery, and thus defendant could be convicted of both offenses; actus reus of the misdemeanor offense was the signing of the name of another, while forgery could be committed by publishing or passing an item regardless of whether it was signed. West's Ann.Cal.Penal Code §§ 470(d), 484f(b).

See Cal. Jur. 3d, Criminal Law: Crimes Against Property, §§ 346, 393; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 192; Annot., Validity, Construction, and Application of State Statutes Relating to Offense of Identity Theft (2005) 125 A.L.R.5th 537.

[6] Indictment and Information 210 ⚿128

210 Indictment and Information
210VI Joinder
210k126 Joinder of Counts; Multiplicity
210k128 k. Same Offense. Most Cited Cases

An accusatory pleading may charge different statements of the same offense. West's Ann.Cal.Penal Code § 954.

[7] Criminal Law 110 ⚿29(1)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(1) k. In General. Most Cited Cases

As a general rule, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct.

[8] Criminal Law 110 ⚿29(1)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(1) k. In General. Most Cited Cases

A single act or course of conduct by a defendant can lead to convictions of any number of the offenses charged.

[9] Criminal Law 110 ⚿29(2)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(2) k. Conviction of Lesser or

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Included Offenses. Most Cited Cases
A judicially created exception to the general rule permitting multiple convictions prohibits multiple convictions based on necessarily included offenses; if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.

[10] Indictment and Information 210 191(.5)

210 Indictment and Information
210XIII Included Offenses
210k191 Different Offense Included in Offense Charged
210k191(.5) k. In General. Most Cited Cases
Under the elements test to determine whether one offense is necessarily included within another, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.

[11] Indictment and Information 210 191(.5)

210 Indictment and Information
210XIII Included Offenses
210k191 Different Offense Included in Offense Charged
210k191(.5) k. In General. Most Cited Cases
Under the accusatory pleading test to determine whether one offense is necessarily included within another, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.

[12] Criminal Law 110 29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases
State was not required to prove that defendant received stolen property, including checks, two credit cards, and holiday ornaments and decorations, on different occasions in order to support four separate counts of receiving stolen property, but rather was only required to prove that defendant withheld or concealed the property from its rightful owner on the dates alleged. West's Ann.Cal.Penal Code § 496(a).

[13] Criminal Law 110 29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases
Evidence showed that defendant possessed both checks and credit card on or about the same date such that she could not be convicted of separate counts of receiving stolen property based on her possession or concealing of the checks and credit card from their rightful owner. West's Ann.Cal.Penal Code § 496(a).

[14] Criminal Law 110 29(5.5)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(5.5) k. In General. Most Cited Cases
Where a defendant receives multiple articles of stolen property at the same time, this amounts to but one offense of receiving stolen property. West's Ann.Cal.Penal Code § 496(a).

[15] Receiving Stolen Goods 324 4

324 Receiving Stolen Goods
324k4 k. Receipt, Possession, and Concealment of Property. Most Cited Cases
Mere possession is not one of the means by which the offense of receiving stolen property can be committed. West's Ann.Cal.Penal Code § 496(a).

[16] Criminal Law 110 1038.1(4)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

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110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(4) k. Elements of Offense and Defenses. Most Cited Cases

Jury instruction on the offense of receiving stolen property which stated that "You may not find the defendant guilty unless you all agree that the People have proved the defendant received, concealed or withheld from its owner at least one item of property that had been stolen and you all agree on which item of property had been received, concealed or withheld," which defendant claimed allowed the jury erroneously to convict on all four counts of even if they only unanimously agreed that she received or possessed one item of stolen property, did not affect defendant's substantial rights, and thus defense counsel's failure to object to the instruction forfeited any claim of error; jury was instructed that each count was a separate crime and must be considered separately, jury was told defendant was charged with four counts of receiving stolen property and the instruction defined the requirements for conviction on one such offense, and instruction did not direct the jury to convict on all four counts if the elements for one count were satisfied. West's Ann.Cal.Penal Code § 496(a); CALCRIM No. 1750.

[17] Criminal Law 110 ⚷1038.1(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(1) k. In General. Most Cited Cases

Failure to object to instructional error forfeits the objection on appeal unless the defendant's substantial rights are affected; "substantial rights" are equated with errors resulting in a miscarriage of justice.

[18] Criminal Law 110 ⚷1038.1(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(1) k. In General. Most Cited Cases

The rule that the failure to object to instructional error results in forfeiture of the error applies to claims based on statutory violations, as well as claimed violations of fundamental constitutional rights.

[19] Criminal Law 110 ⚷1948

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1948 k. Objecting to Instructions. Most Cited Cases

Defendant's argument on appeal that there was a reasonable probability that more favorable verdicts would have resulted if counsel had objected to allegedly erroneous jury instruction was insufficient to explain how counsel's failure to object fell below an objective standard of reasonableness or how the failure to object resulted in prejudice as required to prevail on claim of ineffective assistance of counsel; defendant's argument merely presumed counsel's failure to object fell below an objective standard of reasonableness and that defendant was prejudiced thereby, and defendant also neglected to argue how there could be no satisfactory explanation for counsel's failure to object. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[20] Criminal Law 110 ⚷1870

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1870 k. In General. Most Cited Cases

A criminal defendant has a constitutional right to the assistance of counsel, which entitles the defendant not to some bare assistance but rather to effective assistance. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[21] Criminal Law 110 ⚷1881

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110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 k. Deficient Representation and Prejudice in General. Most Cited Cases

In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms; second, he must also show prejudice flowing from counsel's performance or lack thereof. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[22] Criminal Law 110 ⚿1890

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1890 k. In General. Most Cited Cases

The mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[23] Criminal Law 110 ⚿1119(1)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)15 Questions Presented for Review
110k1113 Questions Presented for Review
110k1119 Conduct of Trial in General
110k1119(1) k. In General. Most Cited Cases

If the record fails to show why counsel failed to object, a claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[24] Criminal Law 110 ⚿1884

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1884 k. Strategy and Tactics in General. Most Cited Cases

A reviewing court will not second-guess trial counsel's reasonable tactical decisions. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

**858 Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.
Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, and Angelo S. Edralin, Deputy Attorney General, for Plaintiff and Respondent.

**859 HULL, J.
*446 Following her three-month employment as a caregiver for Billy C., an elderly and dependent adult, defendant used blank checks, credit cards and identifying information unlawfully taken from Billy to obtain cash, purchase automobiles and acquire other merchandise. She was convicted of 51 offenses, including 22 counts of forgery (Pen.Code, § 470, subd. (d)), four counts of receiving stolen property (*id.*, § 496), three counts of wrongful use of personal identifying information (*id.*, § 530.5), and various drug-related offenses. (Further undesignated section references are to the Penal Code.) Sentenced to an aggregate, unstayed term of 24 years in state prison, defendant appeals, raising 18 separate claims of error, some with subparts. We reject nearly all of these contentions. However, because we agree with a few, we shall reverse her conviction in part.

FACTS AND PROCEEDINGS

For the most part, the facts in this matter are undisputed. In August 2004, William C. hired defendant to work as a caregiver for his father, Billy C., who was 80 years old and not in good health.

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At the time, William C. handled his father's financial affairs. Billy C. had two bank accounts: a Cash Maximizer Account, from which money could be withdrawn only a few times each month; and a Senior Checking Account. Payments received by Billy were deposited in his Senior Checking Account. William kept a book of checks for Billy's Senior Checking Account and paid Billy's expenses using those checks. Other checks for the Senior ***447** Checking Account were kept in a box under a desk next to Billy's bed. Also kept in that box were various active credit cards assigned to either Billy or his deceased wife, Barbara C. Billy's wallet with identifying information was kept in a dresser drawer in his bedroom. Various holiday ornaments and decorations were kept in the garage.

Defendant cared for Billy five days a week, living at the home during those days. Another caregiver, Jean M., cared for Billy the other two days. When defendant was not staying at Billy's home, she resided with her sister.

In November 2004, William received a call from Jean M. informing him that defendant was on her way to Billy's home to make the bed. William thought this was unusual because by that time Billy was already in bed asleep. He drove over to Billy's house and found defendant and Jean M. there arguing. William told defendant she was not going to wake Billy up to make his bed and defendant departed.

The next day, defendant called William and asked if she still had her job. William said he would get back to her on it.

On November 28, defendant came into Bailey Motors and selected a 1994 Honda Accord to purchase. However, because the radio did not work, she did not complete the purchase at that time. The same day, defendant went to Attainable Auto and looked at a 1992 Honda Civic.

The next day, November 29, $10,000 was transferred from Billy's Cash Maximizer Account to his Senior Checking Account via a telephone transaction. According to a bank representative, a person can transfer funds from one account to another over the phone if he or she has the last four digits of the account holder's social security number.

Also on November 29, defendant returned to Attainable Auto and told the dealer her grandparents were giving her $5,000 to buy a car. The dealer told her the exact amount for the car out the door. Later that evening, around 5:30 or 6:00 p.m., defendant returned with a check ****860** drawn on Billy's Senior Checking Account and bought the car. The check was already filled out and signed, although defendant may have filled in the name of the dealership on the check after she arrived. The dealer did not try to verify the check with the bank because the bank was closed. The check was eventually dishonored.

Between 6:00 and 7:00 p.m. that evening, defendant returned to Bailey Motors and, because the radio had been fixed, bought the Honda Accord she had looked at the day before. At the time, defendant told the dealer her grandfather was buying the car for her but was too sick to come in himself. ***448** Defendant paid for the car with a check written on Billy's Senior Checking Account. The check was eventually dishonored by the bank.

On November 30, $8,000 was transferred by telephone from Billy's Cash Maximizer Account to his Senior Checking Account.

On November 30, between 1:00 and 1:30 p.m., defendant walked into a Bank of America branch and attempted to cash a check for $400 written on Billy's Senior Checking Account. However, the signature on the check did not match what was on file for the account and the teller called William C. William told her the check was no good and to call the police. When the teller went to speak with her assistant manager, she saw that defendant had left.

Also on November 30, defendant purchased a 2000 Dodge Stratus from All Star Motors. She had earlier asked for the price of the car out the door and arrived with a check on Billy's Senior Checking Account already filled out. Defendant told the dealer her grandmother was buying the car for her. The check was eventually dishonored.

Sometime in December, Robyn G. purchased a 2000 Dodge Stratus from defendant for $3,000. Later, Robyn heard a report that the car had been stolen and turned it over to the police.

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On December 9, Mellony S. purchased a 1992 Honda Civic from defendant for $1,500. However, when Mellony tried to register the vehicle at the Department of Motor Vehicles, she was arrested, because the car had been reported stolen.

At 7:20 p.m. on December 9, defendant entered a Mervyn's store and used Barbara C.'s Mervyn's credit card to purchase merchandise. She signed Barbara C.'s name to the charge receipt.

On December 10, defendant used Barbara C.'s J.C. Penney credit card to purchase $750 in gift certificates.

On December 14, defendant purchased a 1996 Mitsubishi Eclipse from R & R Sales for $9,000. Defendant told the dealer at the time that her *449 grandfather was buying the car for her and had given her a check. Defendant filled in the name of the payee on the check. The check was later dishonored.

On December 17, defendant passed four checks on Billy C.'s Senior Checking Account at Wal-Mart to purchase merchandise. The checks were written in the amounts of $150.02, $200, $203.59 and $248.98 and contained the forged signature of Barbara C.

On the evening of December 20, Christine B. asked defendant for a ride home, and she and her boyfriend, Mike M., got into a 1996 Mitsubishi with defendant. At approximately 11:45 p.m., Sergeant Steve Solus of the Redding Police Department observed the Mitsubishi travelling on Interstate Highway 5 and, because it had been reported stolen, attempted to effect a traffic stop. However, instead of stopping, the Mitsubishi sped away, committing various traffic offenses along the way. Solus gave chase.

**861 Solus eventually found the Mitsubishi stopped in a trailer park with the driver's side door open and the driver's seat empty. He found Christine B. and Mike M. still inside the car. However, the driver was never located. In the car, officers found a pouch containing check exchange cards, Wal-Mart receipts, check carbons for Billy C.'s Senior Checking Account, identification cards in the name of Christena D., a Mervyn's credit card in the name of Barbara C., a J.C. Penney credit card in the name of Billy C., Discover credit cards in the name of Barbara C., Bank of America access cards in the name of either Billy or Barbara C., and an altered driver's license in the name of Barbara C. They also found two hypodermic needles, a glass device for smoking narcotics, and a clear plastic baggie containing methamphetamine.

Defendant had been the care giver for Christena D. between January and March 2004.

On December 23, defendant called Palo Cedro Motors asking about a Ford Mustang on the lot. Defendant asked how much it would cost out the door and said she would come by later to purchase it.

Defendant arrived at the dealership with a check made out to Palo Cedro Motors with the notation "Xmas gift." She sat down with a salesman, Gregory V., to fill out a credit application. Defendant appeared to the salesman to be in a hurry, asking why she needed to fill out a credit application when she was paying cash. Gregory told her it was the dealership's policy that buyers take a test drive, but defendant said she did not want to do so. Gregory insisted, and they went out on a test drive.

*450 Meanwhile, Edward C., the owner of the dealership, called the bank to verify the funds were available. He then called the owner of the bank account and the woman who answered told him to call the police, which he did.

When Gregory and defendant returned from the test drive and started to get out of the car, a police car pulled in behind them. Defendant got back in the car and pulled away. As she did so, she poked Gregory in the side with something he took for a gun and ordered him out of the car. Shortly after leaving the lot, Gregory opened the car door and rolled out onto the pavement, injuring himself.

The police chased and eventually found the Mustang, but there was nobody inside. They searched the area for about 10 minutes and found defendant lying in a fetal position under a tree. In a purse defendant had with her, officers found hypodermic needles, a narcotics smoking device, methamphetamine, Vicodin, two blank Bank of America checks with the name Billy C. on them, Honda keys, a Nieman-Marcus credit card, and pages of notes with account

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information on them. They did not find a gun.

Later that night, police officers found a Honda automobile parked one block from Palo Cedro Motors. The keys taken from defendant matched the Honda. Inside the vehicle, the officers found a J.C. Penney gift card in the name of defendant in the amount of $750 with a letter entitling defendant to a gift from Barbara C., a death certificate for Barbara C., multiple check carbons in the name of Barbara C., credit cards and identifications for Billy and Barbara C., and notepaper with account information and passwords on it.

In late November, defendant had given her sister a key and contract for a storage unit. On December 29, the police opened the storage unit using the key defendant had given her sister. Inside, they found holiday ornaments and decorations belonging to Billy C.

Defendant was charged with the following offenses:

**862 Count 1: Carjacking (§ 215, subd. (a); the Ford Mustang taken from Palo Cedro Motors and Gregory V. on December 23).

Count 2: Unlawful driving or taking a motor vehicle (Veh.Code, § 10851, subd. (a); the Ford Mustang taken from Palo Cedro Motors on December 23).

Count 3: Forgery (§ 470, subd. (d); the check passed to Palo Cedro Motors on December 23).

Count 4: Possession of a forged item (§ 475, subd. (b); a blank Bank of America check with Billy C.'s name on it found on December 23).

*451 Count 5: Possession of a forged item (§ 475, subd. (b); a blank Bank of America check with Billy C.'s name on it found on December 23).

Count 6: Possession of a controlled substance (Health & Saf.Code, § 11377, subd. (a); the methamphetamine found on December 23).

Count 7: Transportation of a controlled substance (Health & Saf.Code, § 11379, subd. (a); the methamphetamine found on December 23).

Count 8: Acquiring or retaining possession of an access card with intent to defraud, a misdemeanor (§ 484e, subd. (c); the Neiman-Marcus credit card found on December 23).

Count 9: Unlawful possession of a hypodermic needle, a misdemeanor (Bus. & Prof.Code, § 4140; found on December 23).

Count 10: Unlawful possession of a smoking device (Health & Saf.Code, § 11364; found on December 23).

Count 11: Unlawful driving or taking a motor vehicle (Veh.Code, § 10851, subd. (a); the Mitsubishi driven on December 20).

Count 12: Forgery (§ 470, subd. (d); the check written to R & R Sales on December 20).

Count 13: Evading a pursuing peace officer (Veh.Code, § 2800.2; the chase of the Mitsubishi on December 20).

Count 14: Possession of a controlled substance (Health & Saf.Code, § 11377, subd. (a); the methamphetamine found on December 20).

Count 15: Transportation of a controlled substance (Health & Saf.Code, § 11379, subd. (a); the methamphetamine found on December 20).

Count 16: Unlawful possession of a hypodermic needle, a misdemeanor (Bus. & Prof.Code, § 4140; found on December 20).

Count 17: Receiving stolen property (§ 496, subd. (a); the book of checks found on December 20).

Count 18: Acquiring or retaining possession of an access card with intent to defraud, a misdemeanor (§ 484e, subd. (c); four Bank of America access cards found on December 20).

*452 Count 19: Unlawful use of personal identifying information, a misdemeanor (§ 530.5, subd. (d); Christena D.'s identifying information found on December 20).

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Count 20: Unlawful use of personal identifying information, a misdemeanor (§ 530.5, subd. (a); Barbara C.'s identifying information used at Wal-Mart on December 17).

Count 21: Receiving stolen property (§ 496, subd. (a); Barbara C.'s Discover card found on December 20).

Count 22: Unlawful driving or taking a motor vehicle (Veh.Code, § 10851, subd. (a); the 1994 Honda Accord taken from Bailey Motors on November 28).

Count 23: Forgery (§ 470, subd. (d); the check written to Bailey Motors on November 28).

Count 24: Unlawful driving or taking a motor vehicle (Veh.Code, § 10851, subd. **863 (a); the 1992 Honda Civic taken from Attainable Auto on November 29).

Count 25: Forgery (§ 470, subd. (d); the check written to Attainable Auto on November 29).

Count 26: Theft by a caretaker from an elder or dependent adult (§ 368, subd. (e); theft from Billy C. between August 1 and November 30, 2004).

Count 27: Unlawful driving or taking a motor vehicle (Veh.Code, § 10851, subd. (a); the 2000 Dodge Stratus taken from All Star Motors on November 30).

Count 28: Forgery (§ 470, subd. (d); the check written to All Star Motors on November 30).

Count 29: Forgery (§ 470, subd. (d); check No. 5268 written to defendant for $400 on November 30).

Count 30: Forgery (§ 470, subd. (d); check No. 5251 written to defendant for $200 on November 12).

Count 31: Forgery (§ 470, subd. (d); check No. 5252 written to defendant for $200 on November 13).

Count 32: Forgery (§ 470, subd. (d); check No. 5254 written to defendant for $200 on November 15).

*453 Count 33: Forgery (§ 470, subd. (d); check No. 5263 written to defendant for $170 on November 22).

Count 34: Forgery (§ 470, subd. (d); check No. 5264 written to defendant for $170 on November 22).

Count 35: Receiving stolen property (§ 496, subd. (a); the holiday ornaments).

Count 36: Forgery (§ 470, subd. (d); check No. 5260 written to defendant for $170 on November 23).

Count 37: Forgery (§ 470, subd. (d); check No. 416 for $180 cashed at Bank of America on November 23).

Count 38: Forgery (§ 470, subd. (d); check No. 420 for $200 cashed at Bank of America on November 26).

Count 39: Forgery (§ 470, subd. (d); check No. 421 for $180 cashed at Bank of America on November 26).

Count 40: Forgery (§ 470, subd. (d); check No. 423 for $180 cashed at Bank of America on November 27).

Count 41: Forgery (§ 470, subd. (d); check No. 5261 for $180 cashed on November 29).

Count 42: Forgery (§ 470, subd. (d); check No. 5273 for $150.02 passed to Wal-Mart on December 17).

Count 43: Forgery (§ 470, subd. (d); check No. 5274 for $200 passed to Wal-Mart on December 17).

Count 44: Forgery (§ 470, subd. (d); check No. 5275 for $203.59 passed to Wal-Mart on December 17).

Count 45: Forgery (§ 470, subd. (d); check No. 5279 for $248.98 passed to Wal-Mart on December 17).

Count 46: Receiving stolen property (§ 496, subd. (a); the Mervyn's credit card of Barbara C. used on December 9).

Count 47: Unlawful use of personal identifying information, a misdemeanor (§ 530.5, subd. (a); Barbara C.'s identifying information used at Mervyn's on December 9).

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*454 Count 48: Second degree burglary (§ 459; entering Mervyn's on December 9 with intent to steal).

Count 49: Forgery (§ 470, subd. (d); signing Barbara C.'s name to the Mervyn's charge receipt on December 9).

Count 50: Signing another's name to an access card or sales slip, a misdemeanor (§ 484f, subd. (b); signing the Mervyn's receipt on December 9).

**864 Count 51: Fraudulent use of an access card (§ 484g); purchase of the gift card from J.C. Penney on December 10).

Defendant was convicted on all counts and, as mentioned above, was sentenced to an aggregate, unstayed term in state prison of 24 years.

DISCUSSION

I-II FN**

FN** See footnote *, *ante.*

III

Counts 20 and 47

[1] On counts 20 and 47, defendant was convicted of unlawful use or transfer of personal identifying information within the meaning of section 530.5, subdivision (a). That subdivision reads: "Every person who willfully obtains personal identifying information ... of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense...."

In count 20, defendant was charged with violating section 530.5, subdivision (a), on or about December 20, 2004. In count 47, she was charged with violating that provision on or about December 9, 2004. In her arguments to the jury, the prosecutor explained count 20 relates to defendant's use of Barbara C.'s driver's license at Wal-Mart on December 17, while count 47 concerns defendant's use of the driver's license at Mervyn's on December 9.

Defendant contends her conviction on count 47 must be reversed, because there was only one unlawful taking of personal identifying information. *455 According to defendant, "[s]ince there was only a single acquisition of the drivers licenses, and her use thereof was motivated by a single plan to use Barbara's identification when passing stolen checks and credit cards to obtain merchandise, [defendant] only committed a single violation of section 530.5, subdivision (a)."

[2] We disagree. In order to violate section 530.5, subdivision (a), a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533, 69 Cal.Rptr.3d 42.) Thus, it is the use of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime.

Defendant cites two cases, *People v. Bailey* (1961) 55 Cal.2d 514, 11 Cal.Rptr. 543, 360 P.2d 39 (*Bailey*) and *People v. Robertson* (1959) 167 Cal.App.2d 571, 334 P.2d 938 (*Robertson*), for the proposition that where multiple takings are motivated by a single intention and plan, they constitute a single crime. In *Bailey,* the defendant was charged with a single count of grand theft in connection with her fraudulent receipt of multiple welfare payments which, singularly, were below the threshold for grand theft but, in the aggregate, were sufficient. (*Bailey,* at p. 515-516, 11 Cal.Rptr. 543, 360 P.2d 39.) The court concluded it was proper to consider the multiple welfare payments as one offense where they were motivated by a single intent and plan. (*Id.* at p. 519, 11 Cal.Rptr. 543, 360 P.2d 39.)

In *Robertson,* the defendant was convicted of three counts of grand theft and one count of petit theft stemming from his conduct in obtaining charge accounts at four stores and making multiple purchases on those charge accounts. (*Robertson, supra,* 167 Cal.App.2d at pp. 573, 574, 576, 334 P.2d 938.) The court concluded it was proper to aggregate the purchases at each store to determine if the offense was grand **865 or petit theft. According

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to the court: " '[T]he general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. The particular facts ... of each case determine the question. If there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense, and this is so whether the theft is accomplished by larceny or embezzlement.' " (*Id.* at p. 577, 334 P.2d 938, quoting from *People v. Howes* (1950) 99 Cal.App.2d 808, 818-819, 222 P.2d 969.)

The foregoing cases are distinguishable. The question in each was whether a defendant will be permitted to avoid a charge of grand theft by breaking up his transactions into a series of petit thefts. A defendant might go into a store and buy a large amount of merchandise on a single occasion or spread those purchases out over several days. However, the end result to the merchant is *456 the same. In *Bailey,* the court explained: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Bailey, supra,* 55 Cal.2d at p. 519, 11 Cal.Rptr. 543, 360 P.2d 39.)

[3] In deciding whether a defendant commits a series of thefts pursuant to a single intent or plan, we do not use a single, broad objective of stealing property. A defendant who steals from multiple victims over a lengthy crime spree may have a single objective of obtaining as much money or property as possible. However, he has still committed multiple offenses. (See *People v. Ashley* (1954) 42 Cal.2d 246, 273, 267 P.2d 271; *People v. Rabe* (1927) 202 Cal. 409, 413, 261 P. 303; *People v. Barber* (1959) 166 Cal.App.2d 735, 741-742, 333 P.2d 777; *People v. Caldwell* (1942) 55 Cal.App.2d 238, 251, 130 P.2d 495; *People v. Ellison* (1938) 26 Cal.App.2d 496, 498-499, 79 P.2d 732.) As the California Supreme Court explained in *Rabe,*"[w]here the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representations which were still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person." (*People v. Rabe, supra,* 202 Cal. at p. 413, 261 P. 303.)

[4] By parity of reasoning, a single theft of personal identifying information and use of that information to obtain property will not immunize the thief from prosecution for subsequent uses of the information to obtain other property.

In *People v. Neder* (1971) 16 Cal.App.3d 846, 94 Cal.Rptr. 364 (*Neder*), the defendants used another's credit card to make three separate purchases from the same store. On each purchase, one of the defendants signed a sales slip for the purchase. They were convicted of three counts of forgery. (*Id.* at pp. 849-850, 94 Cal.Rptr. 364.) On appeal, the appellant argued there was only one offense committed within the meaning of *Bailey,* because there was a single intent and plan associated with the three forgeries. The Court of Appeal disagreed, explaining: "In the instant case it is probably true that the **866 forgeries were motivated by a preconceived plan to obtain merchandise from Sears by use of [the victim's] credit card and by forging sales slips. However, we do not feel *457 that the *Bailey* doctrine should be extended to forgery. That doctrine was developed for the crime of theft to allow, where there is a common plan, the accumulation of receipts from takings, each less than $200, so that the taker may be prosecuted for grand theft as opposed to several petty thefts. The essential act in all types of theft is taking. If a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part. [Citation.] The real essence of the crime of forgery, however, is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud. Theft pursuant to a plan can be viewed as a large total taking accomplished by smaller takings. It is difficult to apply an analogous concept to forgery.

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The designation of a series of forgeries as one forgery would be a confusing fiction." (*Id.* at pp. 852-853, 94 Cal.Rptr. 364, fn. omitted.)

Section 530.5, subdivision (a), is committed each time an offender *uses* personal identifying information for any unlawful purpose. Contrary to defendant's argument, the first such fraudulent use did not immunize her from punishment for subsequent fraudulent uses. Defendant was therefore properly convicted on both counts 20 and 47.

IV

Counts 49 and 50

[5] Defendant contends she could not be convicted on both counts 49 and 50, because they are both premised on the same act of forging Barbara C.'s signature to the Mervyn's charge receipt. Therefore, defendant argues, her conviction on count 50 must be reversed. The People concede error.

On count 49, defendant was convicted of forgery under section 470, subdivision (d), which reads: "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: ... receipt for money or property...." In her argument to the jury, the prosecutor explained that count 49 is based on defendant signing Barbara C.'s name to the Mervyn's charge receipt.

On count 50, defendant was convicted of misdemeanor forgery of an access card transaction within the meaning of section 484f, subdivision (b). That subdivision reads: "A person other than the cardholder or a person authorized by him or her who, with intent to defraud, signs the name of *458 another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction, is guilty of forgery." The prosecutor argued count 50 is based on defendant's fraudulent use of Barbara C.'s Mervyn's credit card. However, inasmuch as section 484f, subdivision (b), prohibits the act of signing the name of another with intent to defraud, this count is necessarily based on defendant signing Barbara C.'s name to the Mervyn's charge receipt as well.

In support of her argument that she could not be convicted on both counts 49 and 50, defendant relies on *People v. Ryan* (2006) 138 Cal.App.4th 360, 41 Cal.Rptr.3d 277 (*Ryan*). In *Ryan,* the defendant forged a signature on a check and then **867 passed the forged check in order to obtain merchandise. She was convicted under section 470, subdivision (a), for forging the signature and under section 470, subdivision (d), for passing the forged check. (*Id.* at pp. 362-363, 41 Cal.Rptr.3d 277.) The Court of Appeal concluded she could not be convicted on both counts, because subdivisions (a) and (d) of section 470 are alternate ways of describing the same offense of forgery. The court pointed out that, as originally enacted, section 470 did not have subdivisions, and courts had consistently held there is one crime of forgery and the various acts proscribed by the statute are simply different means of committing the offense. (*Id.* at pp. 364, 366, 41 Cal.Rptr.3d 277.)According to the court, "[t]he overhaul of section 470 and related provisions was intended to ' "make [the] laws governing financial crimes more 'user friendly' " ' and ' "to clarify and streamline existing law with regard to forgery and credit card fraud." ' It was not intended to 'change the meaning or legal significance of the law,' but ' "merely [to] organize[ ] the relevant code sections into a cohesive and succinct set of laws that can be readily referred to and understood." ' " (*Id.* at p. 366, 41 Cal.Rptr.3d 277.)

Defendant recognizes that counts 49 and 50 alleged violations of different statutes rather than different subdivisions of the same statute. Nevertheless, she argues the two statutes are just alternate ways of committing the single crime of forgery.

We disagree. In *Ryan,* the court made a point of distinguishing cases where the defendant was accused of violating different statutes. (*Ryan, supra,* 138 Cal.App.4th at pp. 368-369, 41 Cal.Rptr.3d 277.) The court explained: "While each statute may represent a different statement of the same offense, it sets out a separate crime, not just-as in the case of section 470-alternate ways in which the *same crime* can be committed. In the case before us, although appellant arguably committed separate acts-signing the checks and then uttering them-she did not, thereby, violate more than one statute, but simply committed acts contained in separate subdivisions of a single statute, all of which were simply different

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ways of violating the statute." (*Id.* at p. 369, 41 Cal.Rptr.3d 277.)

*459 In conceding error in this instance, the People rely primarily on *Neder.* As described above, the defendant in *Neder* was charged with three counts of forgery under section 470 stemming from three credit card purchases. (*Neder, supra,* 16 Cal.App.3d at pp. 849-850, 94 Cal.Rptr. 364.) The defendant argued he could not be prosecuted under the general forgery statute (§ 470) but instead must be prosecuted under the more specific statute for credit card forgeries (§ 484f), relying on a line of cases holding that where a general statute and a specific statute cover the same criminal conduct, the defendant can be convicted only of the specific statute. (See *People v. Ruster* (1976) 16 Cal.3d 690, 698-699, 129 Cal.Rptr. 153, 548 P.2d 353, disapproved on other grounds in *People v. Jenkins* (1980) 28 Cal.3d 494, 503, fn. 9, 170 Cal.Rptr. 1, 620 P.2d 587 [unemployment insurance fraud must be prosecuted under Unemployment Insurance Code section 2102 rather than Penal Code section 470]; *People v. Gilbert* (1969) 1 Cal.3d 475, 479-481, 82 Cal.Rptr. 724, 462 P.2d 580 [welfare fraud must be prosecuted under Welfare and Institutions Code section 11482 rather than the general theft statute, Penal Code section 484]; *In re Williamson* (1954) 43 Cal.2d 651, 654, 276 P.2d 593 [" 'It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment' "]; **868*People v. Swann* (1963) 213 Cal.App.2d 447, 449, 28 Cal.Rptr. 830 [credit card fraud must be prosecuted under former Penal Code section 484a rather than the more general forgery statute, Penal Code section 470].)

In *Neder,* the court found the foregoing line of cases inapplicable. Those cases were premised on a determination that, where the Legislature enacts a special statute covering the same conduct as a general statute, it must have intended to create an exception to application of the general statute. (See *People v. Jenkins, supra,* 28 Cal.3d at pp. 505-506, 170 Cal.Rptr. 1, 620 P.2d 587; *People v. Ruster, supra,* 16 Cal.3d at p. 699, 129 Cal.Rptr. 153, 548 P.2d 353.) However, in *People v. Liberto* (1969) 274 Cal.App.2d 460, 79 Cal.Rptr. 306, the court pointed out that 1967 amendments to the special credit card forgery statute (former section 484a) demonstrated a legislative intent that prosecution under the general forgery statute (§ 470) is no longer precluded. (See Stats.1967, ch. 1395, § 8, p. 3260.)

Relying on *Liberto,* the *Neder* court concluded the defendant was properly prosecuted under section 470, rather than section 484f. (*Neder, supra,* 16 Cal.App.3d at p. 855, 94 Cal.Rptr. 364.) The court explained: "We agree with *Liberto* that the 1967 enactment, which repealed section 484a, added section 484f, and provided '[t]his act shall not be construed to preclude the applicability of any other provision of the criminal law,' expressed a legislative intent to overcome the judicial interpretation theretofore placed on credit card prosecutions to the effect that a person charged with an offense involving a credit card could not be prosecuted under the general statutes if the People so chose." (*Neder, supra,* 16 Cal.App.3d at p. 855, 94 Cal.Rptr. 364, fn. omitted.)

*460 The People read *Neder* to mean a defendant guilty of credit card forgery can be prosecuted *only* under section 470. However, that is not what the court held. The question presented in *Neder* was whether the defendant was properly convicted under section 470, and the Court of Appeal answered that question in the affirmative. However, because the defendant was not also prosecuted under section 484f, there was no occasion to determine whether he could be prosecuted under both provisions.

[6][7][8] An accusatory pleading may charge different statements of the same offense. (§ 954.) As a general rule, "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227, 45 Cal.Rptr.3d 353, 137 P.3d 184 (*Reed*).)

[9] "A judicially created exception to the general rule permitting multiple convictions 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*Reed, supra,* 38 Cal.4th at p. 1227, 45

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Cal.Rptr.3d 353, 137 P.3d 184.)

[10][11] Two tests have traditionally been applied to determine whether one offense is necessarily included within another: the "elements" test and the "accusatory pleading" test. "Under the elements test if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser **869 offense, the latter is necessarily included in the former." (*Reed, supra,* 38 Cal.4th at pp. 1227-1228, 45 Cal.Rptr.3d 353, 137 P.3d 184.)

In *Reed, supra,* 38 Cal.4th at page 1229, 45 Cal.Rptr.3d 353, 137 P.3d 184, the California Supreme Court concluded only the elements test may be applied in determining whether multiple convictions are permitted.

Thus, the question in the present matter is whether section 484f, subdivision (b), the lesser misdemeanor offense charged in count 50, is a necessarily included offense of section 470, subdivision (d). If so, then defendant could not be convicted of both based on the same act.

As described above, section 484f, subdivision (b), is violated where a person, without authorization, "signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction."(§ 484f, subd. (b).) *461 The actus reus of this offense is *signing* the name of another. By contrast, section 470, subdivision (d), can be violated where a person "falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine" any of a number of items, including a "receipt for money or property." (§ 470, subd. (d).) It is readily apparent that section 470, subdivision (d), can be violated without also violating section 484f, subdivision (b). Section 470, subdivision (d), may be violated by forging a signature on one of the indicated documents. However, it may also be violated by uttering, publishing or passing the item, whether or not the person also forged a signature on it. In the latter case, there is no violation of section 484f, subdivision (b).

Of course, in the present matter, the People argued both offenses were committed by virtue of the same act, signing Barbara C.'s name to the charge clip. However, as the State Supreme Court determined in *Reed, supra,* 38 Cal.4th at page 1229, 45 Cal.Rptr.3d 353, 137 P.3d 184, we cannot look beyond the statutory elements of the offenses to determine if one is a necessarily included offense of the other. In this case, under the elements test, section 484f, subdivision (b), is not a necessarily included offense of section 470, subdivision (d). Therefore, defendant was properly convicted on both counts 49 and 50.

V-VI [FN***]

FN*** See footnote *, *ante*.

VII

Multiple Receiving Stolen Property Counts

[12][13] Defendant contends her conviction on three of the four receiving stolen property counts mentioned in the preceding section must be reversed, because the prosecution failed to prove the property subject to those counts was received on different occasions. As noted above, in count 17, defendant was charged with receiving checks belonging to Billy C. on or about December 20, 2004; in count 21, she was charged with receiving Barbara C.'s Discover card on or about December 20, 2004; in count 35, she was charged with receiving holiday ornaments and decorations belonging to Billy C. on and between November 28, 2004 and December 29, 2004; and in count 46, she was charged with receiving Barbara C.'s Mervyn's credit card on or about December 9, 2004.

[14] Where a defendant receives multiple articles of stolen property at the same time, this amounts to but one offense of **870 receiving stolen property. *462 (*People v. Lyons* (1958) 50 Cal.2d 245, 275, 324 P.2d 556; *People v. Smith* (1945) 26 Cal.2d 854, 858-859, 161 P.2d 941; *People v. Willard* (1891) 92 Cal. 482, 488, 28 P. 585.) As the California Supreme Court explained in *Smith,* this circumstance is comparable to the crime of larceny, "which authorities hold that the theft of several articles at one and the same time constitutes but one

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offense although such articles belong to several different owners." (People v. Smith, supra, 26 Cal.2d at p. 859, 161 P.2d 941.)

The People concede that counts 17 and 21 are duplicative, as they concern checks and a credit card that were found in the Mitsubishi on December 20, 2004, and, hence, were possessed by defendant at the same time. However, the People argue conviction on the other counts was proper, because they were committed on different occasions.

Penal Code section 496, subdivision (a), reads in pertinent part: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year...."

Despite its common moniker of receiving stolen property, this offense may be committed in a number of ways, to wit, buying, receiving, concealing, selling, withholding, or aiding in concealing, selling, or withholding stolen property.

[15] The People contend counts 17 and 21 are duplicative because the property subject to those counts was "possessed" by defendant at the same time. However, mere possession is not one of the means by which this offense can be committed. Of course, *possession* may be viewed as another way of saying the property was *withheld* or *concealed* from its rightful owner. Nevertheless, the mere fact the checks and credit card were withheld or concealed from the rightful owner by defendant at the same time, i.e., the day they were found in the Mitsubishi, does not preclude conviction for multiple counts of receiving stolen property. If the evidence showed those items had been received by defendant on different occasions, presumably multiple convictions would be permitted.

It is often the case with theft-related offenses that the People do not have direct evidence of the theft of the victims' property. Although circumstantial evidence of a defendant's opportunity to steal the items and later possession of them would suggest he was the thief, it is a safer bet to prosecute for receiving stolen property.

*463 That appears to be the case here. Circumstantial evidence of defendant's opportunity to steal property while working for Billy C. coupled with her later possession of that property suggests she was the thief. Nevertheless, it is conceivable someone else stole the property and passed it on to defendant. Therefore, with uncontradicted evidence of defendant's possession of the property under circumstances suggesting it had been stolen by someone, the People may have considered prosecution for receiving stolen property the more prudent course.

As with the lack of direct evidence that defendant stole the property, there is nothing in the record to suggest the People had any evidence as to when defendant came into possession of it. Counts 17 and 21 alleged receipt of stolen property on or about December 20, 2004. This was the day the property was discovered by the police. However, presumably it was received by defendant some time earlier. **871 On the other hand, December 20 would be a day on which defendant withheld or concealed the property from its rightful owner. Count 46 alleged receipt of the Mervyn's credit card on or about December 9, 2004, the day it was used by defendant to purchase merchandise. Count 35 alleged receipt of the holiday ornaments on and between November 28, 2004 and December 29, 2004. Evidence presented at trial established that defendant gave her sister a key to a storage unit toward the end of November 2004 and the holiday ornaments were found in the unit on December 29, 2004.

Defendant was charged in counts 17, 21, 35, and 46 in the alternative with buying, receiving, concealing, selling, withholding, or aiding in concealing or withholding property. No evidence was presented as to defendant buying, receiving, or selling any of the property. Thus, on each count, defendant's guilt turned on when she concealed or withheld the property from its owner. In her argument to the jury, the prosecutor explained these counts were based on defendant's possession of the property, i.e., her concealing or withholding the property, on the indicated days.

As with counts 8 and 18 discussed above, the People

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were required to prove defendant concealed or withheld the property subject to counts 17, 21, 35, and 46 at the time alleged. They satisfied that burden. They were not required to prove when defendant received the property, as that was not their theory of liability. Because the evidence showed defendant possessed both the checks of Billy C. (count 17) and the Discover card of Barbara C. (count 21) on or about December 20, 2004, she could not be convicted on both offenses. (*People v. Smith, supra,* 26 Cal.2d at pp. 858-859, 161 P.2d 941; *People v. Lyons, supra* 50 Cal.2d at p. 275, 324 P.2d 556; *People v. Willard, supra,* 92 Cal. at p. 488, 28 P. 585.) Her conviction on count 21 must therefore be reversed.

***464 VIII**

Unanimity Language of Various Instructions

[16] In connection with counts 17, 21, 35 and 46, the jury was instructed on the offense of receiving stolen property pursuant to a modified version of CALCRIM No. 1750 as follows:

"The defendant is charged in Counts 17, 21, 35, 46 with receiving stolen property.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant received, concealed, or withheld from its owner property that had been stolen;

"AND

"2. When the defendant received, concealed or withheld the property, she knew that the property had been stolen.

"Property is stolen if it was obtained by any type of theft, or by burglary.

"To receive property means to take possession and control of it.

"Mere presence near or access to the property is not enough.

"Two or more people can possess the property at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

"*You may not find the defendant guilty unless you all agree that the People have proved the defendant received, concealed or withheld from its owner at least one item of property that had been stolen and you all agree on which item of property had been received, concealed or withheld.*" (Italics added.)

**872 Defendant contends the final paragraph of the instruction was inadequate as a unanimity requirement, because "it allowed the jury to convict [her] of all four counts of receiving stolen property even if the jury only unanimously agreed that [she] had received, concealed or withheld from its owner one, rather than four, items of stolen property."

[17] *465 Defendant failed to object to the instruction. As explained above, failure to object to instructional error forfeits the objection on appeal unless the defendant's substantial rights are affected. (§ 1259; *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1192-1193, 36 Cal.Rptr.2d 235, 885 P.2d 1.) "Substantial rights" are equated with errors resulting in a miscarriage of justice under *People v. Watson, supra,* 46 Cal.2d 818, 299 P.2d 243. (*People v. Arredondo, supra,* 52 Cal.App.3d at p. 978, 125 Cal.Rptr. 419.)

[18] The forfeiture rule applies to claims based on statutory violations, as well as claimed violations of fundamental constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198, 17 Cal.Rptr.3d 633, 95 P.3d 896.) "The reasons for the rule are these: ' "In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." ' " (*Ibid.*) "To consider on appeal a defendant's claims of error that were not objected to at trial 'would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his

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trial secure in the knowledge that a conviction would be reversed on appeal." ' " (*Ibid.*)

Defendant contends the last paragraph of the instruction should have been modified to read: "You may not find the defendant guilty of count 17, 21, 35, and/or 46 unless you all agree as to each such count that the People have proved that the defendant received, concealed or withheld from its owner at least one item of property that had been stolen, and you all agree on which item of property has been received, concealed or withheld as to each count." However, if defendant had brought this to the court's attention, it would have been a simple matter to make the requested modifications if warranted. However, defendant deprived the prosecution and the court an opportunity to do so.

In our view, defendant's substantial rights were not affected by the instruction as given. The jury was instructed with CALCRIM No. 3515 that each count is a separate crime and must be considered separately. In the instruction on receiving stolen property, the jury was told defendant was charged with four counts of receiving stolen property and the instruction proceeded to define the requirements for conviction on one such offense. The language of the final paragraph continued this format. It did not direct the jury to convict on all four counts if the elements for one count are satisfied. Because defendant's substantial rights were not affected, her failure to object forfeited any claim of error.

*466 Defendant raises an identical claim of error as to the instructions given on the offenses of forgery under section 470, subdivision (d), unlawfully acquiring or retaining an access card in violation of section 484e, subdivision (c), and unlawful possession of a hypodermic needle or syringe in violation of Business and Professions Code section 4140. However, as to each instruction,**873 defendant failed to object, and her substantial rights were not adversely affected thereby. Therefore, for the same reasons stated above, her claim of error is forfeited.

IX

Ineffective Assistance

[19] Defendant contends her counsel's failure to object to the unanimity language in the instructions discussed in the preceding section amounted to ineffective assistance. According to defendant, "[i]f this court agrees with the merits of [defendant's] arguments [in the preceding section], but concludes the issues are waived [*sic*] based on lack of specific objections, then a further conclusion of ineffective assistance of counsel must inexorably follow."

Actually, the only thing that inexorably follows a finding that an argument on appeal has been forfeited by counsel's failure to object is a claim of ineffective assistance. This has increasingly become the favored means by which appellate defense counsel attempt to avoid any and all claims of forfeiture. In effect, if an issue was forfeited, then counsel's representation must have been deficient, and the issue must be considered anyway to determine if the ineffective assistance resulted in prejudice. However, that is not the applicable standard.

[20][21] Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed.2d 674, 691-692; *People v. Pope* (1979) 23 Cal.3d 412, 422, 152 Cal.Rptr. 732, 590 P.2d 859.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, 233 Cal.Rptr. 404, 729 P.2d 839.) " '[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness ... under prevailing professional norms." [Citations.] Second, he must also show *467 prejudice flowing from counsel's performance or lack thereof.' " (*In re Avena* (1996) 12 Cal.4th 694, 721, 49 Cal.Rptr.2d 413, 909 P.2d 1017.)

[22][23][24] "[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel." (*People v. Boyette* (2002) 29 Cal.4th 381, 433, 127 Cal.Rptr.2d 544, 58 P.3d 391.) If, as here, the record fails to show why counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation.

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(*People v. Huggins* (2006) 38 Cal.4th 175, 206, 41 Cal.Rptr.3d 593, 131 P.3d 995.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*People v. Kelly* (1992) 1 Cal.4th 495, 520, 3 Cal.Rptr.2d 677, 822 P.2d 385.)

In the present matter, after setting forth the basic standard for ineffective assistance, defendant's argument consists of the following: "Since there is a reasonable probability that verdicts more favorable to [defendant] would have resulted if [defendant]'s counsel had acted in a reasonably competent manner by objecting to the erroneous instructions, this court should consider the instructional arguments raised herein, and reverse [defendant]'s convictions on counts 3, 8, 9, 12, 16, 17, 18, 21, 23, 25, 28-46, 49 and 50. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257, 259 Cal.Rptr. 491, 774 P.2d 164; *Strickland v. Washington, supra,* 466 U.S. at p. 694, 104 S.Ct. 2052.)"

**874 This argument does not even attempt to explain how counsel's failure to object fell below an objective standard of reasonableness or how the failure to object resulted in prejudice. We will not address a claim that defendant has failed to develop. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196, fn. 12, 64 Cal.Rptr.3d 163, 164 P.3d 590; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19, 32 Cal.Rptr.2d 762, 878 P.2d 521.) In this instance, defendant's argument merely presumes counsel's failure to object fell below an objective standard of reasonableness and she was prejudiced thereby. Defendant also neglects to argue how there could be no satisfactory explanation for counsel's failure to object. This will not suffice.

X-XVI FN†

FN† See footnote *, *ante*.

*468 DISPOSITION

The judgment is reversed as to counts 5 and 21 and affirmed as to all other counts. The sentences on counts 2, 20, 47 and 50 are stayed pursuant to section 654. The result is an overall reduction of 16 months in defendant's aggregate sentence. The trial court is directed to correct the abstract of judgment to reflect the foregoing and to reflect that defendant was convicted on count 47 of violating section 530.5, subdivision (a), and to reflect the sentence imposed on count 51. The trial court is further directed to forward the corrected abstract to the Department of Corrections and Rehabilitation.

We concur: DAVIS, Acting P.J., and CANTIL-SAKAUYE, J.
Cal.App. 3 Dist.,2008.
People v. Mitchell
164 Cal.App.4th 442, 78 Cal.Rptr.3d 855, 08 Cal. Daily Op. Serv. 8306, 2008 Daily Journal D.A.R. 9972

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THE PEOPLE, Respondent,
v.
I. W. ROBINSON, Appellant.
Crim. No. 1562.

District Court of Appeal, First District, Division 1, California.
July 12, 1930.

HEADNOTES

(1) CRIMINAL LAW--DUE PROCESS--NOTICE OF CHARGE--PLEADING--CONSTITUTIONAL LAW.
Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense, and the state has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states.
See 7 **Cal. Jur.** 932.
(2) ID.--PROCEDURE--STATUTORY CONSTRUCTION--LARCENY--EMBEZZLEMENT--OBTAINING PROPERTY BY FALSE PRETENSES--THEFT.
The amendment of section 484 of the Penal Code in connection with other cognate legislation, such as amendments to sections 951 and 952 of said code, was designed to simplify procedure, and its effect is to merge the former crimes of larceny, embezzlement and obtaining property by false pretenses into one crime of theft.

(3) ID.--ONCE IN JEOPARDY--PLEADING--RIGHT TO DEFEND--CONSTITUTIONAL LAW.
There is nothing in the legislation amending sections 484, 951 and 952 of the Penal Code which deprives an accused of the right to appear and defend under section 13 of article I of the Constitution, or which supports the contention that a judgment based upon pleadings in the statutory form would be insufficient protection against another prosecution.

(4) ID.--PLEAS--IDENTITY OF OFFENSE--PAROL EVIDENCE.
The identity of the offense involved in the plea of a former conviction or acquittal ultimately rests in parol proof and may be established even though the pleadings be alike.

(5) PLEDGE--LOANS--STOCK--TITLE--LIENS.
Where stock is pledged to secure a loan, the general property and title remain in the pledgor, subject only to a lien in favor of the pledgee for the amount of his debt, and this notwithstanding an apparent transfer of title to the pledgee or that the owner under such circumstances would be estopped from asserting title against an innocent purchaser from the pledgee.
See 6 **Cal. Jur.** 816.
(6) CRIMINAL LAW--GRAND THEFT--PLEDGE--WRITTEN CONTRACT--INTENTION--PAROL EVIDENCE.
In a prosecution wherein the pledgee is charged with grand theft, the State not being a party to the pledge transaction, parol evidence is admissible to show the intention of the parties notwithstanding their written agreement.

(7) ID.--LARCENY--EMBEZZLEMENT--OBTAINING PROPERTY BY FALSE PRETENSES--PROOF.
Section 484 of the Penal Code merges the former crimes of larceny, embezzlement and obtaining property by false pretenses into the one crime of theft, and proof of any one of them is sufficient to sustain the charge of theft.

(8) ID.--PLEDGE--BAILMENT--FRAUD--INTENT.
Where there is a transfer of possession merely or of some special property by way of pledge or bailment which has been secured by fraud with a present felonious intent to convert the property so acquired, the offense is larceny.
Appropriation of property after obtaining possession by fraud as larceny, note, 26 A. L. R. 381. See, also, 15 **Cal. Jur.** 899; 17 **R. C. L.** 13 (6 **Perm. Supp.**, p. 4217).
(9) ID.--OBTAINING PROPERTY BY FALSE PRETENSES--MISREPRESENTATIONS--LARCENY BY FRAUD OR TRICK--PROOF--INTENT.

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To constitute the crime of obtaining property by false pretenses, the misrepresentations must be of an existing or a past fact, but such proof is not essential to a conviction for larceny by fraud or trick, and it is sufficient that the owner, induced by the fraudulent promises of the accused, delivered possession without the intention of parting with title, and that the accused, having obtained possession with the preconceived intention of appropriating the property without performing his promise, did subsequently convert it to his own use.

See 12 **Cal. Jur.** 452; 11 **R. C. L.** 831 (4 **Perm. Supp.**, p. 3005).

(10) ID.--GRAND THEFT--VENUE--PLEDGE OF STOCK--MISREPRESENTATIONS-- CONVERSION--LARCENY.

In this prosecution for grand theft in converting stock pledged with defendant, where the false representations that the stock pledged as security had declined in value and that it was necessary to deposit additional security were made in the county of trial, but the stock involved in three of the counts was delivered and converted in another county, as to such counts, the evidence was insufficient to show the commission of the crime of larceny in the county of trial, and the venue should have been laid in the other county.

(11) ID.--LARCENY--FRAUD--EVIDENCE.

Fraud is not a necessary element of the crime of larceny, although evidence of fraud is admissible for the purpose of showing that the act of taking was without the consent of the owner and was a trespass.

(12) ID.--OBTAINING PROPERTY BY FALSE PRETENSES--MISREPRESENTATIONS--VENUE--PROOF--PASSAGE OF TITLE.

A false representation is a necessary element of the crime of obtaining property by false pretenses, and the venue may be laid either in the county where the representation was made or the property delivered, but in order to prove the offense it is necessary to show that title to the property passed to the accused; and in this prosecution for grand theft in converting stock pledged with defendant, the evidence as to three of the counts did not show the commission of this offense where title did not pass to defendant.

See 12 **Cal. Jur.** 462; 11 **R. C. L.** 854 (4 **Perm. Supp.**, p. 3011).

(13) ID.--VENUE--MISREPRESENTATIONS--DELIVERY OF STOCK--CONVERSION.

In such prosecution, where, as to one count, no false representations or promises were made in the county of trial, and the property was not delivered or converted there, and no communications passed between defendant and the pledgor in that county except two letters and an offer by radio, which contained no false representations or promises, all representations and promises having been made in the county where the stock was delivered and converted, the venue should have been laid in the latter county.

(14) ID.--EVIDENCE OF SIMILAR TRANSACTIONS--KNOWLEDGE--INTENT--DESIGN.

Evidence of similar transactions is admissible to show guilty knowledge or intent where the transactions contain the material elements of the main case; and such evidence is also admissible to establish a definite prior design or system which included the doing of the act charged as part of its consummation, and for that purpose it may be shown that defendant made substantially the same representations to other persons, and it is not essential that such representations shall have resulted in the commission of a crime, it being sufficient if they tend to prove a scheme of the defendant which included the acts charged.

See 12 **Cal. Jur.** 484; 11 **R. C. L.** 867 (4 **Perm. Supp.**, p. 3012).

(15) ID.--GRAND THEFT--CONVERSION OF PLEDGED STOCK--LOAN NEGOTIATIONS--EVIDENCE.

In this prosecution for grand theft in converting stock pledged with defendant, evidence of similar promises and representations made to others was properly admitted, and testimony as to the details of the negotiations leading to the making of their loans, by witnesses who did not testify as to any false representations, while immaterial, was not prejudicial to defendant.

(16) ID.--ACCOMPLICE--CORROBORATION--EVIDENCE.

In such prosecution, there was sufficient corroboration of an accomplice's testimony that he was instructed by defendant in the presence of the latter's private secretary that the stock pledged was not to be sold unless its market value should fall fifteen per cent, in which case before a sale the borrowers should receive twenty-four hours' notice, and that he should so advise the agents and prospective borrowers, where his testimony as to a conversation to the

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same effect between defendant and an agent was corroborated by the agent, and a former employee testified that she was told by defendant to receive instructions from his private secretary, who told her that the securities deposited by borrowers were held in defendant's vault.

(17) ID.--ACCOUNT BOOKS--BUSINESS ENTRIES--EVIDENCE.
In such prosecution, the books of certain stockbrokers were properly admitted in evidence to show that the pledged stock had been sold and converted by defendant, where employees of the brokers were sworn and it was shown that the books constituted the brokers' records of the stock transactions with their customers and that the entries were made by the witnesses or under their supervision in the regular course of business.

(18) ID.--CROSS-EXAMINATION--RELATIONS WITH ACCOMPLICE--EVIDENCE.
In such prosecution, where defendant denied that he told the accomplice and others to represent to prospective borrowers that the stock pledged would not be sold, and on cross-examination the prosecuting attorney, to show defendant's relations with the accomplice and the others, inquired as to the salary paid the accomplice and whether defendant was the sole proprietor of the loan business, while the subject of the inquiry did not appear to have been material, the questions were not improper or prejudicial.

(19) ID.--COPY OF LETTER--FAILURE TO LAY FOUNDATION--ABSENCE OF PREJUDICE.
In such prosecution, defendant was not prejudiced by the failure to first lay a foundation for the admission of a photographic copy of a letter which defendant admitted was signed by him, and which tended to contradict his testimony that his agents were not instructed to make certain representations to prospective borrowers as claimed by the accomplice, where although it was not shown that the letter was mailed, it sufficiently appeared from defendant's testimony that the correspondence was customarily prepared, and inferentially that it was subsequently mailed, by his employees.

(20) ID.--PRINCIPAL AND AGENT--ACCOMPLICE--MISREPRESENTATIONS--KNOWLEDGE-- AUTHORIZATION.
It is not necessary, in order to hold the principal criminally liable, that false representations made by his agent should have been directly authorized by him, it being sufficient if he consented thereto or knowingly and intentionally aided, advised or encouraged the acts of his agent; and in such prosecution there was no error in permitting defendant's agents to testify that they were instructed to make certain representations, although they did not testify that he directly instructed them to do so, where the evidence supported the conclusion that their representations were consented to and encouraged by him.

(21) ID.--CONVERSION OF PLEDGED STOCK--REPAYMENT TO PLEDGORS--EVIDENCE.
In such prosecution evidence that prior to the seizure of defendant's books by the corporation commissioner and the filing of a petition in bankruptcy against him, the borrowers upon payment of their notes received their pledged stock or the equivalent in stock or cash, was clearly irrelevant and was properly excluded.

(22) ID.--MISCONDUCT--ADMONISHMENT OF JURORS--ABSENCE OF PREJUDICE.
In such prosecution the remarks of the prosecuting attorney did not constitute prejudicial misconduct, where upon objection in each instance the jury was admonished to disregard the remarks, and they were instructed to the same effect at the conclusion of the trial, and the remarks excepted to were not such that their possible effect could not have been removed by an admonition.

(23) ID.--REFUSED INSTRUCTIONS COVERED BY THOSE GIVEN.
In such prosecution, there was no error in refusing to give instructions requested by defendant where the questions involved therein were fully and fairly presented in other instructions given by the court.

(24) ID.--LARCENY BY TRICK AND DEVICE--FUTURE PROMISES--INSTRUCTIONS.
In such prosecution, there was no error in instructing the jury that larceny by trick and device might consist of future promises.

(25) ID.--CONVERSION OF PLEDGED STOCK--INTENT--LARCENY--INSTRUCTIONS.
In such prosecution, there was no error in instructing the jury that if defendant's agreements with the borrowers were a trick and device used by him as a

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means of obtaining possession of the securities for the purpose and with the intention of feloniously appropriating the same to his own use, then he had no right to do the acts complained of, which was no more than a charge that if possession was obtained in the manner stated title did not pass, and the subsequent conversion of the property constituted larceny.

(26) ID.--PRINCIPAL AND AGENT--ACCOMPLICES--AUTHORIZATION--INSTRUCTIONS.
If the acts and statements of a principal's agents and employees are authorized, it is immaterial whether the authority is given directly or indirectly; and in such prosecution there was no error in instructing the jury that where a defendant is charged with crime, neither the acts nor statements of his agents or employees are chargeable against him unless such acts and statements are authorized by him, without stating that such acts and statements must be directly authorized by him.

(27) ID.--CONSPIRACY--EVIDENCE--INSTRUCTIONS--PRESUMPTIONS.
While instructions not applicable to the facts are erroneous, to constitute grounds for reversal they must have resulted in prejudice to the defendant, and prejudice is not presumed; and in such prosecution, defendant was not prejudiced by instructions relating to conspiracy, where there was some evidence tending to prove a conspiracy, and, after carefully stating the facts necessary to constitute conspiracy, the court charged that defendant would not be responsible for the acts or declarations of either of his codefendants unless a conspiracy existed or such acts or declarations were authorized by him.
See 8 Cal. Jur. 628, 629.

(28) ID.--LARCENY--CONVERSION OF PLEDGED STOCK--PASSAGE OF TITLE--PROOF-- EVIDENCE--INTENT.
In such prosecution, title to the pledged stock did not pass to defendant and there was no failure to prove the offense of larceny, where the promissory notes, as well as the testimony, showed that the stock was pledged, and defendant's power to sell under certain circumstances was not equivalent to a transfer of title to him, and the evidence showed that his conversion of the pledged stock was the culmination of a fraudulent scheme whereby he obtained possession with the felonious intention of appropriating the property.

SUMMARY

APPEAL from a judgment of the Superior Court of Alameda County and from orders denying a new trial. Homer R. Spence, Judge. Reversed in part and affirmed in part.

The facts are stated in the opinion of the court.

COUNSEL
Milton T. U'Ren for Appellant.
U. S. Webb, Attorney-General, and W. R. Augustine, Deputy Attorney-General, for Respondent.

THE COURT
.--Appellant Robinson, A. N. Jackson and W. S. Himmelright were jointly charged by an indictment with ten separate offenses of grand theft. Jackson and Himmelright entered pleas of guilty to one of the counts of the indictment and Robinson pleaded not guilty to each count. A jury found the latter guilty as charged upon nine of the counts and upon the other returned a verdict of petty theft. The appeal is from the judgments entered thereon, and the orders denying motions for a new trial.

The counts in the indictment were identical in form except as to the names of the persons whose property was alleged to have been taken and the description of the same, the allegations of the first count being as follows: "The grand jury of the county of Alameda hereby accuses I. W. Robinson, A. N. Jackson, and W. S. Himmelright of a *217 felony, to wit, grand theft, a violation of section 484 of the Penal Code of California, in that on or about the 11th day of June, 1928, at the said county of Alameda, State of California, they, the said I. W. Robinson, A. N. Jackson, and W. S. Himmelright, unlawfully took the property of one Gabriella Morello consisting of 30 shares of Bank of Italy stock, certificate No. B-34,302, of the reasonable value of Sixty-three Hundred Dollars ($6300.00) more or less lawful money of the United States."

A number of grounds for reversal are urged, the first being that sections 484 and 490a, 951 and 952 of the Penal Code, under which appellant was charged and convicted, contravenes certain provisions of section 13 of article I of the Constitution in that the pleading required by the statute is insufficient to inform a defendant of the nature of the crime charged, so that he

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may be prepared to defend, or, upon an acquittal or conviction, to protect him against being again placed in jeopardy for the same offense.

Section 950 of the Penal Code requires that the indictment contain a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended, and section 952 of the same code provides that in charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. [1] Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him (Rogers v. Peck, 199 U. S. 425 [50 L. Ed. 256, 26 Sup. Ct. Rep. 87]; Garland v. Washington, 232 U. S. 642 [58 L. Ed. 772, 34 Sup. Ct. Rep. 456] to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense (United States v. Simmons, 96 U. S. 360 [24 L. Ed. 819]). The state, however, has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states (Ex parte Reggel, 114 U. S. 642, 651 [29 L. Ed. 250, 5 Sup. Ct. Rep. 1148, see, also, Rose's U. S. Notes]), and in People v. Nolan, 144 Cal. 75 [77 Pac. 774], where the defendant, an accomplice, was charged in the information as a principal in conformity with section 971 of the Penal Code, it was held that the *218 pleading was sufficient notice of the nature of the accusation to satisfy the requirements of the federal Constitution. The same objection to an information which followed the provisions of section 951 of the same code was made and overruled in People v. Burdg, 95 Cal. App. 259 [272 Pac. 816], and it was held in the following cases that an indictment charging grand theft in the statutory form gave the defendant all the information necessary as to the nature of the accusation and that proof of any one of the species of theft named in section 484 of the Penal Code is sufficient to sustain the charge (People v. Plum, 88 Cal. App. 575 [263 Pac. 862, 265 Pac. 322]; People v. Campbell, 89 Cal. App. 646 [265 Pac. 364]; People v. Lalor, 95 Cal. App. 242 [272 Pac. 794]; People v. Wickersham, 98 Cal. App. 502 [277 Pac. 121]).[2] The amendment to section 484 (Stats. 1927, p. 1046) in connection with other cognate legislation, such as amendments to sections 951 (Stats. 1927, p. 1043) and 952 (Stats. 1927, p. 1043; Stats. 1929, p. 303) of the Penal Code, was designed to simplify procedure (People v. Myers, 206 Cal. 480 [275 Pac. 219]). And the effect of section 484 is to merge the former crimes of larceny, embezzlement, and obtaining property by false pretenses into the one crime of theft (People v. Plum, supra; People v. Palmer, 92 Cal. App. 323 [268 Pac. 417]).

[3] There is nothing in this legislation which deprives the accused of his rights under the section of the article of the Constitution upon which appellant relies, namely, the right to appear and defend, or which supports the contention that a judgment based upon pleadings in the statutory form would be an insufficient protection against another prosecution. [4] Moreover, the identity of the offense involved in the plea of former conviction or acquittal rests ultimately in parol proof and may be thus established even though the pleadings be alike. (People v. Faust, 113 Cal. 172 [45 Pac. 261]; People v. Foster, 198 Cal. 112 [243 Pac. 667].)

The evidence shows that some time previous to March, 1928, appellant, under the name of Colonial Loan and Discount Company, entered upon the business of loaning money on stocks and bonds, the amount loaned being usually about sixty per cent of the security. The facts of the transaction alleged in the first count of the indictment furnish an *219 example of his methods. On June 11, 1928, Gabriella Morello borrowed from appellant $3,780, for which she gave her note. The note was made payable to Colonial Loan and Discount Company, one year after date, with interest, which, with the brokerage charges, was deducted in advance. As security she delivered on the same date thirty shares of Bank of Italy stock, the market value of which on the day of delivery was $6,300. The net amount of the loan to Mrs. Morello, namely, $3,326, was paid to her on June 15, 1928, but in the meantime appellant had sold the stock pledged for the sum of $6,527, which was $227 more than its market value on the date it was deposited. A few days thereafter Mrs. Morello was induced to deliver to appellant as additional security another certificate of twenty-five shares in the same banking corporation. Thereafter she demanded the return of this certificate, but a redelivery was refused unless she deposited other security. In compliance with this requirement she delivered to appellant on July 2, 1928, fifty shares of stock of Bancitaly Corporation, whereupon a certificate for twenty-five shares of Bank of Italy stock was delivered to her. On July

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3, 1928, appellant sold the Bancitaly Corporation stock for $6,066. With the above exception, none of the stock pledged or the proceeds therefrom were returned to Mrs. Morello. The same course was followed by appellant in his dealings with other borrowers as alleged in the indictment, and evidence of similar transactions other than those alleged was admitted for the purpose of showing design or system. The notes executed by the several borrowers each contained the following provisions respecting the security which was described therein: "I hereby assign, deliver, and pledge with the said payee as collateral security for the payment of this note the following personal property. ... "

The notes also provided that if in the judgment of the payee the market price of the stock pledged should drop fifteen per cent the payee should have the right to demand further security and if the same was not forthcoming to sell the pledge after twenty-four hours' written notice. It was also stipulated therein that all securities deposited as collateral, might be sold, pledged, transferred or assigned by the payee at any time, the borrower ratifying anything the payee might do in that behalf. In each instance the stock *220 pledged was sold immediately without notice, and for more than the amount of the loan, and in several instances the borrowers, who were ignorant of the previous sale of their stock, were induced to deposit more security upon the representation that if they refused a sale would be made. According to their testimony, the borrowers were promised that the pledged stock would not be sold but returned when the loan was paid, and each of them testified that their stock was delivered in reliance upon this promise. None, however, was returned, nor was any part of the proceeds paid to the borrowers mentioned in the indictment.

Appellant contends that the facts show that title to the stock passed to him, that any promise with respect thereto was of something in the future, and that consequently there was a failure to prove the commission of any crime.

As the court said in *People v. Tomlinson*, 102 Cal. 19 [36 Pac. 506, 507]: "On the facts there must often be a very narrow margin between cases of larceny, obtaining money by false pretenses, an embezzlement, because the character of the crime depends upon the secret intention of the parties, which is often difficult to ascertain; but so far as the law is concerned, the principles upon which the question of guilt or innocence is to be determined are plain. ... Where one honestly receives the possession of goods upon a trust, and after receiving them fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by false pretenses. But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession and not with the title, the offense is larceny." And as held in the same case, the questions whether the defendant feloniously took the property or the owner intended to part with title are for the jury. [5] It is manifest from the documentary and oral evidence in the present case that the stock was pledged by the borrowers to appellant. In such cases the general property and title remain in the pledgor, subject only to a lien in favor of the pledgee for the amount of his debt (*Wright v. Ross*, 36 Cal. 414; ***221** *Brewster v. Hartley*, 37 Cal. 15 [99 Am. Dec. 237]). And this notwithstanding an apparent transfer of legal title to the pledgee (*Cross v. Eureka Lake etc. Canal Co.*, 73 Cal. 302 [2 Am. St. Rep. 808, 14 Pac. 885]; *Sparks v. Caldwell*, 157 Cal. 401 [108 Pac. 276]), or that the owner under such circumstances would be estopped from asserting title against an innocent purchaser from the pledgee (*Fowles v. National Bank of California*, 167 Cal. 653 [140 Pac. 271]).[6] Moreover, the state not being a party to the transaction, parol evidence is admissible to show the intention of the parties notwithstanding their written agreement (*Smith v. Moynihan*, 44 Cal. 53; *People v. Eiseman*, 78 Cal. App. 223 [248 Pac. 716).[7] As stated, section 484 of the Penal Code merges the former crimes of larceny, embezzlement and obtaining property by false pretenses into the one crime of theft, proof of any one being sufficient to sustain the charge (*People v. Plum, supra*), [8] and the rule is well settled that where there is a transfer of possession merely or of some special property by way of pledge or bailment which has been secured by fraud with a present felonious intent to convert the property so acquired, the offense is larceny (*People v. Raschke*, 73 Cal. 378 [15 Pac. 13]; *People v. Campbell*, 127 Cal. 278 [59 Pac. 593]).[9] As appellant contends, to constitute the crime of obtaining property by false pretenses, the misrepresentations must be of an existing or a past

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fact (*People v.* Green, 22 Cal. App. 45 [133 Pac. 334]; *People v.* Walker, 76 Cal. App. 192 [244 Pac. 94]; *People v.* White, 85 Cal. App. 241 [259 Pac. 76]), but such proof is not essential to a conviction of larceny by fraud or trick. It was held in the following cases to be sufficient that the owner induced by the fraudulent promises of the accused (which were in some instances to apply the property to a purpose contemplated by the owner and in others to pay its agreed price on delivery) delivered possession to the accused without the intention of parting with title, and that the latter, having obtained possession with the preconceived intention of appropriating the property without performing his promise, did subsequently convert it to his own use (*People v.* DeGraaff, 127 Cal. 676 [60 Pac. 429]; *People v.* Grider, 13 Cal. App. 703 [110 Pac. 586]; *People v.* Schenone, 19 Cal. App. 280 [125 Pac. 758]; *People v.* Sing, 42 Cal. App. 385 [183 Pac. 865]; *People v.* *222Miller, 64 Cal. App. 330 [221 Pac. 409]; *People v.* Edwards, 72 Cal. App. 102 [236 Pac. 944, 948]).

[10] It is further urged that the venue of the offenses alleged in counts 6, 7, 8 and 9 of the indictment did not lie in Alameda County. The first three counts alleged the theft of the property of Thomas Bava, consisting of shares of stock in three corporations, which, according to the testimony, was pledged by the owner as additional security to secure the loans from appellant. The original security in each instance was sold by the latter on the day following its receipt for more than the amount of the loan, and the stock which is the subject of the charges in the indictment was subsequently delivered to appellant following a letter and a telephone message which were received by Bava in Alameda County from appellant's agent. The agent stated that the market price of the stock originally pledged had declined, and that unless further security was furnished the stock would be sold by appellant. It was manifestly made for the fraudulent purpose of inducing Bava to part with additional shares, and it is a fair conclusion from the testimony that it had that effect. Appellant claims, however, that this stock having been delivered in San Francisco and converted there, if at all, the venue should have been laid in this county. This contention must, we think, be sustained, as the evidence was clearly insufficient to show the commission of the offense of larceny in Alameda County and this notwithstanding false representations were made there. As the court said in *People v. Edwards, supra*: "The taking, in order to support a charge of larceny, must be against the will of the owner or at least without his consent. In other words, the act of taking must be a trespass against the owner's possession. Though the taking must be against the will of the owner or a trespass to his possession, still an actual trepass or actual violence is not necessary. Fraud may take the place of force. ... In such case the fraud vitiates the transaction, and the owner is deemed still to retain a constructive possession of the property." Or where possession is obtained by the accused upon the false and fraudulent representation that it is to be used for a special purpose, title still remains in the owner (*People v.* Solomon, 75 Cal. App. 9 [241 Pac. 931]).*223

[11] Although evidence of fraud is admissible for the purpose of showing that the act of taking was without the consent of the owner, that is to say, was a trespass, fraud is not a necessary element of the crime of larceny, and in the transaction set forth in the three counts in question, all of the acts which would constitute that offense occurred in San Francisco.

[12] Nor does the evidence adduced in support of these counts show the commission in Alameda County of the offense of obtaining property by false pretenses. While a false representation is a necessary element of the latter crime, and the venue of the offense may be laid either in the county where the representation was made or the property delivered (*People v.* Bocchio, 80 Cal. App. 138 [251 Pac. 672]) in order to prove the offense it is necessary to show that title to the property passed to the accused (*People v. Tomlinson, supra;* People v. Delbos, 146 Cal. 734 [81 Pac. 131]; *People v.* Shwartz, 43 Cal. App. 696 [185 Pac. 686]), which here, as shown by the evidence, was not the case.

[13] As to the offense charged in the ninth count, there were no false representations or promises made in Alameda County, nor was the property the subject of the alleged theft delivered or converted there. It appears that Lily H. Hughes, who resided in Oakland, following an offer to make loans without interest to the authors of letters commending a radio program broadcasted by appellant and the receipt of two letters from his office in San Francisco offering her a loan for one year without interest, visited the office. There, following negotiations, she received a loan from appellant and delivered to him the stock described in the indictment. With the exception of the offer by radio and the letters mentioned, which con-

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tain no false representations or promises, no communications passed between appellant and Mrs. Hughes in Alameda County, and all promises or representations leading to the delivery of her stock were made in San Francisco. In view of these facts, appellant's contention that the venue of the offense alleged in this count should also have been laid in the latter county must be sustained.

Several witnesses who had borrowed money from the Colonial Loan and Discount Company and pledged stock as *224 security were permitted over objection to testify with relation to their transactions with the concern. Some testified to promises that their stock would not be sold, others that they were induced to pledge more stock on the representation that the market price of that originally pledged had declined, when in fact it had already been sold. Other witnesses related only the details of negotiations leading to the making of their loans and failed to testify that any false representations were made to them. The admission of this testimony is assigned as error. [14] Evidence of similar transactions is admissible to show guilty knowledge or intent, it being held that in such cases the transactions sought to be shown must contain the material elements of the main case (*People v. Whiteman*, 114 Cal. 338 [46 Pac. 99]; *People v. Bird*, 124 Cal. 32 [56 Pac. 639]; *People v. King*, 23 Cal. App. 259 [137 Pac. 1076]; *People v. Byrnes*, 27 Cal. App. 79 [148 Pac. 944]). Such evidence is also admissible to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. For that purpose it may be shown that the defendant made substantially the same representations to other persons (*Kornblum v. Arthurs*, 154 Cal. 246 [97 Pac. 420]; *Bone v. Hayes*, 154 Cal. 759 [99 Pac. 172]; *J. B. Colt Co. v. Freitas*, 76 Cal. App. 278 [244 Pac. 916]; *People v. Whalen*, 154 Cal. 472 [98 Pac. 194]; *People v. Ward*, 5 Cal. App. 36 [89 Pac. 874]). And as held in effect by the two cases last cited, it is not essential that such representations shall have resulted in the commission of a crime, it being sufficient if they tend to prove a scheme of the defendant which included the acts charged. [15] In view of the above rules, the testimony to similar promises and representations was properly admitted, and that of the witnesses to whom such promises or representations were not made, while immaterial, was not prejudicial to appellant.

[16] It is next urged that the testimony of the defendant Jackson, an accomplice jointly indicted with appellant, and who, after entering a plea of guilty, was sworn as a witness for the prosecution, was uncorroborated. This witness testified in substance that he was told by appellant in the presence of the latter's private secretary that none of the stock pledged was to be sold unless its market value should fall fifteen per cent, in which case before a sale the*225 borrowers should receive twenty-four hours' notice, and he was further instructed to so advise the agents for the concern and prospective borrowers. He also testified to a conversation to the same effect between appellant and William J. Voss, another of appellant's agents, whose testimony to this extent corroborated that of the witness. A former employee of appellant testified that she was told by him to receive her instructions from the private secretary mentioned, who told her that the securities deposited by borrowers were held in the vaults in appellant's San Francisco office. As the court said in *People v. Yeager*, 194 Cal. 452 [229 Pac. 40, 49]: "It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the acts with the alleged crime may be inferred from the corroborating evidence in the case it is sufficient." Measured by this rule, the above testimony was sufficient corroboration of the accomplice. [17] In order to show that the pledged stock was sold by appellant in the manner stated above, employees of certain stock-brokers were sworn and the books of the brokers admitted in evidence over objection. Appellant assigns this as error, and in support thereof cites *People v. Doble*, 203 Cal. 510 [265 Pac. 184]. This case does not sustain the contention. There the defendant was charged with conspiracy to violate the Corporate Securities Act (Deering's Gen. Laws, Act 3814) by taking subscriptions in California for the shares of a corporation without a permit to do so from the corporation commissioner. A summary of the entries in the books of the corporation was admitted in evidence, but the defendant denied all knowledge thereof. It was held that while the books were admissible for what they might show as to the excess of subscriptions over the permits, still, in view of the defendant's claim that he knew nothing of their contents, he was entitled to an instruction that an officer of a corporation is not criminally liable for the acts of other officers or agents thereof unless he authorized or consented to such acts. It was shown in the present case that the

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books constituted the brokers' records of the stock transactions with their customers, and that the entries were made by the witnesses or under their supervision in *226 the regular course of business. Under such circumstances the same were properly admitted (*People v. Woollacott*, 80 Cal. App. 275 [251 Pac. 826]; *People v. Kuder*, 98 Cal. App. 206 [276 Pac. 578]).

[18] The further point is made that the court permitted improper cross-examination of appellant. The latter on his direct examination denied that he had told the witness Jackson and others to represent to prospective borrowers that the stock pledged would not be sold. On cross-examination the prosecuting attorney was permitted to inquire as to the salary paid the witness Jackson, and whether appellant was the sole proprietor of the Loan and Discount Company. The object of the cross-examination was to show appellant's relations with Jackson and the others mentioned by him, and while the subject of the inquiry does not appear to have been material the questions were not improper or prejudicial. [19] In the same connection there was introduced by the prosecution a photographic copy of a letter which appellant admitted was signed by him. The letter was addressed to one Gunderson and stated that contrary to the latter's impression that the stock deposited with the company was sold, the fact was that no stock was sold unless requested by the borrowers, but was merely transferred to another name for the protection of both parties. The letter tended to contradict appellant's testimony that his agents were not instructed as claimed by the witness Jackson; and though it was not shown that the letter was mailed to the addressee it sufficiently appeared from appellant's testimony that while he signed the correspondence of the concern the same was customarily prepared and inferentially that it was subsequently mailed by his employees. In view of the testimony no prejudice was caused by the failure to first lay the foundation for the admission of the letter in evidence.

[20] Two witnesses were permitted over objections to testify that loans were made by him for the concern, and that they were instructed to represent to borrowers that the pledged stock would not be sold, but kept in appellant's office. Neither witness testified that he was directly instructed by appellant to make such representation. In one case the instructions were given by the witness Jackson, and in the other by appellant's private secretary, to whom *227 he referred the witness for instructions. It is urged that there was no evidence that appellant directly authorized these witnesses to make such representations, and that their testimony was consequently incompetent. It is not necessary in order to hold the principal criminally liable that false representations made by his agent should have been directly authorized by him, it being sufficient that he consented thereto or knowingly and intentionally aided, advised, or encouraged the acts of his agent (*People v. Green, supra; People v. Doble, supra*). That the witnesses were appellant's agents is undisputed, and their testimony and that of other witnesses for the prosecution sufficiently supports the conclusion that their representations were consented to and encouraged by him.

[21] The further point is made that the court erroneously rejected evidence that prior to the seizure of appellant's books by the corporation commissioner and the filing of a petition in bankruptcy against him, the borrowers upon the payment of their notes received their pledged securities or their equivalent in stock or cash. The offered evidence was clearly irrelevant and was properly excluded.

[22] It is also contended that the remarks of the prosecuting attorney during the trial constituted prejudicial misconduct. Appellant's counsel in his closing argument criticised the prosecution for the length of time consumed in the trial. The prosecution in reply claimed that the delay was due to the former's frequent objections and in that connection referred to objections made upon the cross-examination of appellant, stating in substance that counsel for the latter feared a close investigation of his client's business methods. In addition to the above, appellant's counsel on several occasions objected to remarks made by the prosecution, which he assigned as prejudicial misconduct, and prior to the submission of the case moved the court to declare a mistrial, which motion was denied. In each instance where objection was made the jury was admonished to disregard the remarks of the prosecuting attorney, and they were instructed to the same effect at the conclusion of the trial. The remarks excepted to were not such that their possible effect could not be removed by an admonition, and we are satisfied that this result followed the court's instructions. *228

[23] Appellant proposed something over fifty instruc-

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tions, and assignments of error are based upon the refusal of a number of those offered. Without reviewing them in detail, which would serve no useful purpose, it will be sufficient to say that all the questions involved were fully and fairly presented in other instructions given by the court.

[24] It is also claimed that certain of the court's instructions were erroneous. The jury was instructed that larceny by trick and device might consist of future promises. As hereinabove shown such an instruction was correct. [25] They were also charged in substance that if they found that the agreements between the borrowers and appellant were *bona fide* loan transactions made without any intention on the part of appellant to use the transaction as a trick or device or a fraudulent means of obtaining possession of their property, then he had a right to dispose of the same at any time and no crime was committed; but should they find from the evidence beyond a reasonable doubt that the agreements were a trick and device used by appellant as a means of obtaining possession of the securities for the purpose and with the intention of feloniously appropriating and converting the same to his own use, then he had no right to do the acts complained of. The latter portion of this instruction to which appellant excepts was no more than a charge that if possession was obtained in the manner stated title to the securities did not pass. In that event, as above shown, the subsequent conversion of the property constituted larceny.

[26] The court also instructed that where a defendant is charged with crime, neither the acts nor statements of his agents or employees are chargeable against him unless such acts and statements are authorized by him. Appellant's objection to the instruction is that the jury should have been told that such acts or statements, in order to be chargeable to the principal must be directly authorized by him. Notwithstanding language to that effect in some of the cases, we are of the opinion that if such acts or statements are authorized, whether the authority is given directly or indirectly is immaterial, and that the instruction correctly stated the law. [27] The jury was instructed on the subject of conspiracy and it is claimed that the instructions *229 were not justified by the evidence. It is not contended that they were not correct statements of law, and the record contains some evidence tending to prove a conspiracy between appellant and his co-defendants. While instructions not applicable to the facts are erroneous (8 Cal. Jur., Criminal Law, sec. 606, pp. 628, 629), to constitute grounds for reversal they must have resulted in prejudice to the defendant (*People v. Schmah*, 62 Cal. App. 192 [216 Pac. 624]; *People v. Ybarra*, 68 Cal. App. 259 [228 Pac. 868]). Here, after carefully stating the facts necessary to constitute conspiracy, the court charged that appellant would not be responsible for the acts or declarations of either of his codefendants unless the jury found from the evidence beyond a reasonable doubt that a conspiracy existed or that such acts or declarations were authorized by him. Prejudice is not presumed (8 Cal. Jur., Criminal Law, sec. 606, p. 628), and no reasonable ground appears for the conclusion that the jury was misled or confused by the instructions.

[28] There is no merit in the claim that title to the stock deposited by the borrowers passed to appellant, and that consequently the offense of larceny was not proved. The notes, as well as the testimony, show that the stock was pledged and while appellant was given the power to sell under certain circumstances, this was not equivalent to a transfer of title to him. That he converted the pledged stock to his own use is not disputed, and the evidence shows beyond a reasonable doubt that this was the culmination of a fraudulent scheme whereby he obtained possession with the felonious intention of appropriating the property.

While it will be necessary for the reasons stated to reverse the judgments entered upon the sixth, seventh, eighth and ninth counts of the indictment, the verdicts upon the remaining counts were sufficiently sustained by the evidence, and the record discloses no error which reasonably supports the conclusion that the same resulted in a miscarriage of justice. The judgments entered upon the sixth, seventh, eighth and ninth counts of the indictment are accordingly reversed, and the judgments entered upon the first, second, third, fourth, fifth and tenth counts therein with the orders denying appellant's motion for a new trial thereof are affirmed. *230

A petition for a rehearing of this cause was denied by the District Court of Appeal on July 26, 1930, and a petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 11, 1930.

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Cal.App.1.Dist.
People v. Robinson
107 Cal.App. 211, 290 P. 470

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C

Supreme Court of California.
PEOPLE
v.
STAPLES.
No. 20,796.

Sept. 3, 1891.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Information against M. N. Staples, for grand larceny. Verdict of guilty. Defendant appeals. Affirmed.

West Headnotes

Criminal Law 110 ⚷97(1)

110 Criminal Law
110VIII Jurisdiction
110k91 Jurisdiction of Offense
110k97 Locality of Offense
110k97(1) k. Offenses Outside of State. Most Cited Cases

Under Pen.Code, § 789, which provides that the jurisdiction of a criminal action for stealing in any other state and bringing the property into this state is in any county into or through which such property has been brought, an information which charges the defendant with having stolen property in Arizona, and that he did bring the same into the county of Los Angeles, charges an offense within the jurisdiction of the court of Los Angeles county.

Criminal Law 110 ⚷212

110 Criminal Law
110XII Pretrial Proceedings
110k208 Preliminary Complaint or Affidavit
110k212 k. Examination of Witnesses and Evidence. Most Cited Cases

Pen.Code, §§ 811-813, provide that, when an information is laid before a magistrate, he must take the depositions of the informant and his witnesses, if any; that the depositions must set forth the facts tending to prove the offense, and the guilt of defendant; that, if the magistrate is satisfied therefrom that an offense has been committed, and there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest. Held that, when the information is positive in its allegations of every fact necessary to support the charges laid, it is a sufficient deposition within the meaning of the statute, and a warrant may be issued thereon.

Criminal Law 110 ⚷219

110 Criminal Law
110XII Pretrial Proceedings
110k215 Preliminary Warrant or Other Process
110k219 k. Defects and Objections. Most Cited Cases

Where one charged with committing a felony is examined, and evidence adduced sufficient to justify the magistrate in holding the accused to answer the charge, an irregularity in the warrant of arrest is immaterial, since thereafter the accused is held under the commitment, which authorizes the filing of an information.

Criminal Law 110 ⚷1132

110 Criminal Law
110XXIV Review
110XXIV(K) Hearings
110k1132 k. Hearing. Most Cited Cases

Pen.Code, § 1252, which provides that "all appeals in criminal cases must be heard and determined by the appellate court within sixty days after the record is filed in said appellate court, unless continued on motion or with the consent of the defendant," is merely directory, and a failure to determine a case within the time mentioned does not entitle the defendant to a discharge.

Indictment and Information 210 ⚷122(2)

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k122 Variance from Preliminary

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Proceedings

210k122(2) k. Variance as to Nature or Degree of Offense Charged. Most Cited Cases

Under (West's Ann.) Pen.Code, § 872, concerning commitment for public offenses, which provides that, if it appears from the examination that a public offense has been committed, the accused must be held to answer to the same, the fact that the offense charged in the information is different from that laid in the complaint does not affect the sufficiency of the information.

Larceny 234 ⚷40(2)

234 Larceny
234II Prosecution and Punishment
234II(A) Indictment and Information
234k40 Issues, Proof, and Variance
234k40(2) k. Matters to Be Proved. Most Cited Cases

On trial for stealing property in Arizona and bringing the same into the county of Los Angeles, Cal., the fact that the information alleged that the larceny was committed in Arizona does not require the state to prove that the offense charged is defined by the laws of Arizona as larceny.

Larceny 234 ⚷40(3)

234 Larceny
234II Prosecution and Punishment
234II(A) Indictment and Information
234k40 Issues, Proof, and Variance
234k40(3) k. Evidence Admissible Under Pleadings. Most Cited Cases

On trial for stealing property in Arizona and bringing the same into the county of Los Angeles, where the larceny was committed at or near the line between Arizona and California, on a moving train, it was proper to admit evidence that it was committed immediately after crossing the line into California, as the variance was not material, as taking the stolen property into Los Angeles county was a part of the offense, and it was immaterial whether it was stolen before or immediately after coming into the state.

**523 *25 *Hugh J. & Wm. Crawford*, for appellant.
W. H. H. Hart, Atty. Gen., for the People.

BEATTY, C. J.

The defendant was convicted in the superior court of Los Angeles county of the crime of grand larceny, and appeals from the judgment and from an order denying a new trial.

His first assignment of error is upon the order of the superior court overruling his motion to set aside the information. One ground of the motion was that the magistrate before whom his examination was had issued his warrant of arrest without having taken any depositions of witnesses in support of the charge laid in the complaint, thus violating,-as he claims,-the provisions of sections 811-813 of the Penal Code.[FN1] In support of this point he cites and relies on the case of Ex parte Dimming, 74 Cal. 164, 15 Pac. Rep. 619. But that case lends no support to his contention for two reasons. In the first place, the complaint in this case-unlike the complaint against Dimmig-is positive and direct in its allegation of every fact necessary to support the charge laid, and is therefore, in itself, a sufficient deposition within the doctrine of the Dimmig Case. In the second place, the want of jurisdiction to order an arrest becomes immaterial when the warrant of arrest is *functus officio*. In Dimmig's Case the objection was raised while the warrant was the *26 only authority for holding him, and, the warrant being held invalid, he was necessarily discharged. But when a prisoner has been examined, and evidence adduced sufficient to justify the magistrate in holding him to answer on a charge of felony, the infirmity in the warrant of arrest, if any there be, ceases to be of any consequence, since he is thereafter held under the commitment, which of itself authorizes the filing of an information. The regularity of the information does not depend on the **524 complaint, but upon the order holding the defendant to answer. People v. Velarde, 59 Cal. 458; People v. Wheeler, 65 Cal. 77, 2 Pac. Rep. 892. This view also disposes of the second ground of the motion, viz., that the complaint alleged the larceny to have been committed in San Bernardino county, and the stolen goods to have been brought into Los Angeles county, whereas the information charges a larceny in Arizona territory, and a subsequent bringing of the stolen goods into Los Angeles county. Even if the offense charged in the information was, as claimed, totally different from that laid in the complaint, it would not affect the sufficiency of the information, since, as we have seen, the information does not depend on the complaint, but upon the commitment, and it does not appear that the order of commitment differed in any

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respect from the information. It is not claimed, and it cannot be, that the commitment must follow the complaint, for the statute and the decisions of this court, are directly to the contrary. It is the duty of the magistrate to hold the defendant to answer for the offense proved, whatever may have been the offense charged. Pen. Code, § 872;[FN2] People v. Wheeler, 73 Cal. 255, 14 Pac. Rep. 796. Therefore, if the evidence showed that the goods were stolen in Arizona territory, it was the duty of the magistrate to hold him for that offense, if it was in fact or law a different offense from that charged; and, if he failed to do so, it was, nevertheless, the duty of the district attorney, in drawing the information, to charge the offense according to the facts disclosed by the depositions, ignoring to that extent the form of the commitment. People v. Vierra, 67 Cal. 231, 7 Pac. Rep. 640;*27 People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. Rep. 859. But in truth there is no substantial difference between the charge laid in the original complaint and that set out in the information. Each charges in effect a larceny in Los Angeles county. When goods are stolen in one jurisdiction and carried into another, in legal contemplation the crime of larceny is committed in both jurisdictions, and may be punished in either. Our statute on that point (Pen. Code, §§ 497, 786, 789,) merely re-enacts the law as it was before. People v. Mellon, 40 Cal. 654; State v. Brown, 8 Nev. 212. Or, perhaps, it is more correct to say that our statute has adopted one of the two views upon which the courts of other states have divided in deciding upon the common-law rule. It follows that in both the complaint and information the defendant was charged with an offense committed in Los Angeles county. The place where the goods were alleged to have been stolen-San Bernardino or Arizona-was a mere circumstance, and a wholly immaterial one, of the offense. The superior court did not err in refusing to set aside the information.

FN1 Sec. 811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. Sec. 812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant. Sec. 813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

FN2Sec. 872. If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order, signed by him, to the following effect: 'It appearing to me that the offense in the within depositions mentioned [or any offense, according to the facts, stating generally the nature thereof] has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same, and committed to the sheriff of the county of.'

Nor did the superior court err in overruling the demurrer to the information. If we understand the position of appellant's counsel with reference to the demurrer, it is that the information does not charge an offense within the jurisdiction of the superior court of Los Angeles county, although no such objection is stated in the demurrer. The information charges in plain, direct, and unequivocal terms that the defendant did, in the territory of Arizona, unlawfully, willfully, and feloniously take, steal, and carry away from the possession of one Margaret McGregor a watch and chain, of the value of $75, then and there being the personal property of said Margaret McGregor; and that, after having so unlawfully taken and stolen said watch and chain, he did bring the same into the county of Los Angeles. This states the exact offense defined in section 497 of the Penal Code, the jurisdiction of which is, by section *28 789,[FN3] conferred upon any county of the state, into or through which the stolen property has been brought.

FN3Sec. 789. The jurisdiction of a criminal action for stealing in any state the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought.

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Several instructions asked by the defendant were refused by the court. The only question worthy of consideration raised by the assignments of error upon these rulings is this: Was it essential to prove that the original larceny was committed in Arizona, as alleged in the information? The defendant was porter on a sleeping-car, upon which the owner of the stolen property, Mrs. McGregor, was traveling as a passenger from Chicago to this state. The watch and chain were stolen from her berth just about the time the train crossed the Colorado river from Arizona to San Bernardino county in this state. The evidence left it somewhat doubtful upon which side of the boundary the theft occurred, and the defendant asked the court to instruct the jury that they must acquit unless they were satisfied that the larceny was committed in Arizona. These requests to charge were refused, and the question is whether such refusal was error. We do not think it was. Whether the original larceny was committed in Arizona or across the line in San Bernardino, the taking of the stolen property into Los Angeles county was equally criminal; and not only was it equally criminal, it was the same offense, punishable in the same manner, to the same extent, in the same jurisdiction, under the same law. The precise spot at which the criminal act was initiated was a mere circumstance of the offense, properly enough stated in the information, but not essential to be proven **525 as stated. If the information had charged a larceny in Los Angeles county, proof of an original taking in San Bernardino or in Arizona would have been admissible. The only real question is whether evidence of a larceny on the west bank of a river is such a substantial variance from the charge that it was committed on the east bank as to be inadmissible. Under the circumstances of this case, where the theft occurred on a moving train in the act of crossing the river, we do not think the variance was material.

*29 As to the other instructions refused. it is sufficient to say of them generally that, so far as they were correct, they were given in better form in the charge of the court and in other instructions asked by the defendant and allowed.

It is contended that the evidence does not sustain the verdict, because-*First*, there was no evidence as to the laws of Arizona defining larceny; and, *second*, be cause the evidence clearly showed that the stolen goods were worth less than $50. As to the first objection, we say that the laws of Arizona have no bearing upon the question whether our laws have been violated. We do not assume to punish offenses against the laws of other states and territories. When we undertake to punish as larceny the bringing into this state goods that have been stolen in another state or country, we mean goods that have been stolen according to our definition of larceny, for which we lock to our own laws exclusively, and not the laws of other countries. As to the second objection, it is sufficient to say that there was some evidence that the watch and chain were worth more than $50, and therefore the verdict of the jury on that point is conclusive.

There is no error in the record, and the judgment and order appealed from must be affirmed, unless a motion now made by the defendant to reverse the judgment and discharge him from custody must be granted on the ground that his appeal has not been decided within 60 days after the filing of the transcript here, as required by section 1252 of the Penal Code.[FN4] But no such consequence is annexed to a failure to comply with that provision, in which respect it differs from section 1382, which is mandatory in its requirement that a criminal prosecution must be dismissed, unless good cause to the contrary is shown, when the defendant is not brought to trial in the superior court within 60 days after the filing of an indictment or information. It is to be noted also that the latter section prescribes the means, and the only means, of enforcing the constitutional right of the accused to a speedy and public trial. Const. art. *30 1, § 13; People v. Morino, 85 Cal. 515, 24 Pac. Rep. 892. We do not, however, rest our denial of this motion upon any distinction between a constitutional and statutory right,-between the right to a speedy trial and a speedy determination of an appeal,-but solely upon the ground that one provision is merely directory and the other mandatory in substance and in terms. Motion to reverse denied, and judgment and order affirmed.

FN4 Sec. 1252. All appeals in criminal cases must be heard and determined by the appellate court within 60 days after the record is filed in said appellate court, unless continued on motion, or with the consent of the defendant.

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We concur: SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.
Cal. 1891.
People v. Staples
91 Cal. 23, 27 P. 523

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COLLEEN LAKIN, Plaintiff and Appellant,
v.
WATKINS ASSOCIATED INDUSTRIES et al.,
Defendants and Respondents.
No. S030179.

Supreme Court of California
Dec 16, 1993.

SUMMARY

Plaintiff, who was injured in an accident involving a truck, the driver of which gave false identification and insurance information, brought an action for negligence and intentional infliction of emotional distress against the driver and the company that owned the truck. Pursuant to Code Civ. Proc., § 2033, plaintiff requested that defendants admit that a collision had occurred between their truck and her car. Defendants responded that they had insufficient information to admit or deny the truth of this request. More than two years before trial, plaintiff made an offer to the company to compromise under Code Civ. Proc., § 998, subd. (b), in the amount of $89,000, and the company did not accept. At trial plaintiff proved that the company's own records established, more than two years before her request for an admission, that the collision had occurred. The jury found for plaintiff and awarded $100,000 against the company, including both compensatory and punitive damages. After judgment, the trial court denied plaintiff's motions for attorney fees under Code Civ. Proc., § 2033, subd. (o) (sanction for unwarranted failure to admit), and for prejudgment interest, which latter motion was made on the ground that her pretrial offer was less than the eventual judgment (Civ. Code, § 3291). (Superior Court of Los Angeles County, No. SCC-12628, Roy J. Brown, Judge.) The Court of Appeal, Second Dist., Div. Seven, No. B054960, dismissed the appeal as to the order denying attorney fees, concluding that the order was nonappealable. The Court of Appeal also affirmed the denial of prejudgment interest, reasoning that plaintiff failed to prove the damages were awarded exclusively for personal injury.

The Supreme Court reversed the judgment of the Court of Appeal with directions to address the merits of the attorney fees issue and thereafter to reverse the order of the trial court on the prejudgment interest issue and remand to the trial court for further proceedings on that issue. The court held that the postjudgment order denying attorney fees under Code Civ. Proc., § 2033, subd. (o), was an appealable order. The court also held that plaintiff bore the burden of proving what portion of the total award represented damages for personal injury and were thus eligible for prejudgment interest; however, plaintiff had not yet been given the opportunity to carry this burden, and thus remand was necessary. It further held that prejudgment interest under Civ. Code, § 3291, may not be awarded on punitive damages. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Appellate Review § 30--Decisions Appealable--Orders After Judgment--Order Denying Attorney Fees as Discovery Sanction.
The trial court's denial of a personal injury plaintiff's postjudgment motion for attorney fees under Code Civ. Proc., § 2033, subd. (o) (sanction for unwarranted failure to admit discovery request), was an appealable order. Thus, the Court of Appeal erred in concluding that the denial neither added to nor subtracted from the relief granted in the judgment and dismissing the complaint. The order denying the fees plainly raised issues different from those of the judgment itself. Further, appealable postjudgment orders include both those granting affirmative relief and those denying it. Thus, postjudgment orders that neither literally add to nor subtract from the judgment can nevertheless be appealable, as long as they affect the judgment or relate to its enforcement. The order denying plaintiff's motion was a postjudgment order that affected the judgment or related to its enforcement, because it determined the rights and liabilities of the parties arising from the judgment, was not preliminary to later proceedings, and would not become subject to appeal after some future judgment.
[See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 103.]
(2a, 2b) Appellate Review § 30--Decisions Appeal-

able--Orders After Judgment.
Despite the inclusive language of Code Civ. Proc., § 904.1, subd. (b), which provides that an order made after an appealable judgment is itself appealable, not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements. The first requirement is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. The reason for this general rule is that to allow the appeal from an order raising the same issues as those raised by the judgment would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment. The second requirement is that the order must either affect the judgment or relate to it by enforcing it or staying its execution. Under this rule, a postjudgment order that does not affect the judgment or relate to its enforcement is not appealable.

(3) Damages § 8--Interest--Prejudgment Interest--Personal Injury--Action for Negligence and Emotional Distress:Interest § 4--Interest on Judgments.
Plaintiff's action for negligence and intentional infliction of emotional distress against a trucking company and its driver, arising from an accident involving a truck, the driver of which gave false identification and insurance information, was an action for personal injuries within the meaning of Civ. Code, § 3291 (interest in personal injury action). Plaintiff's claims of emotional distress were not incidental to a substantial invasion of property interests. Rather, they were at the heart of her case. She presented evidence of emotional distress under both her theories: in the negligence cause of action, her emotional distress resulted from the accident itself, and in the cause of action for intentional infliction of emotional distress, her emotional distress resulted from her dealings with defendants subsequent to the accident. Although the events that formed the basis for her lawsuit did cause some property damage, that fact alone did not defeat her claim for damages under a personal injury theory. Therefore, § 3291 prejudgment interest was available.

(4a, 4b) Damages § 8--Interest--Prejudgment Interest--Personal Injury-- Action for Negligence and Emotional Distress--Burden of Proof:Interest § 4--Interest on Judgments.
In an action for negligence and intentional infliction of emotional distress against a trucking company and its driver, arising from an accident involving a truck, the driver of which gave false identification and insurance information, plaintiff bore the burden of proving what portion of the damages awarded her were damages for personal injury rather than property damage, and that they were therefore eligible for prejudgment interest pursuant to Civ. Code, § 3291 (judgment greater than amount of offer to compromise under Code Civ. Proc., § 998). The jury awarded plaintiff $20,000 in compensatory damages, but the verdict did not state what portions were attributed to personal injury or to property damage. Even if plaintiiff showed that a portion of these damages were for personal injury, the burden did not shift to defendants to demonstrate the magnitude of that portion. Shifting the burden would be contrary to Evid. Code, § 500, which provides that a party has the burden of proof as to each fact that is essential to the claim or defense that party is asserting.

(5) Damages § 8--Interest--Prejudgment Interest--Personal Injury:Interest § 4--Interest on Judgments.
Prejudgment interest under Civ. Code, § 3291 (judgment greater than amount of offer to compromise under Code Civ. Proc., § 998), is limited to damages attributable to personal injury. The second paragraph of Civ. Code, § 3291, provides that if the plaintiff makes a pretrial offer to compromise that is not accepted and then "obtains a more favorable judgment, the judgment shall bear interest." Taken literally, this language requires a court to assess prejudgment interest on an entire judgment regardless of what portion of the award consisted of personal injury damages. However, this construction does not comport with the Legislature's intent. The first paragraph of Civ. Code, § 3291, permits the plaintiff in "any action brought to recover damages for personal injury" to claim interest on damages. The Legislature intended to confine the availability of prejudgment interest to "damages for personal injury." To adopt the broader reading of the second paragraph would render the narrower language of the first paragraph nugatory. Further, the narrower construction also serves an important purpose of Civ. Code, § 3291, i.e., to provide a statutory incentive to settle personal injury litigation where the plaintiff has been physically as well as economically impaired.

(6a, 6b) Damages § 8--Interest--Prejudgment Inter-

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est--Personal Injury-- Entitlement to Prejudgment Interest on Award of Punitive Damages:Interest § 4--Interest on Judgments.

A plaintiff who is entitled to prejudgment interest pursuant to Civ. Code, § 3291 (judgment greater than amount of offer to compromise under Code Civ. Proc., § 998), is not entitled to prejudgment interest for any portion of the judgment for punitive damages. Although Civ. Code, § 3291, provides that "the judgment" shall bear interest, the operative language of the entire statute is "damages for personal injury." Civ. Code, § 3291, was intended to encourage settlements in personal injury cases. Any connection there might be between the availability of prejudgment interest on punitive damages and the statutory purpose of providing an incentive to settle is too attenuated and speculative. Further, prejudgment interest has an additional purpose of compensating personal injury plaintiffs for loss of use of money during the prejudgment period. Punitive damages are awarded for the sake of example and by way of punishing the defendant and are not intended to make the plaintiff whole by compensating for a loss suffered. To award prejudgment interest on punitive damages arising from personal injury actions would therefore give a windfall to the plaintiffs in those actions. (Disapproving to the extent contrary: *Greenfield v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111 [219 Cal.Rptr. 805]; *Morin v. ABA Recovery Service, Inc.* (1987) 195 Cal.App.3d 200 [240 Cal.Rptr. 509]; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976 [16 Cal.Rptr.2d 787].)

[Right to prejudgment interest on punitive or multiple damages award, note, **9 A.L.R.5th 63.**]

(7) Damages § 8--Interest--Prejudgment Interest--Personal Injury--Obtaining Judgment Greater Than Pretrial Offer--Inclusion of Punitive Damages:Interest § 4--Interest on Judgments.

In an action for negligence and intentional infliction of emotional distress arising from a vehicle collision, plaintiff's award of punitive damages was included in the judgment for the purpose of determining whether the judgment was more favorable than her pretrial offer under Civ. Code, § 3291 (plaintiff's entitlement to prejudgment interest where judgment is greater than amount of offer to compromise under Code Civ. Proc., § 998). Plaintiff had offered to compromise the case for $89,000 and eventually obtained a jury verdict of $100,000, including $80,000 in punitive damages. Plaintiff was not required to subtract the punitive damage award before comparing the verdict with the offer. The plain language of Civ. Code, § 3291, provides for a simple comparison in personal injury cases between the judgment and the offer to compromise; if the judgment is "more favorable," the plaintiff is eligible for prejudgment interest on the damages attributable to personal injury. The Legislature did not intend the judgment and the offer to compromise to be apportioned between personal injury damages and other kinds of damages.

COUNSEL

R. Stevens Condie for Plaintiff and Appellant.

Parker, Stanbury, Babcock, Combs & Bergsten, Douglass H. Mori and Michael E. McCabe for Defendants and Respondents.

MOSK, J.

We granted review to decide three issues. First, we must determine whether a postjudgment order denying an award of attorney fees under Code of Civil Procedure section 2033, subdivision (o), is appealable. For the reasons that follow, we conclude that it is. Second, we must *649 determine where the burden of proof lies when a plaintiff in a personal injury case claims prejudgment interest, under Civil Code section 3291, on a judgment more favorable than her offer to compromise under Code of Civil Procedure section 998, subdivision (b). As will appear, we conclude the plaintiff has the burden of proving what portion of the total award represents damages for personal injury; we further conclude that plaintiff herein has not yet had the opportunity to carry this burden. Accordingly, the judgment of the Court of Appeal on these issues holding to the contrary will be reversed. Finally, we must determine whether prejudgment interest under Civil Code section 3291 may be awarded on punitive damages. We conclude that it may not.

I. Factual and Procedural Background

At the scene of an accident in which a truck that defendant driver was operating on behalf of defendant trucking company hit plaintiff's car, the driver identified himself falsely to plaintiff and gave her false insurance information. Later, a company official denied the accident had occurred and accused plaintiff of fabricating her claim. She sued for negligence and intentional infliction of emotional distress.

Pursuant to Code of Civil Procedure section 2033, plaintiff requested that defendants admit a collision

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had occurred between their truck and her car. They replied that they had insufficient facts to admit or deny the truth of the request. More than two years before trial, plaintiff made an offer to the company to compromise under Code of Civil Procedure section 998, subdivision (b), in the amount of $89,000. The company did not accept.

At trial plaintiff proved that the company's own dispatch records placed the truck driver at the scene of the accident on the day in question and that the company had conducted an internal investigation at the time of the accident-two years before her request for admission-and had concluded the collision had in fact occurred. The jury found for plaintiff, awarding her a total of $100,000 against the company, including both compensatory and punitive damages.

After entry of judgment plaintiff moved for an award of attorney fees incurred in proving facts that defendants had refused to admit-specifically, the fact of the collision. (Code Civ. Proc., § 2033, subd. (o).) She also moved for an award of prejudgment interest on the ground that the amount of her pretrial offer to compromise was less than the eventual judgment. (Civ. Code, § 3291.)*650

The court denied both motions. It ruled that plaintiff could not receive attorney fees because she had presented evidence of such fees in the context of her prayer for punitive damages; it concluded the jury intended the punitive award to include reimbursement for such fees. It further ruled that plaintiff could not receive prejudgment interest because she did not demand such interest in her complaint.

Plaintiff appealed from this postjudgment order. Insofar as the order denied attorney fees, the Court of Appeal held it was nonappealable and dismissed that portion of her appeal. Insofar as the order denied prejudgment interest, the Court of Appeal held that Civil Code section 3291 does not require a plaintiff to demand prejudgment interest in the complaint, but nevertheless affirmed the denial of prejudgment interest, reasoning that plaintiff failed to prove the damages were awarded exclusively for personal injury.

II. Attorney Fees

(1a) Plaintiff first contends a postjudgment order granting or denying attorney fees is appealable. Code of Civil Procedure section 2033, subdivision (o), provides in relevant part: "If a party fails to admit the ... truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the ... truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." The statute mandates that the court "shall" make such an order unless (1) an objection to the request was sustained or a response was waived, (2) the admission was of no substantial importance, (3) the party failing to make the admission reasonably expected to prevail on the matter, or (4) there was other good reason for the failure to admit. (*Ibid.*)

The trial court denied plaintiff's motion for attorney fees, not because of any of the four statutory exceptions but because of concern that an award of attorney fees would constitute double recovery. [FN1] The Court of Appeal did not reach the merits of this ruling; it concluded that the order denying attorney fees was not appealable as a postjudgment order. (See Code Civ. Proc., § 904.1, subd. (b).) *651

FN1 We do not decide whether a court would be powerless to deny a motion for attorney fees under Code of Civil Procedure section 2033, subdivision (o), when such an award would result in double recovery.

Code of Civil Procedure section 904.1, subdivision (b), provides that an order made after an appealable judgment is itself appealable. [FN2] As this court long ago explained, " 'The necessity for this ... provision is apparent, when it is considered that an appeal from the judgment would only bring up the record of the proceedings resulting in the rendition of the judgment, and that such an appeal may have been taken, and even disposed of here, by affirmance or reversal, *before* the order complained of was made in the Court below; so that while an appeal from a judgment might in some instances be safely relied upon for the review of an order entered before its rendition, it would afford no reliable remedy against such an order only entered *subsequently* to its rendition.' " (*Calderwood v. Peyser* (1871) 42 Cal. 110, 116, italics in original.)

FN2 Code of Civil Procedure section 904.1

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states in relevant part:

"An appeal may be taken from a superior court in the following cases:

"(a) From a judgment [with certain exceptions] ....

"(b) From an order made after a judgment made appealable by subdivision (a)."

(2a) Despite the inclusive language of Code of Civil Procedure section 904.1, subdivision (b), not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements. FN3 The Court of Appeal concluded that an order in the nature of a denial of attorney fees did not satisfy one of those requirements, and thus that appeal from the order was precluded. We conclude otherwise.

FN3 The prerequisite that the underlying judgment must itself be final is sometimes described as a third requirement of appealable postjudgment orders. (See, e.g., 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 101, p. 121; 1 Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 1993) ¶ 2:150, p. 2-43, rev. #1, 1991.) Here, the finality of the underlying judgment is not in dispute and was not part of the Court of Appeal's analysis.

The first requirement-not discussed by the Court of Appeal-is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. (See *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351 [110 Cal.Rptr. 353, 515 P.2d 297].) "The reason for this general rule is that to allow the appeal from [an order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment." (*Id.* at p. 358.)(1b) In the present case, an appeal from the order denying attorney fees pursuant to Code of Civil Procedure section 2033, subdivision (o), plainly raises issues different from those arising from the judgment itself. Thus, this requirement is satisfied.

(2b) The second requirement-which the Court of Appeal found dispositive-is that "the order must either affect the judgment or relate to it by ***652** enforcing it or staying its execution." (*Olson v. Cory* (1983) 35 Cal.3d 390, 400 [197 Cal.Rptr. 843, 673 P.2d 720].) Under this rule, a postjudgment order that does "not affect the judgment or relate to its enforcement [is] not appealable ...." (*Ibid.*) (1c) The Court of Appeal reasoned that the order here in issue did not affect the judgment or relate to its enforcement because it "leaves the judgment intact and neither adds to it nor subtracts from it." (*Redevelopment Agency v. Goodman* (1975) 53 Cal.App.3d 424, 429 [125 Cal.Rptr. 818].) This reasoning, however, is incomplete.

The rule that an appealable postjudgment order must affect the judgment or relate to its enforcement has existed for more than a century. In *Griess v. State Investment etc. Co.* (1892) 93 Cal. 411, 413 [28 P. 1041], we held that a postjudgment order denying a motion to amend the minutes of the court was not appealable because "[i]t in no manner affected the judgment or bore any relation to it, either by way of enforcing it or staying its operation, nor did it concern any pending motion in the case itself. It was only the determination of the court that its minutes did not require correction, and the action of a court of record in such a matter is not subject to review by the ordinary process of appeal."

In the ensuing years we determined the appealability of a variety of postjudgment orders. It is instructive to review those we have held did not affect the judgment or relate to its enforcement, and hence were not appealable. All are orders that, although following an earlier judgment, are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal.

For example, we held not appealable a posttrial order excusing a plaintiff's failure to present a bill of exceptions for settlement before making a motion for a new trial; it would become appealable as part of an appeal from the later motion for a new trial. (*Kaltschmidt v. Weber* (1902) 136 Cal. 675, 676-677 [69 P. 497].) Similarly, an order denying a motion to amend an order vacating a judgment "could be reviewed by appeal only on an appeal from the subsequent final judgment." (*City of San Diego v. Superior Court* (1950) 36 Cal.2d 483, 486 [224 P.2d 685].) An order

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approving employment of additional counsel for a receiver with respect to an appeal "is not a matter affecting enforcement of the [preceding] judgment." (*Raff v. Raff* (1964) 61 Cal.2d 514, 519 [39 Cal.Rptr. 366, 393 P.2d 678].)

Other nonappealable orders have pertained to the preparation of a record for use in a future appeal: an order striking a court's certificate from a clerk's transcript (*Lake v. Harris* (1926) 198 Cal. 85, 89 [243 P. 417]); an order vacating an order to show cause in contempt proceedings for failure to *653 prepare a reporter's transcript (*Williams v. Superior Court* (1939) 14 Cal.2d 656, 658, 666 [96 P.2d 334]); an order granting a stay of proceedings on appeal, which "simply continued the time within which the appellant was required to prepare his record on appeal" (*Imperial Beverage Co. v. Superior Court* (1944) 24 Cal.2d 627, 632, 633 [150 P.2d 881]); an order refusing to correct and amend a transcript (*People v. Gross* (1955) 44 Cal.2d 859, 860-861 [285 P.2d 630]); and an order denying relief relative to a charge for preparing a transcript (*Summers v. Superior Court* (1959) 53 Cal.2d 295, 296, 297 [1 Cal.Rptr. 324, 347 P.2d 668]). All these "postjudgment" orders lacked finality in that they were also preparatory to later proceedings. To hold these orders "nonappealable" merely postponed their appeal until the conclusion of later proceedings; it did not deny it altogether.

For some time, courts-including this one-have used the "neither adds nor subtracts" standard here employed by the Court of Appeal as a yardstick to measure whether a postjudgment order affects the preceding judgment or relates to its enforcement. (See, e.g., *Lake v. Harris, supra*, 198 Cal. at p. 89.) This standard, however, has never been an exclusive statement of the necessary relationship between a judgment and an appealable postjudgment order. Although the standard can be useful in some circumstances, the effect on, or relationship to, the judgment required to make a postjudgment order appealable is not limited to a simple mathematical calculation. To conclude otherwise would mean that a postjudgment order *awarding* attorney fees-thereby adding to the judgment-was appealable, while a postjudgment order *denying* attorney fees-neither adding to nor subtracting from the judgment-was not. This is not the law. [FN4]

FN4 Appealable postjudgment orders include both those granting affirmative relief and those denying it. (See *Gilman v. Contra Costa County* (1857) 8 Cal. 52, 57.) It is true that on occasion an order granting a particular motion may be appealable while an order denying the same motion may not be, or vice versa. For example, this court noted in *Wood v. Peterson Farms Co.* (1931) 214 Cal. 94, 98 [3 P.2d 922], that although an order *denying* relief from default in the preparation of a reporter's transcript was appealable because it had "the effect of precluding an appellant from presenting his case on appeal," an order *granting* relief from default would not be appealable, presumably because it was not a final determination of the rights of the parties and would be appealable as part of the later appellate proceedings. There is, however, no parallel distinction to be made between an order granting attorney fees and an order denying them. In either case the resulting determination is final; in neither case would the ruling become appealable as part of later proceedings.

Further, we have held appealable postjudgment orders making a final determination of rights or obligations of parties even though they did not necessarily add to or subtract from the judgment. An order terminating proceedings for a record on appeal was appealable because it was "necessarily a final determination of the matter," eliminating the possibility of appeal. (*Wood v. Peterson Farms Co., supra*, 214 Cal. 94, 98.) An order *654 authorizing a receiver to make payments in his discretion was appealable, whether viewed as consistent or inconsistent with the preceding judgment. (*Raff v. Raff, supra*, 61 Cal.2d at pp. 517-518.) An order fixing attorney fees and requiring them to be paid was appealable. (*Id.* at p. 519.)An order denying a motion for judgment on an appeal bond was appealable because it "relates directly to the enforcement of a judgment." (*Merritt v. J. A. Stafford Co.* (1968) 68 Cal.2d 619, 622 [68 Cal.Rptr. 447, 440 P.2d 927].) [FN5]

FN5 We note in addition that in *Fulton v. Fulton* (1934) 220 Cal. 726, 729 [32 P.2d 634], this court described-although without analysis, and with no reference to any effect on, or relationship to, the judgment-a post-

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judgment order denying attorney fees and costs on appeal as an appealable order not subject to review on appeal from the judgment.

Thus, postjudgment orders that neither literally add to nor subtract from the judgment can nevertheless be appealable, as long as they affect the judgment or relate to its enforcement. To say that a nonappealable postjudgment order neither adds to nor subtracts from the judgment is but one way of describing its lack of relationship to the judgment. Alternative formulations of that description include saying, for example, that a nonappealable postjudgment order " 'in no manner affected the judgment, or bore any relation to it, either by way of enforcing it or staying its operation.' [Citation.] Neither is it a final determination of any matter affecting the appellant in the proceeding before the court in which it was made." (*Kaltschmidt v. Weber, supra,* 136 Cal. 675, 676.) Similarly, nonappealable postjudgment orders "neither added to nor subtracted from the relief granted in the judgment, nor did they adjudicate any rights or establish any liabilities." (*Watson v. Pryor* (1920) 49 Cal.App. 554, 558 [193 P. 797].)

Unlike orders we have previously held nonappealable, the present order denying attorney fees is not preliminary to future proceedings and will not become subject to appeal after a future judgment. Rather, it resembles the orders we have held appealable. It affects the judgment or relates to its enforcement in that it finally determines the rights of the parties arising from the judgment. Moreover, it is plainly appealable under *Kaltschmidt v. Weber, supra,* 136 Cal. at page 676, as a final determination of a matter affecting plaintiff in the original proceeding, and under *Watson v. Pryor, supra,* 49 Cal.App. at page 558, as an adjudication of the right to attorney fees arising from the judgment.

In addition, numerous decisions of the Courts of Appeal have expressly or impliedly held appealable similar postjudgment orders concerning costs, interest, and attorney fees. Some examples include orders denying an award of attorney fees based on fee provisions in promissory notes (*Del Mar v. Caspe* (1990) 222 Cal.App.3d 1316, 1320 [272 Cal.Rptr. 446]), denying a *655 motion to tax costs (*Norman I. Krug Real Estate Investments, Inc.* v. Praszker (1990) 220 Cal.App.3d 35, 45-46 [269 Cal.Rptr. 228]), denying a motion to recover litigation expenses (*San Diego Gas & Electric Co.* v. 3250 Corp. (1988) 205 Cal.App.3d 1075, 1087 [252 Cal.Rptr. 853]), denying attorney fees under Civil Code section 1717 (*Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 702 [154 Cal.Rptr. 345]), apportioning attorney fees among attorneys (*Breckler v. Thaler* (1978) 87 Cal.App.3d 189, 193, 194-197 [151 Cal.Rptr. 50]), denying interest on a judgment (*Redevelopment Agency v. Goodman, supra,* 53 Cal.App.3d at p. 429), and denying a motion to vacate an order for attorney fees and costs (*MacLeod v. Tribune Publishing Co.* (1958) 157 Cal.App.2d 665, 669 [321 P.2d 881]). Although none of these orders either literally added to or subtracted from the relief accorded by the preceding judgments, each order nevertheless had a sufficient effect on the judgment or bore a sufficient relationship to its enforcement to be appealable.

Defendants attempt to distinguish postjudgment orders pertaining to attorney fees requested under Code of Civil Procedure section 2033, subdivision (o), from other postjudgment orders pertaining to attorney fees held to be appealable. (See, e.g., *Viejo Bancorp, Inc.* v. *Wood* (1989) 217 Cal.App.3d 200, 204, 205 [265 Cal.Rptr. 620] [order awarding attorney fees pursuant to contract is appealable]; *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 840, 841-842 [218 Cal.Rptr. 704] [order awarding attorney fees under Code of Civil Procedure section 1021.5 is appealable]; *Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 834-835 [160 Cal.Rptr. 465] [same].) It is true that the substantive issues arising under those and other theories on which attorney fees can be based may differ from the substantive issues arising from a request for the kind of attorney fees here in issue. We see no reason, however, to erect unique procedural barriers to recovery of the latter. To do so would thwart the Legislature's intent in enacting the statutory scheme that makes them available in the first place.

Defendants also rely on *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35 [278 Cal.Rptr. 706], which considered the appealability of an order denying sanctions. That case involved a complex sequence of events: the plaintiff filed suit, the trial court dismissed, the plaintiff appealed, the Court of Appeal affirmed and awarded costs on appeal to the defendants, the plaintiff moved to tax costs, the trial court

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denied that motion, the plaintiff appealed from the denial, the Court of Appeal again affirmed and awarded costs on appeal to the defendants, the plaintiff moved to tax those costs and requested sanctions, and the trial court denied that motion. On the plaintiff's appeal from the last order insofar as it denied sanctions, the Court of Appeal had "serious doubt that the order is appealable" (*id.* at p. 44), stating without *656 analysis that the order did not affect or relate to the judgment of dismissal. Because of the dissimilar procedural stance of that case, the court's equivocation as to the order's appealability, and the special appeal rules for sanction orders (see Code Civ. Proc., § 904.1, subd. (k)), we find its reasoning unpersuasive in resolving the problem at hand.

Accordingly, we hold that the order here in issue, denying an award of attorney fees requested pursuant to Code of Civil Procedure section 2033, subdivision (o), is a postjudgment order that affects the judgment or relates to its enforcement because it determines the rights and liabilities of the parties arising from the judgment, is not preliminary to later proceedings, and will not become subject to appeal after some future judgment. Therefore, it is appealable. [FN6] On remand the Court of Appeal should address the merits of plaintiff's appeal from the portion of the order that denied attorney fees.

FN6 Given our holding that the order is appealable as an order made after a judgment, we need not consider the alternate ground suggested by the plaintiff: that the order is appealable as "an order which determines a matter collateral to the main action ... [as well as] severable from the general objective of the litigation and ... a decision thereon determines finally the rights of the parties in relation to the collateral matter, leaving no further judicial action to be taken in regard to that matter." (*Henneberque v. City of Culver City, supra,* 172 Cal.App.3d 837, 841.)

III. Prejudgment Interest

(3) Plaintiff next contends the Court of Appeal incorrectly affirmed the denial of her motion for prejudgment interest. She so moved pursuant to Civil Code section 3291 (hereafter section 3291), which provides in relevant part: "In any action brought to recover damages for personal injury ... it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section. [¶] If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure [FN7] which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

FN7 Code of Civil Procedure section 998, subdivision (b), provides in relevant part: "Not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time."

Plaintiff alleged causes of action sounding in negligence and intentional infliction of emotional distress. The threshold question is whether her action falls within the ambit of section 3291. (See *657*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 126-127 [3 Cal.Rptr.2d 666, 822 P.2d 374] [hereafter *Gourley*].) We are satisfied that it does. In *Gourley* we held that section 3291 interest was not available in insurance bad faith actions because such actions seek damages for interference with a property right, not for personal injury. (*Id.* at pp. 127-130.)"The substance of a bad faith action ... is the insurer's unreasonable refusal to pay benefits under the policy" (*id.* at p. 127), and in such an action "damages for emotional distress are compensable as *incidental damages* flowing from the initial breach, not as a separate cause of action" (*id.* at p. 128, italics in original).

Here, by contrast, plaintiff's claims of emotional distress were not incidental to " 'a substantial invasion of property interests' " (*Gourley, supra,* 53 Cal.3d at p. 128); rather, they were at the heart of her case. [FN8] She presented evidence of emotional distress under both her theories: in the negligence cause of action, her emotional distress resulted from the accident itself, while in the cause of action for intentional infliction of emotional distress her emotional distress re-

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sulted from her dealings with defendants subsequent to the accident. Although the events that formed the basis for her lawsuit did cause some property damage, that fact alone does not defeat her claim for damages under a personal injury theory. Therefore, section 3291 prejudgment interest is available because this suit is an "action brought to recover damages for personal injury" within the meaning of the section. (See also *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1005 [16 Cal.Rptr.2d 787] [action for sexual harassment in the workplace under the Fair Employment and Housing Act is an action for personal injury within the meaning of § 3291].)

FN8 Defendants do not dispute that emotional distress is personal injury for the purposes of section 3291. (See Prosser & Keeton, Torts (5th ed. 1984) ch. 2, § 12, p. 56; 2 Harper et al., The Law of Torts (2d ed. 1986) § 9.1, p. 604; *Morin v. ABA Recovery Service, Inc.* (1987) 195 Cal.App.3d 200, 208 [240 Cal.Rptr. 509] [assuming emotional distress is personal injury for purposes of § 3291].)

A. *Burden of Proof*

(4a) We next determine where the burden of proof lies on the issue of entitlement to prejudgment interest under section 3291. Plaintiff made a statutory pretrial offer to defendant trucking company to compromise for $89,000; the company did not accept her offer. At trial she presented evidence of her emotional distress and of damage to her car. After trial she claimed prejudgment interest on the entire $100,000 award against the company, which was comprised of punitive damages of $80,000 against it *658 and compensatory damages of $20,000 jointly and severally against both it and the truck driver. [FN9]

FN9 We perceive no significance in the fact that the compensatory damages claimed against defendant trucking company included damages for the conduct of defendant truck driver. If plaintiff had made an undifferentiated settlement offer to both defendants and then had obtained a judgment for which defendants were not jointly liable, an issue of apportionment might arise. (See, e.g., *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579 [11 Cal.Rptr.2d 820].) The present situation, however, differs in two respects: plaintiff made her offer to only one defendant, and that defendant was either solely liable or jointly and severally liable for the entire judgment. (See *Bihun v. AT&T Information Systems, Inc., supra*, 13 Cal.App.4th at pp. 1000-1001.)

The court denied plaintiff's motion for prejudgment interest on procedural grounds, not reaching its merits. On appeal, the Court of Appeal held there was no procedural barrier to an award of prejudgment interest but nevertheless denied relief, apparently on the ground that the award was not "damages for personal injury" within the meaning of the statute.

Morin v. ABA Recovery Service, Inc., supra, 195 Cal.App.3d at page 208 (hereafter *Morin*), read section 3291 as authorizing prejudgment interest only on damages attributable to personal injury. The *Morin* court reasoned from cases involving motions for attorney fees. For example, in *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84 [127 Cal.Rptr. 275] (hereafter *McKenzie*), three legal theories-only one of which was contractual in nature-were argued to the jury. After a general verdict, the court denied attorney fees available in contract actions under Civil Code section 1717 because it could not determine what part of the award related to the contractual theory, and "[a]ttorney fees are not allowed where it is impossible to determine what part of the jury award relates to contract." (*Morin, supra*, 195 Cal.App.3d at p. 209, citing *McKenzie, supra*, 55 Cal.App.3d at pp. 88-89.) The *Morin* court reasoned that section 3291 similarly authorizes "prejudgment interest only for the personal injury portion of a more general total recovery." (*Morin, supra*, 195 Cal.App.3d at p. 208.)

(5) We agree with this conclusion, although we do not adopt the reasoning. The statute in issue is not a model of clarity. Its second paragraph provides that if the plaintiff makes a pretrial offer to compromise that is not accepted and then "obtains a more favorable judgment, the *judgment* shall bear interest ..." (§ 3291, italics added). Taken literally, this language requires a court to assess prejudgment interest on an entire judgment regardless of how much or how little of the award consisted of personal injury damages.

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Our inquiry, however, does not end here. We are not prohibited "from determining whether the literal meaning of a statute comports with its *659 purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation] ...." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

The first paragraph of section 3291 permits the plaintiff in "any action brought to recover *damages for personal injury* ... to claim interest on the damages alleged" (italics added). We understand the Legislature to have intended this narrower language, which confines the availability of prejudgment interest to "damages for personal injury," to limit the broader language of the second paragraph. To adopt the broader reading of the second paragraph would render the narrower language of the first paragraph nugatory.

By authorizing prejudgment interest only on personal injury damages, the narrower language also serves an important purpose of section 3291, i. e., "to provide a statutory incentive to settle personal injury litigation where plaintiff has been physically as well as economically impaired ...." (*Gourley, supra,* 53 Cal.3d at p. 126.) The broader reading gives a windfall to plaintiffs who happen to attach claims for personal injury damages to claims for other kinds of damages. We conclude that section 3291 authorizes courts to award prejudgment interest only on damages attributable to personal injury.

(4b) We next consider how a court is to determine the nature of damages for purposes of section 3291. In *Morin, supra,* 195 Cal.App.3d 200, the first case to address this issue, the plaintiffs moved for section 3291 prejudgment interest on damages awarded in a general verdict under both personal injury and property damage theories. The Court of Appeal reversed the trial court's denial of the motion and remanded for further proceedings to establish what portion of the award was attributable to personal injury.

In the present case the Court of Appeal relied on *Morin, supra,* 195 Cal.App.3d 200, for the proposition that plaintiff has the burden of "establishing the threshold proposition that a certain award is in fact for personal injury ...." (*Id.* at p. 208.)According to the special verdict, the compensatory damages included $5,000 as a result of the collision and $15,000 as a result of the false identification and insurance information furnished by *660 defendant truck driver. [FN10] Assuming that the compensatory damages of $5,000 as a result of the collision were attributable to property damage to plaintiff's car, [FN11] the Court of Appeal concluded that by requesting prejudgment interest on the entire award plaintiff failed to establish that the award was for personal injury.

FN10 The special verdict declared in relevant part: "1. Did defendant Gary Prince negligently operate a vehicle in such a manner as to damage plaintifs [*sic*] vehicle?" Answer: "Yes." "2. Was such negligence a legal cause of damage to the plaintiff?" Answer: "Yes." "3. What is the total amount of damages suffered by the plaintiff as a legal result of the collision?" Answer: "$5000.00." "4. Did defendant Gary Prince intentionally give plaintiff false information regarding his identity and insurance?" Answer: "Yes." "5. What is the total amount of damages suffered by the plaintiff as a legal result of the failure of defendant Gary Prince to inform plaintiff of his true identity and accurate insurance data?" Answer: "$15,000." "6. Do you find that there was oppression, fraud or malice in the conduct of defendant Gary Prince?" Answer: "Yes." "7. Do you find that there was oppression, fraud or malice in the conduct of defendant Watkins Motor Lines, Inc.?" Answer: "Yes."

FN11 At trial plaintiff presented evidence of $4,808.50 in automobile repair and storage costs as a result of the accident.

Plaintiff concedes the initial burden of proof rested on her, but contends (1) that she carried her threshold burden to show that "any portion of the jury award reflects personal injury damages" (*Morin, supra,* 195

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Cal.App.3d at p. 208) by establishing that the jury awarded damages on a personal injury theory, and (2) that the burden then shifted to defendant to claim and prove apportionment for any fraction of the award that might not be for personal injury.

We do not agree in full with either reading of *Morin*.Plaintiff's proposal to shift the burden of proving apportionment to defendant is contrary to Evidence Code section 500, which provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." It is plaintiff who is claiming prejudgment interest; thus, under the general rule it is plaintiff who bears the burden of proving each fact essential to an award of such interest, including the amount or proportion of personal injury damages in the judgment.

It is true that "[t]he general rule allocating the burden of proof applies 'except as otherwise provided by law.' The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and *661 the probability of the existence or nonexistence of the fact." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 500, p. 431.)

Plaintiff offers no reason why we should make an exception to the general rule for section 3291, and we cannot conceive of one. Personal injury defendants possess no special knowledge of the basis of a jury's award of damages; the plaintiffs in such cases can request special verdicts or devise other means of identifying damages awarded for personal injury. Nor are we aware of any public policy that would justify creating a presumption that all damages in personal injury cases are eligible for prejudgment interest and then requiring defendants to rebut that presumption.

We therefore hold that, consistent with the general rule of Evidence Code section 500, plaintiff has the burden of proving what portion of her award was "damages for personal injury" and thus was eligible for prejudgment interest under section 3291.

We disagree, however, with the Court of Appeal's conclusion that plaintiff has tried but failed to carry that burden; in our view, she never had an opportunity to carry it. The trial court ruled that plaintiff's motion for prejudgment interest was barred on procedural grounds without reaching the question of what portion of the award represented damages for personal injury. Rather than remanding for such a determination, the Court of Appeal itself denied plaintiff's motion because the motion claimed interest on damages that were not for personal injury.

The Court of Appeal should instead have remanded the matter to the trial court to give plaintiff an opportunity-in effect, her first-to prove which damages were assessed for personal injury. As a general rule, this kind of factual determination lies in the province of the trial court. (See *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 751 [286 Cal.Rptr. 755] [remanding "for the trial court to determine the amount of prejudgment interest due appellants"]; *Morin, supra*, 195 Cal.App.3d at p. 212 [remanding "to determine the portion, if any, of the verdict attributable to personal injury claims and [to] award prejudgment interest accordingly"].) Such a determination requires an inquiry that the trial court, already familiar with the facts and issues of the case, is ordinarily better able to make.

This is especially true when, as here, the special verdict does not explicitly identify which damages are for personal injury. Although we encourage the use of special verdicts or jury findings as "the most direct and effective means of establishing the fact and amount of personal injury recovery" (*Morin, supra*, 195 Cal.App.3d at p. 211), special findings "are not necessarily the sole means to determine whether the jury awarded ... damages *662 for personal injuries and, if such damages were awarded, their amount. Facts and circumstances peculiar to [the] case, possibly including such considerations as the parties' theories of the case, uncontroverted evidence or jury instructions, may permit determination of the fact and amount of personal injury recovery." (*Ibid.*) In such a case, the trial court is usually better equipped than an appellate court to determine from the relevant facts and circumstances which portion of the judgment is eligible for prejudgment interest.

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Here, the special verdict attributed $5,000 in compensatory damages to the collision, $15,000 in compensatory damages to the truck driver's failure to provide plaintiff with his true identity and accurate insurance information, and $80,000 to punitive damages. As will appear, section 3291 interest is available on compensatory, but not punitive, damages. On remand, plaintiff will be entitled to interest on the portion of the $20,000 in compensatory damages that she proves was for personal injury. [FN12]

FN12 We note that defendant mistakenly characterizes as "dictum" the Court of Appeal's holding that a prayer for prejudgment interest in the complaint is not a prerequisite to recovery of such interest under section 3291. The Court of Appeal necessarily decided this issue before reaching the issue of the nature of the award.

B. *Punitive Damages*

(6a) Defendant contends for the first time that plaintiff should not receive prejudgment interest on the $80,000 in punitive damages awarded to her under Civil Code section 3294. Although no party raised this question at any previous stage of the proceedings, we deem its resolution appropriate because it is integrally related to the principal issues on review and will provide guidance on remand. (See Code Civ. Proc., § 906.)

(7) (See fn. 13.) We expressly reserved this question in *Gourley, supra*, 53 Cal.3d at page 126, footnote 3. We now hold that section 3291 does not authorize the award of prejudgment interest on punitive damages in personal injury cases. [FN13]

FN13 Defendant further argues that when the $80,000 in punitive damages is subtracted from the total award of $100,000, plaintiff's personal injury award totals at most $20,000; that this was well below her offer to compromise for $89,000 and so did not constitute a "more favorable judgment" in the meaning of section 3291; and, therefore, that she cannot receive prejudgment interest even on the damages she proves are for personal injury.

We disagree. Section 3291 provides for prejudgment interest when a personal injury plaintiff obtains a "more favorable judgment" than the plaintiff's offer to compromise under Code of Civil Procedure section 998. Although the word "judgment" used later in section 3291 must bear a narrower meaning to avoid conflict with legislative intent and the meaning of the statute as a whole (see *ante*, pp. 658-659), here there is no such conflict. The plain language of section 3291 provides for a simple comparison in personal injury cases between the judgment and the offer to compromise; if the judgment is "more favorable," the plaintiff is eligible for prejudgment interest on the damages attributable to personal injury. We see no sign the Legislature intended the judgment and the offer to compromise to be apportioned between personal injury damages and other kinds of damages.

(6b) In arguing to the contrary, plaintiff cites *Greenfield v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111, 124-125 [219 Cal.Rptr. 805]*663 (hereafter *Greenfield*), and cases following it (e.g., *Morin, supra*, 195 Cal.App.3d at p. 207; *Bihun v. AT&T Information Systems, Inc., supra*, 13 Cal.App.4th at p. 1005). The reasoning of *Greenfield* rests on the language of the second paragraph of section 3291 providing that "the *judgment* shall bear interest" (italics added), and concludes that because "[t]here is only one judgment[,] ... both compensatory and punitive damages are encompassed therein ...." (174 Cal.App.3d at p. 125.) As we have already seen, however, this language is not dispositive. The operative language of the first paragraph of section 3291 restricts the availability of prejudgment interest to "damages for personal injury."

The question then becomes whether punitive damages are "damages for personal injury." (§ 3291.)The statute itself is silent on this point. During the enactment process, "the Legislature rejected several proposed amendments expressly providing that prejudgment interest would not accrue to that portion of the judgment representing punitive damages. [Citation.]" (*Gourley, supra*, 53 Cal.3d at p. 126.) The Legislature's rejection of the proposed amendments, however, is not conclusive of legislative intent re-

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garding the availability of prejudgment interest on punitive damages. (See *id.*, fn. 3.)

We turn to the legislative intent of section 3291 as a whole. As noted above, section 3291 was intended to encourage settlements in personal injury cases. (*Gourley, supra,* 53 Cal.3d at p. 126.) Any connection there might be between the availability of prejudgment interest on punitive damages and the statutory purpose of providing an incentive to settle is too attenuated and speculative to be dispositive.

Prejudgment interest has an additional purpose, however. The basic provision governing prejudgment interest is Civil Code section 3287, subdivision (a) of which provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day ...." For more than a century it has been settled that one purpose of section 3287, and of prejudgment interest in general, is to provide just compensation to the injured party for loss of use of the award during the prejudgment period-in other words, to make the plaintiff whole as of the date of the injury. (See, e.g., *Cox v. McLaughlin* (1888) 76 Cal. 60, 68-69 [18 P. 100]; *Gourley, supra,* 53 Cal.3d at p. 132*664 (dis. opn. of Broussard, J.).) In enacting section 3291, the Legislature provided a means of compensating personal injury plaintiffs for loss of use of money during the prejudgment period. [FN14]

FN14 Other states that award prejudgment interest recognize its compensatory purpose. (See, e.g., *City and Borough of Juneau v. Comm'l U. Ins. Co.* (Alaska 1979) 598 P.2d 957, 959 ["The purpose of prejudgment interest is to place an injured plaintiff in the same position as if he had been compensated immediately for his loss."]; *Heid v. Destefano* (1978) 41 Colo.App. 436 [586 P.2d 246, 247] [the purpose of prejudgment interest is "to compensate a successful plaintiff for the loss of the use of the money to which he has been entitled"]; *Old Orchard by the Bay v. Hamilton Mut.* (1990) 434 Mich. 244 [454 N.W.2d 73, 76] [the purpose of prejudgment interest is to compensate "the prevailing party for loss of the use of the funds awarded," as well as to offset any "costs of bringing a court action" and "to provide an incentive for prompt settlement"]; *Buckhannon-Upshur Cty. Airport v. R&R Coal* (1991) 186 W.Va. 583 [413 S.E.2d 404, 408] [prejudgment interest is "intended to make an injured plaintiff whole as far as loss of use of funds is concerned"].)

This end would not be served by awarding prejudgment interest on punitive damages. Punitive damages are awarded "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) By definition they are not intended to make the plaintiff whole by compensating for a loss suffered. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323].) To award prejudgment interest on punitive damages arising from personal injury actions would therefore give a windfall to the plaintiffs in those actions.

We are not persuaded that the Legislature intended such a result. Had the Legislature meant section 3291 to authorize prejudgment interest on punitive damages, it could easily have used explicit language to that effect. Instead, it limited prejudgment interest to "damages for personal injury." (*Ibid.*) Punitive damages are not damages "for" personal injury in the sense of compensating plaintiffs for their injuries, even though they may arise from a personal injury cause of action.

We therefore conclude that section 3291 does not authorize the award of prejudgment interest on punitive damages. We disapprove the contrary holding in *Greenfield v. Spectrum Investment Corp., supra,* 174 Cal.App.3d at pages 124-125, as well as in *Bihun v. AT&T Information Systems, Inc., supra,* 13 Cal.App.4th at pages 1005-1006, and in *Morin, supra,* 195 Cal.App.3d at page 207, to the extent they conclude that prejudgment interest may be calculated on an award of punitive damages. Here, plaintiff may not recover prejudgment interest on her $80,000 punitive damages award.

Disposition

For the reasons stated the judgment of the Court of Appeal is reversed with directions to address the merits of the attorney fees issue and thereafter *665 to reverse for further proceedings the order of the trial

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court on the prejudgment interest issue.

Lucas, C. J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred. *666

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C FRANK VALLEJOS, Plaintiff and Appellant,
v.
CALIFORNIA HIGHWAY PATROL, Defendant and Respondent.
ROBERT E. FIELD, Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA, Defendant and Respondent.
JEFFREY ADRIAN VILLAGRAN, Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA, Defendant and Respondent.

Civ. No. 53205., Civ. No. 53243., Civ. No. 53265.

Court of Appeal, Second District, Division 3, California.
Feb. 26, 1979.

SUMMARY

In actions seeking reimbursement from the State of California and the California Highway Patrol for allegedly illegal charges made for copies of traffic accident reports and an injunction against such practice, the trial court sustained defendants' demurrers without leave to amend on the ground that the accident reports were not public records within the meaning of Gov. Code, § 6257, which limits the amount that may be charged for copies of such records. No request for leave to amend was made by any of the parties and the actions were forthwith ordered dismissed. (Superior Court of Los Angeles County, Nos. CA 000399, CA 000419, C 189860, George M. Dell, Judge.)

The Court of Appeal reversed the orders of dismissal and remanded the causes with instructions for the trial court to sustain the demurrers with leave to amend. The court held that the accident reports were public records, but it further held that the complaints failed to state causes of action in that plaintiffs had failed to allege their status, under Gov. Code, § 6254, subd. (f), and Veh. Code, § 20012, as persons entitled to copies of such otherwise confidential records. (Opinion by Allport, J., with Potter, Acting P J., and Cobey, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Records and Recording Laws § 12--Inspection of Public Records-- Confidential Records--Copies--Charges.

In actions seeking reimbursement from the State of California and the California Highway Patrol for allegedly illegal charges made for copies of traffic accident reports and an injunction against such practice, the trial court properly sustained defendants' demurrers, where, though the reports were public records within the meaning of Gov. Code, § 6252, subd. (d), and thus subject to the limitation of Gov. Code, § 6257, as to charges for copies, the complaints failed to allege that plaintiffs were persons entitled, under Gov. Code, § 6254, subd. (f), and Veh. Code, § 20012, to such otherwise confidential information. However, the court should have granted plaintiffs leave to amend to allege such entitlement if the facts permitted.

[See Cal.Jur.3d, Records and Recording Laws, § 8; Am.Jur.2d, Records and Recording Laws, § 12 et seq.]

COUNSEL

Laufer & Roberts, Kenneth P. Roberts, Merritt L. Weisinger and Weisinger & Frederick for Plaintiffs and Appellants.

Evelle J. Younger, Attorney General, L. Stephen Porter, Assistant Attorney General, and Henry G. Ullerich, Deputy Attorney General, for Defendants and Respondents.

ALLPORT, J.

Frank Vallejos, Jeffrey Adrian Villagran and Robert E. Field appeal from orders of dismissal of their actions for restitution, accounting and injunctive relief following sustaining of general demurrers. At the request of defendants the three matters were consolidated for briefing, oral argument and decision by this court. The gravamen of the actions is that, during the year 1976, defendants made illegal charges for copies of traffic accident reports in violation of *783 Government Code section 6257, [FN1] for which reimbursement is sought and against which practice an injunction is requested. The Vallejos and Field

actions are brought as class actions.

FN1 Prior to its amendment effective January 1, 1977, section 6257 provided: "A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, provided such fee shall not exceed ten cents ($0.10) per page or the prescribed statutory fee, where applicable."

The reporter's transcript discloses that the three demurrers were heard on November 9, 1977, and each was sustained without leave to amend on the ground that the accident reports were not public records within the meaning of section 6257. No request for leave to amend was made by any of the parties and the actions were forthwith ordered dismissed.

The Issue

(1)Bearing in mind that our function on appeal in these cases is to review the validity of the ruling and not necessarily the reason therefor *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 627 [137 Cal.Rptr. 681]; *Rupp v. Kahn* (1966) 246 Cal.App.2d 188, 192, fn. 1 [55 Cal.Rptr. 108]), we proceed to consideration of whether written traffic accident reports prepared and retained by the California Highway Patrol during the year 1976 were "identifiable public record[s]" for which reproduction costs were limited to 10 cents per page. FN2 We deem this to be the threshold, if not the only, issue before us. It was so considered by the court below and it has been so treated by all parties in their presentations on appeal. For reasons to follow we conclude these reports were "identifiable public records" and will therefore reverse.

FN2 Section 6257 was amended effective January 1, 1977, to read as follows: "A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a fee or deposit to the state or local agency, provided such fee shall not exceed the actual cost of providing the copy, or the prescribed statutory fee, if any, whichever is less."

Discussion

In 1968 the California Public Records Act, Government Code section 6250 et seq., section 6252 subdivision (d) defined public records to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." In *Cook v. Craig* (1976) 55 Cal.App.3d 773 [127 Cal.Rptr. 712], citizens sought copies of the *784 rules and regulations of the department governing the investigation and disposition of complaints of police misconduct. In holding the material requested to be public records this court said, at pages 781-782:

"The California Public Records Act

"The PRA begins with a broad statement of intent: 'In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.' (§ 6250.)

"Like the federal Freedom of Information Act, section 552 et seq. of 5 United States Code, upon which it was modeled (see *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 652 [117 Cal.Rptr. 106]), the general policy of the PRA favors disclosure. Support for a refusal to disclose information 'must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act.' (*State of California* ex rel. *Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783 [117 Cal.Rptr. 726].) To this end, subdivision (d) of section 6252 states that '" [p]ublic records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.' The word 'writing' is itself defined comprehensively in subdivision (e) of section 6252: '(e) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums,

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and other documents.'

"Defendants claim that nowhere in the PRA is the term 'public records' *defined*, and that subdivision (d) of section 6252 is merely a statement of certain inclusions within the term and not its definition. Accordingly defendants urge a narrow meaning to the term, based upon cases interpreting it as used in other statutes. (See *People v. Olson* (1965) 232 Cal.App.2d 480, 486 [42 Cal.Rptr. 760]; *Nichols v. United States* (D.Kan. 1971) 325 F.Supp. 130,affd. on other grounds (10th Cir.) 460 F.2d 671,cert. den. (1972) 409 U.S. 966 [34 L.Ed.2d 232, 93 S.Ct. 268].) Without quibbling over whether or not subdivision (d) of section 6252 is a 'definition' of the term 'public records,' the expression *'any writing *785 containing information relating to the conduct of the public's business* prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics' is sufficiently broad to include the material sought by the plaintiffs. The breadth of the term 'public records' is further shown by certain exceptions in section 6254, such as subdivisions (a) exempting '[p]reliminary drafts ... which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure; ...' (g) exempting test questions for examination, and (j) exempting '[l]ibrary and museum materials made or acquired and presented solely for reference or exhibition purposes.'

"We therefore conclude that the scope of the term 'public records' as used in subdivision (d) of section 6252 does not depend upon the scope of the term as used elsewhere; defendants cases interpreting it are thus inapplicable." (Fn. omitted.)

Relying upon the rationale of *Cook* we are persuaded to hold that the traffic accident reports sought in the instant case are likewise public records within the meaning of the act. The language of section 6252 subdivision (d) is "sufficiently broad" to include these reports within its definition as "containing information relating to the conduct of the public's business prepared ... by a state agency." "The *filing* of a document imports that it is thereby placed in the custody of a public official to be preserved by him for public use. Because for a season its value is best conserved by maintaining its confidential character by excluding public gaze, it becomes no less a public record. (*People v. Tomalty*, 14 Cal.App. 224, 232 [111 P. 513]; *Cox v. Tyrone Power Enterprises, Inc.*, 49 Cal.App.2d 383, 395 [121 P.2d 829].) (*People v. Pearson* (1952) 111 Cal.App.2d 9, 30 [244 P.2d 35].)

The state does not seriously contend to the contrary, arguing strenuously however that the reports are exempt from disclosure under section 6254 subdivisions (f) and (k) as being investigatory records compiled by a state agency. In *Cook v. Craig, supra.*, 55 Cal.App.3d 773, at pages 782-783, this court suggested such approach, saying: "Defendants' justification for refusing to disclose that which was sought herein must be found, if at all, in the exemptions for particular records set out in section 6254, the 'islands of privacy upon the broad seas of enforced disclosure.' (*Black Panther Party v. Kehoe, supra.*, 42 Cal.App.3d [645] at p. 653 [117 Cal.Rptr. 106].)*786

"Section 6254 provides in part: 'Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

"'

. . . .

"'(f) Records of *complaints to or investigations conducted by*, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and *any state or local police agency*, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

"'

. . . .

"'(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.' (Italics added.)" (Fn. omitted.) [FN3] While it is true these reports are deemed confidential by Vehicle Code section 20012 and perhaps privileged under Evidence Code section 1040, for reasons to follow they may not be exempt

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from disclosure in these cases. While the general public is denied access to this information such is not true with respect to parties involved in the incident or others who have a proper interest in the subject matter. For example, subdivision (f) of Government Code section 6254 provides in part that: "except that local police agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the persons involved in an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, ..." *787

FN3 Subsection (2) of subdivision (b) of section 1040 of the Evidence Code provides: "(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and: elip; [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

Vehicle Code section 20012 renders the reports confidential, "except that the Department of the California Highway Patrol or the law enforcement agency to whom the accident was reported shall disclose the entire contents of the reports, including, but not limited to, the names and addresses of persons involved in, or witnesses to, an accident, the registration numbers and descriptions of vehicles involved, the date, time and location of an accident, all diagrams, statements of the drivers involved in the accident and the statements of all witnesses, to any person who may have a proper interest therein, including, but not limited to, the driver or drivers involved, or the legal guardian thereof, the parent of a minor driver, the authorized representative of a driver, or to any person injured therein, the owners of vehicles or property damaged thereby, persons who may incur civil liability, including liability based upon a breach of warranty arising out of the accident, and any attorney who declares under penalty of perjury that he represents any of the above persons." Thus there exists an obvious exception to the exemption granted by section 6254.

Furthermore, the burden of establishing an exemption is upon the public agency. (§ 6255.) If for some reason not apparent to us, the department did in fact consider the instant reports to be exempt under the act, or otherwise not to be made public, the burden was upon it to so demonstrate before preparing and delivering copies. If no claim of confidentiality or exemption from disclosure was then and there asserted it is deemed waived. (Cf. *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656 [117 Cal.Rptr. 106].)

The question remains-are the plaintiffs in the instant actions "interested or proper parties" within the statutory exceptions. Presumably so but the complaints fail to allege their status in these respects and for that reason do fail to state a cause of action. Under the circumstances it is appropriate to give plaintiffs an opportunity to amend their complaints in accordance with the views expressed herein in the event the facts so permit.

Assuming arguendo that the reports come within the purview of section 6257, the state would have us sustain the demurrers on a number of other grounds not considered below. It is argued that the demurrers were properly sustainable on theories of governmental immunity, lack of payment under protest, as being improper class actions, as lacking compliance with claim statutes and that no cause for refund of money has been stated. It is also argued that the Villagran complaint failed to state a *788 cause of action under Civil Code section 3369. While it may be true that our function on appeal is to review the validity of the ruling below, not the reasons therefor, we do not perceive our function to include an *ab initio* consideration of all of the grounds of the demurrer not heretofore considered below. It does not go so far as to render this court a law and motion department of the superior court. In view of our determination to allow

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time to amend, the propriety of the remaining grounds of demurrer can be considered in due course.

The order of dismissal in each case is reversed and the causes remanded with instructions for the court below to sustain the demurrers with leave to amend.

Potter, Acting P. J., and Cobey, J., concurred.
Petitions for a rehearing were denied March 20, 1979, and respondents' petitions for a hearing by the Supreme Court were denied May 10, 1979. *789

Cal.App.2.Dist.
Vallejos v. California Highway Patrol
89 Cal.App.3d 781, 152 Cal.Rptr. 846

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GARY WILLIAMS et al., Plaintiffs and Appellants,
v.
GILBERT GARCETTI, as District Attorney, etc., et al., Defendants and Respondents.
No. S024925.

Supreme Court of California
Jul 1, 1993.

SUMMARY

Plaintiff taxpayers filed a complaint for injunctive and declaratory relief against the county district attorney and the city attorney, seeking to halt the enforcement of an amendment to Pen. Code, § 272 (contributing to dependency or delinquency of minor), which imposes upon parents the duty to "exercise reasonable care, supervision, protection, and control over their minor children." Plaintiffs alleged that enforcement would constitute a waste of public funds inasmuch as the amendment was unconstitutionally vague and overbroad on its face and impinged on the right to privacy. On cross-motions for summary judgment, the trial court granted summary judgment in favor of defendants. (Superior Court of Los Angeles County, No. C731376, Ronald M. Sohigian, Judge.) The Court of Appeal, Second Dist., Div. One, No. B056250, reversed, determining that the amendment was unconstitutionally vague.

The Supreme Court reversed the judgment of the Court of Appeal with directions to affirm the judgment of the trial court. The court held that the amendment is not unconstitutionally vague, since it provides adequate notice to parents with regard to potential criminal liability for failure to supervise and control their children, and provides adequate standards for its enforcement and adjudication in order to avoid the danger of arbitrary and discriminatory enforcement. The court also held that the amendment is not unconstitutionally overbroad. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Vagueness.
The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of life, liberty, or property without due process of law, as assured by both the federal Constitution (U.S. Const., 5th and 14th Amends.) and the California Constitution (Cal. Const., art. I, § 7). Under both Constitutions, due process of law in this context requires two elements. A criminal statute must be definite enough to provide (1) a standard of conduct for those whose activities are proscribed, and (2) a standard for police enforcement and for ascertainment of guilt. Indeed, the requirement of guidelines for law enforcement is the more important aspect of the vagueness doctrine. The reason for its importance is that where the Legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows police officers, prosecutors, and juries to pursue their personal predilections.
[See 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 43 et seq.]
(2) Constitutional Law § 113--Due Process--Substantive Due Process-- Statutory Vagueness--Standard of Review.
Courts evaluate the specificity of a statute according to the following standards: Vague laws offend several important values. First, because it is assumed that a person is free to steer between lawful and unlawful conduct, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police officers, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. The starting point of the court's analysis is the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without

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violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.

(3a, 3b, 3c, 3d, 3e, 3f, 3g) Parent and Child § 14--Custody and Control--Criminal Liability for Failure to Supervise and Control Minor Child--Validity of Statute--Vagueness:Delinquent, Dependent, and Neglected Children § 38--Contributing to Delinquency.
An amendment to Pen. Code, § 272, which imposes upon parents the duty to "exercise reasonable care, supervision, protection, and control over their minor children," is not unconstitutionally vague. The amendment incorporates the definitions and limits of parental duties that have long been a part of California dependency law and tort law. The terms "supervision" and "control" suggest an aspect of the parental duty that focuses on the child's actions and their effect on third persons. Implicit in the statute's original language was the duty to prevent the child from from engaging certain delinquent acts. The amendment provides more explicitly that parents violate § 272 when their failure to reasonably supervise and control results in the child's delinquency. Thus, the amendment provides adequate notice with regard to potential criminal liability for failure to supervise and control their children because (1) it incorporates well-established tort law, and (2) it imposes criminal liability only when the parent engages in conduct that so grossly departs from the standard of care as to amount to criminal negligence. Further, the incorporation of preexisting tort concepts and the requirement of a causative link between a parent's criminal negligence and the child's delinquency provide standards for enforcement and adjudication of the amendment thereby minimizing the danger of arbitrary and discriminatory enforcement.
[See **Cal.Jur.3d (Rev), Criminal Law, § 967**; 2 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1988) § 836.]

(4) Statutes § 13--Amendment--Purpose--Change in law or Clarification.
Where changes have been introduced to a statute by amendment, it must be assumed the changes have a purpose. That purpose is not necessarily to change the law. While an intention to change the law is usually inferred from a material change in the language of the statute, a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute.

(5) Statutes § 21--Construction--Legislative Intent--Motive of Individual Legislator.
In construing a statute, a court does not consider the motives or understandings of an individual legislator even if he or she authored the statute.

(6) Parent and Child § 14--Custody and Control--Duty to Prevent Minor Child From Harming Others.
California law finds a special relationship between parent and child, and accordingly places upon a parent a duty to exercise reasonable care to control his or her minor child so as to prevent it from intentionally harming others or conducting itself in a way that creates an unreasonable risk of bodily harm to others, if the parent (a) knows or has reason to know that he or she has the ability to control the child, and (b) knows or should know of the necessity and opportunity for exercising such control.

(7) Statutes § 45--Construction--Presumptions--Legislature's Knowledge of Existing State of Law.
When construing a statute, a court assumes that, in passing the statute, the Legislature acted with full knowledge of the state of the law at the time.

(8) Constitutional Law § 113--Due Process--Substantive Due Process-- Statutory Vagueness--Difficulty in Determining Statute's Applicability to Marginal Offense.
Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

(9) Criminal Law § 8--Mental State--Criminal Negligence.
In the criminal context, ordinary negligence sufficient for recovery in a civil action will not suffice; to constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a gross or culpable departure from the required standard of care.

(10a, 10b) Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Overbreadth.
A challenge that a statute is overbroad implicates the constitutional interest in due process of law (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, §§ 7, subd. (a), 24.). The overbreadth doctrine provides that a governmental purpose to control or prevent

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activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. However, a facial overbreadth challenge is difficult to sustain. Application of the overbreadth doctrine is employed sparingly and only as a last resort. Consequently, to justify a conclusion of facial overbreadth, the overbreadth of a statute must not only be real, but must be substantial as well.

(11a, 11b) Parent and Child § 14--Custody and Control--Criminal Liability for Failure to Supervise and Control Minor Child--Validity of Statute--Overbreadth:Delinquent, Dependent, and Neglected Children § 38-- Contributing to Delinquency.
An amendment to Pen. Code, § 272 (contributing to dependency or delinquency of minor), which imposes upon parents the duty to "exercise reasonable care, supervision, protection, and control over their minor children," is not unconstitutionally overbroad on its face. Although parties challenging the amendment asserted that it infringed on the right of intimate family association protected by both the federal and state Constitutions, the assertions lacked the particularity necessary to find a statute overbroad. Moreover, the amendment is not standardless; it incorporates the definition and limits of the parental tort duty of supervision and control. That definition and those limits guard against any excessive sweep by the criminal prohibition. Since the challengers did not show that a substantial number of instances exist in which the amendment cannot be applied constitutionally, the amendment could not be considered substantially overbroad, and whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations involved.

(12) Constitutional Law § 113--Due Process--Substantive Due Process-- Statutory Overbreadth--Rights Protected.
The concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government extends to basic liberties and rights not explicitly listed in the Constitution, such as the right to marry, establish a home and bring up children; the right to educate one's children as one chooses; and the right to privacy and to be let alone by the government in the private realm of family life.

COUNSEL

Carol A. Sobel, Paul L. Hoffman and Mark D. Rosenbaum for Plaintiffs and Appellants.
James K. Hahn, City Attorney, Maureen Siegel, Assistant City Attorney, Debbie Lew and R. Bruce Coplen, Deputy City Attorneys, Ira Reiner and Gilbert I. Garcetti, District Attorneys, Thomas P. Higgins, Deputy District Attorney, Chase, Rotchford, Drukker & Bogust, Ronald A. Dwyer, John A. Daly and David F. Link for Defendants and Respondents.

MOSK, J.
Penal Code section 272 (hereafter section 272) provides that every person who commits any act or omits any duty causing, encouraging, or contributing to the dependency or delinquency of a minor is guilty of a misdemeanor. A 1988 amendment thereto (hereafter the amendment) provides that for the purposes of this section, parents or guardians "shall have the duty to exercise reasonable care, supervision, protection, and control" over their children. We granted review in this case to determine whether on ***566** its face the amendment is so vague or overbroad as to violate constitutional due process requirements. As will appear, we conclude that the amendment withstands challenge on the grounds of both vagueness and overbreadth, and we therefore reverse the judgment of the Court of Appeal.

I. Facts and Procedural History

For decades there has been some form of statutory prohibition against the conduct known as "contributing to the delinquency of a minor." [FN1] Section 272 is the most recent of these provisions, although its "contributing to delinquency" title is incomplete because it explicitly applies not only to delinquency (see Welf. & Inst. Code, §§ 601 [habitually disobedient or truant minors], 602 [minors who commit crimes]) but also to dependency (see *id.*, § 300 [minors within the jurisdiction of juvenile courts by reason of physical, emotional, or sexual abuse, or neglect, among other factors]).

FN1 See, e.g., Statutes 1909, chapter 133, section 26, page 225; Statutes 1915, chapter 631, section 21, page 1246; Statutes 1937, chapter 369, section 702, page 1033; Statutes 1961, chapter 1616, section 3, page 3503.

Between 1979 and 1988 section 272 provided, in

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relevant part: "Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Sections 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto ... is guilty of a misdemeanor ...." In 1988 the Legislature appended a sentence to section 272: "For purposes of this section, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child." (Stats. 1988, ch. 1256, § 2, p. 4182.) This amendment is the object of the present lawsuit.

As part of the bill that included the amendment, the Legislature established a parental diversion program. (Pen. Code, § 1001.70 et seq.) Under specified circumstances the probation department may recommend the diversion of parents or guardians (hereafter collectively referred to as parents) charged under section 272 to an education, treatment, or rehabilitation program prior to trial. Satisfactory completion of the program results in dismissal of the criminal charges.

Plaintiffs, as taxpayers, filed a complaint for injunctive and declaratory relief to halt the enforcement of the amendment, claiming it would constitute a waste of public funds. (Code Civ. Proc., § 526a.)They named as defendants Ira Reiner, as Los Angeles County District Attorney, and James K. *567 Hahn, as Los Angeles City Attorney. (Gilbert Garcetti has since succeeded Reiner as district attorney.) The grounds of the complaint were that the amendment was unconstitutionally vague, overbroad, and an impingement on the right to privacy.

Both sides moved for summary judgment. The trial court granted summary judgment for defendants, concluding that the amendment was neither vague nor overbroad and that plaintiffs lacked standing to challenge it in any case.

Plaintiffs appealed. Reversing the judgment, the Court of Appeal first held that the trial court erred on the question of standing and that plaintiffs had standing as taxpayers. [FN2] On the merits, the court struck down the amendment as unconstitutionally vague, expressly declining to reach the question of its overbreadth. [FN3]

FN2 Defendants did not challenge plaintiffs' standing on appeal, nor do they do so before this court.

FN3 The trial court did not rule on the privacy claim, and plaintiffs did not raise the point on appeal.

II. Vagueness

(1a) The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7). Under both Constitutions, due process of law in this context requires two elements: a criminal statute must " 'be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.' " (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 141 [253 Cal.Rptr. 1, 763 P.2d 852]; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 908-909, 103 S.Ct. 1855].)

(2) We evaluate the specificity of the amendment according to the following standards: " 'Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and *568 juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763 [221 Cal.Rptr. 779, 710 P.2d 845], quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109 [33 L.Ed.2d 222, 227-228, 92 S.Ct. 2294], fns. omitted.)

The starting point of our analysis is "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively,

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and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' " (*Walker v. Superior Court, supra,* 47 Cal.3d at p. 143.)

A. *Notice*

(3a) According to the foregoing principles, the amendment is not sufficiently specific unless a parent of ordinary intelligence would understand the nature of the duty of "reasonable care, supervision, protection, and control" referred to therein, as well as what constitutes its omission. Plaintiffs contend the amendment changed the law by creating a new-and impermissibly vague-parental duty as a basis for criminal liability. Defendants reply that the amendment did not change the law; rather, it merely clarified the statute's application to an existing parental duty. FN4

FN4 In either case it is clear that parents have always been liable for contributing to the delinquency of a minor under section 272 and its predecessors. Originally the statute provided for liability of "the parent or parents, legal guardian or person having the custody of such child, or any other person ...." (Stats. 1909, ch. 133, § 26, p. 225; cf. *In re Sing* (1910) 14 Cal.App. 512, 514 [112 P. 582] ["any other person" not limited to person standing in loco parentis to minor].) This was later amended simply to "[a]ny person" (Stats. 1913, ch. 673, § 28, p. 1303) and is now "[e]very person" (§ 272).

(4) " 'Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ....' " (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)

(3b) In support of their contention that the purpose of the amendment was to clarify existing law and facilitate prosecution of parents under *569section 272, defendants offer a declaration to this effect by the legislative assistant to the principal author of the legislation that included the amendment. This declaration is not dispositive of the amendment's purpose. (5) In construing a statute "we do not consider the motives or understandings of an individual legislator even if he or she authored the statute." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801, fn. 12 [268 Cal.Rptr. 753, 789 P.2d 934]; accord, *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590 [128 Cal.Rptr. 427, 546 P.2d 1371].)

(3c) We therefore turn to the statutory context as a sign of legislative purpose. The Legislature enacted the amendment and the related parental diversion program as part of the Street Terrorism Enforcement and Prevention Act, the premise of which was that "the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (Stats. 1988, ch. 1256, § 1, p. 4179.) The act included measures establishing criminal penalties for gang participation and allowing sentence enhancements for gang-related conduct; defining certain buildings in which gang activities take place as nuisances subject to injunction, abatement, or damages; and prohibiting terrorist threats of death or great bodily injury.

Viewed in the context of the act, i.e., as part of its broad scheme to alleviate the problems caused by street gangs, the amendment to section 272 and the parental diversion program appear intended to enlist parents as active participants in the effort to eradicate such gangs. FN5 Because the legislative history of the amendment is sparse, confined largely to the declaration *570 described above, we cannot rule out either plaintiffs' interpretation that the Legislature intended to enlarge the scope of parents' criminal liability or defendants' view that the Legislature merely clarified its scope. But it is not necessary for us to decide this question, for in either case our inquiry is the same: whether a parental duty of "reasonable care, supervision, protection, and control" is sufficiently certain to meet constitutional due process requirements. We

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conclude that it is because it incorporates the definitions and the limits of parental duties that have long been a part of California dependency law and tort law.

FN5 Our Legislature is not unique in addressing the problem of juvenile delinquency by making a parent criminally liable when the parent's failure to supervise or control a child results in the child's delinquency. "Holding parents responsible for juvenile delinquency is not a new concept. Colorado enacted the first law holding parents criminally liable for their children's delinquent acts in 1903." (Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children* (1991) 44 Vand.L.Rev. 441, 446.)At present, a New York statute provides: "A person is guilty of endangering the welfare of a child when: ... [¶] [b]eing a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision' ...." (N.Y. Penal Law, § 260.10, subd. (2) (Lawyers Coop. 1993); see *People v. Scully* (1987) 134 Misc.2d 906 [513 N.Y.S.2d 625, 627] [statute not void for vagueness as applied]; *People v. Bergerson* (1966) 17 N.Y.2d 398 [271 N.Y.S.2d 236, 239-240, 218 N.E.2d 288] [predecessor statute not void for vagueness].) A similar Kentucky statute provides: "A parent, guardian or other person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child." (Ky. Rev. Stat. Ann., § 530.060, subd. (1) (Michie 1992).)

Plaintiffs do not dispute that parents' legal responsibilities in regard to the "care" and "protection" of their children-focusing on forces external to the child that affect the child's own welfare-are well established and defined. For example, Welfare and Institutions Code section 300 contains a lengthy list of conditions under which a minor can be removed from the custody of a parent and declared a dependent child of the court. FN6 We agree with the Court of Appeal that section 300 provides guidelines sufficiently specific to delineate the circumstances under which a child will qualify for dependent status and thus to define the parental duty of care and protection that would prevent the occurrence of those circumstances.

FN6 These conditions include: "(a) The minor has suffered ... serious physical harm inflicted nonaccidentally upon the minor by the minor's parent or guardian. ... [¶] (b) The minor has suffered ... serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor .... [¶] (c) The minor is suffering serious emotional damage ... as a result of the conduct of the parent or guardian .... [¶] (d) The minor has been sexually abused ... by his or her parent or guardian or a member of his or her household .... [¶] (e) The minor is under the age of five and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the minor. ... [¶] ... [¶] (g) The minor has been left without any provision for support .... [¶] ... [¶] (i) The minor has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household ...."

Accordingly, we confine the balance of our analysis to section 272 as applied to juvenile delinquency through Welfare and Institutions Code sections 601 and 602, and to the "supervision" and "control" elements of the duty identified in the amendment.

The terms "supervision" and "control" suggest an aspect of the parental duty that focuses on the child's actions and their effect on third parties. This aspect becomes plain when the amendment is read in conjunction with Welfare and Institutions Code sections 601 and 602. Section 601, subdivision (a), brings within the jurisdiction of the juvenile court any minor who, inter alia, "violated any ordinance of any city or county of this state establishing a curfew ...." Subdivision (b) of section 601 brings within ***571** the juris-

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diction of the juvenile court minors for whom "the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities ...." Section 602 brings within the jurisdiction of the juvenile court any minor who "violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime ...."

According to its preamendment language, section 272 thus imposes misdemeanor liability on any person whose act or omission causes or encourages a child to violate a curfew, be habitually truant, or commit a crime-i.e., to engage in delinquent acts. Implicit in this language is the duty to make a reasonable effort to prevent the child from so doing; the breach of that duty violates section 272 only when the person "causes or tends to cause or encourage" the child's delinquency. The amendment here at issue provides more explicitly that *parents* violate section 272 when they omit to perform their duty of reasonable "supervision" and "control" and that omission results in the child's delinquency. Therefore, the Legislature must have intended the "supervision" and "control" elements of the amendment to describe parents' duty to reasonably supervise and control their children so that the children do not engage in delinquent acts.

Parents have long had a duty to supervise and control [FN7] their children under California tort law. (See, e.g., *572*Singer v. Marx* (1956) 144 Cal.App.2d 637, 644 [301 P.2d 440] ["[T]he parent has a special power of control over the conduct of the child, which he is under a duty to exercise reasonably for the protection of others."].) In adding the language of "supervision" and "control" to section 272, the Legislature was thus not imposing a new duty on parents but simply incorporating the definition and limits of a traditional duty.

FN7 We note that terms similar to "supervision" and "control" have also been used for some time in dependency law. Indeed, the version of Welfare and Institutions Code section 300, subdivision (a), in effect before, during, and for three months after the enactment of the amendment, referred to "proper and effective parental care or control." (Stats. 1986, ch. 1122, § 2, p. 3976; language changed by Stats. 1987, ch. 1485, § 4, p. 5603, operative Jan. 1, 1989.) Defendants urge that the established meaning of the term "control" in dependency law also serves to clarify its meaning in the amendment.

A reading of dependency cases reveals, however, that the term "parental control" has been employed in those cases primarily in the context of a parent's ability to provide the necessities of life and to refrain from harming the child. (See, e.g., *Marr v. Superior Court* (1952) 114 Cal.App.2d 527, 530 [250 P.2d 739] ["the usual incidents of the exercise of control over" a child are "its proper care and support"]; *In re Corrigan* (1955) 134 Cal.App.2d 751, 755 [286 P.2d 32] [mother's inability to exercise proper control evidenced by failure to protect children from abuse by their father and by leading a "nomadic life of moral poverty and insecurity" that kept them out of school]; *In re Edward C.* (1981) 126 Cal.App.3d 193, 202-203 [178 Cal.Rptr. 694] [father's inability to exercise proper parental control evidenced by "cruel and inhuman corporal punishment" of children].) In that context, a parent's success or failure in fulfilling this duty to control is assessed by the resulting care and support given to the child, as measured by statutory standards such as those in Welfare and Institutions Code section 300. (See fn. 6, *ante*.)Thus, "control" in dependency law is roughly synonymous with "care" and "protection" as used in the amendment. The term has not been employed in dependency law in the sense of regulation of a child's behavior or prevention of a child's delinquent conduct.

(6) As for the scope of this duty, "California follows the Restatement rule (Rest. 2d Torts, § 316), which finds a 'special relationship' between parent and child, and accordingly places upon the parent 'a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such con-

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trol.' " (Robertson v. Wentz (1986) 187 Cal.App.3d 1281, 1288 [232 Cal.Rptr. 634].)

(7) We "assume that in passing a statute the Legislature acted with full knowledge of the state of the law at the time." (*In re Misener* (1985) 38 Cal.3d 543, 552 [213 Cal.Rptr. 569, 698 P.2d 637].) (3d) When the amendment was enacted, parental tort liability for breach of the duty of supervision and control was a doctrine of long standing. We thus find the terms "supervision" and "control" in the amendment to section 272 to be consistent with the definition and limits of the parental duty established in the law of torts. Welfare and Institutions Code sections 601 and 602 are, of course, concerned with a child's delinquent behavior, not simply a child's harmful behavior. Therefore, we understand the amendment to describe the duty of reasonable restraint of, and discipline for, a child's delinquent acts by parents who know or should know that their child is at risk of delinquency and that they are able to control the child.

It is true that neither the amendment nor prior case law sets forth specific acts that a parent must perform or avoid in order to fulfill the duty of supervision and control. We nonetheless find the duty to be sufficiently certain even though it cannot be defined with precision. [FN8]To plaintiffs' complaint that the amendment is subjective and imprecise, defendants reply *573 that the amendment's lack of specificity concerning the boundaries of the duty is both inevitable and desirable. We agree with defendants that it would be impossible to provide a comprehensive statutory definition of reasonable supervision and control. Unlike the statute at issue in *Kolender v. Lawson, supra,* 461 U.S. 352, which was invalidated because it failed to provide standards by which to evaluate the "credible and reliable" identification it required, the present amendment is not susceptible of exegesis in an apt sentence or two.

FN8 It is instructive to note that in dependency cases terms similar to "supervision" and "control" have withstood challenge on vagueness grounds even though "[f]ew [dependency] cases have attempted to define 'proper and effective parental care or control' [citation], since in most cases ... it is easier to describe what is not proper parental care and control." (*In re Edward C., supra,* 126 Cal.App.3d at p. 202; see, e.g., *In re J. T.* (1974) 40 Cal.App.3d 633, 638 [115 Cal.Rptr. 553] [upholding the phrase "proper and effective parental care or control" in former Welfare and Institutions Code section 600, subdivision (a)]; *In re Baby Boy T.* (1970) 9 Cal.App.3d 815, 818-819 [88 Cal.Rptr. 418] [upholding the phrase "incapable of supporting or controlling the child in a proper manner" in Civil Code former section 232, subdivision (g)].) As previously noted, of course, the term "parental control" in dependency law is not synonymous with that in tort law. (See fn. 7, *ante.*)

We also agree that a statutory definition of "perfect parenting" would be inflexible and not necessary to identify the egregious breaches of parental duty that come within the statute's purview. The concept of reasonableness serves as a guide for law-abiding parents who wish to comply with the statute. "As the Supreme Court said in *Go-Bart Importing Co. v. United States* (1931) 282 U.S. 344, 357 [75 L.Ed.2d 374, 382, 515 S.Ct. 153], 'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1129 [80 Cal.Rptr. 897, 459 P.2d 225, 43 A.L.R.3d 677].) (8) One can devise hypotheticals to demonstrate the difficulty of deciding whether particular parental acts were reasonable, but "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." (*United States v. National Dairy Corp.* (1963) 372 U.S. 29, 32 [9 L.Ed.2d 561, 565, 83 S.Ct. 594].)

(3e) Section 272 holds parents liable only if they are criminally negligent in breaching their duty of supervision and control. This requirement of criminal negligence arises in part from Penal Code section 20, which provides, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." It also arises in part from the Legislature's use of the term "reasonable" in the amendment. The duty to act "reasonably" reflects the applicability of the negligence doctrine-here, criminal, not civil, negligence.

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(9) In the criminal context, "ordinary negligence sufficient for recovery in a civil action will not suffice; to constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a 'gross' or 'culpable' departure from the required standard of care." (*People v. Peabody* (1975) 46 Cal.App.3d 43, 47 [119 Cal.Rptr. 780].) (3f) It *574 follows that the amendment to section 272 punishes only negligence that exceeds ordinary civil negligence. We have defined criminal negligence as " 'aggravated, culpable, gross, or reckless, that is, ... such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to [demonstrate] ... an indifference to consequences.' " (*People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926].)

The heightened requirements of the criminal negligence standard in regard to breach of duty alleviate any uncertainty as to what constitutes reasonable supervision or control. Plaintiffs fear the statute punishes parents who could not reasonably know that their child is at risk of delinquency. As we have seen, however, only a parent who "knows or should know of the necessity and opportunity for exercising ... control" can be held liable in tort for breaching the duty to control a child. (*Robertson v. Wentz, supra,* 187 Cal.App.3d at p. 1288.) Similarly, there can be no criminal negligence without actual or constructive knowledge of the risk. (See *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].) In the setting of involuntary manslaughter, for example, "[c]riminal liability cannot be predicated on every careless act merely because its carelessness results in injury to another. [Citation.] The act must be one which has knowable and apparent potentialities for resulting in death. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the quality of the act makes it so." (*Ibid.*) Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness." (*People v. Watson* (1981) 30 Cal.3d 290, 296 [179 Cal.Rptr. 43, 637 P.2d 279].) The amendment thus punishes only parents who know or reasonably should know that their child is at risk of delinquency.

Plaintiffs also fear the statute punishes parents who try but fail to control their children. In tort law, however, "[t]he duty of a parent is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing. The parent is not under a duty so to discipline his child as to make it amenable to parental control when its exercise becomes necessary to the safety of others." (Rest.2d Torts, § 316, com. b.) In other words, a parent who makes reasonable efforts to control a child but is not actually able to do so does not breach the duty of control. This is consistent with the rule that " 'there is no [civil] liability upon the parent unless he has had an opportunity to correct specific propensity on the part of the child, and that it is too much to hold the parent responsible for general incorrigibility and a bad disposition.' " (*Singer v. Marx, supra,* 144 Cal.App.2d at p. 644.) A fortiori, parents who reasonably try but are unable to control their children are not criminally negligent. *575

The criminal negligence standard in regard to breach of duty thus provides notice to law-abiding parents that is consistent with and reinforces the notice provided by the amendment's incorporation of the definition and limits of the tort duty of parental supervision and control. The amendment requires parents who know or reasonably should know of the child's risk of delinquency to exercise their duty of supervision and control. This duty consists of undertaking reasonable-not necessarily successful-efforts at supervision and control. Omission of this duty owing to simple negligence will not subject the parent to criminal liability; a parent can be convicted only for gross or extreme departures from the objectively reasonable standard of care.

In sum, we understand the Legislature to have intended the amendment to provide that there is a duty of reasonable restraint of, and discipline for, a child's delinquent acts by parents who know or should know that their child is at risk of delinquency and that they are able to control the child. Parents who intentionally or with criminal negligence fail to perform this duty, and as a result contribute to the delinquency of the child, violate section 272.

Thus understood, the amendment is specific enough to allow parents to identify and avoid breaches of the duty of supervision and control for which they could be penalized under section 272. The amendment does not trap the innocent. It provides adequate notice to

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parents with regard to potential criminal liability for failure to supervise and control their children because (1) it incorporates the definition and the limits of a parental duty to supervise and control children that has long been a part of California tort law, and (2) it imposes criminal liability only when the parent engages in conduct that so grossly departs from the standard of care as to amount to criminal negligence.

B. *Enforcement*

In addition to affording notice to citizens, due process requires that the amendment to section 272 provide standards for its application and adjudication in order to avoid the dangers of arbitrary and discriminatory enforcement. (*Grayned v. City of Rockford, supra,* 408 U.S. at pp. 108-109 [33 L.Ed.2d at pp. 227-228].) (1b) Indeed, the requirement of guidelines for law enforcement is "the more important aspect of the vagueness doctrine." (*Kolender v. Lawson, supra,* 461 U.S. at p. 358 [75 L.Ed.2d at p. 909].) The reason for its importance is that "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " (*Ibid.*)

At issue in *Kolender v. Lawson, supra,* 461 U.S. 352, was a statute construed to require people accused of loitering to provide "credible and *576 reliable" identification. Holding the statute unconstitutionally vague, the high court noted that its lack of any standard for determining how a suspect should meet the requirement "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute ...." (*Id.* at p. 358 [75 L.Ed.2d at p. 909].)

(3g) Unlike the statute in *Kolender,* the amendment to section 272 as construed herein does not vest "virtually complete discretion" in law enforcement officials. Although the amendment contains no explicit description of the parental duty, it incorporates a preexisting definition from tort law that supplies sufficient guidance to police, prosecutors, and juries charged with enforcing it, and thereby minimizes the danger of arbitrary or discriminatory enforcement.

Application of the criminal negligence standard facilitates enforcement and adjudication of the amendment. Although the standard does not with specificity proscribe parental conduct or omission, it aids those who would enforce parental duty in providing a measure by which to assess a parent's knowledge of or authority over a child's delinquent activities.

The causation element of section 272 also reduces the likelihood of arbitrary or discriminatory enforcement. A parent will be criminally liable only when his or her criminal negligence with regard to the duty of reasonable supervision and control "causes or tends to cause or encourage" the child to come within the provisions of Welfare and Institutions Code sections 601 or 602. The Court of Appeal expressed concern about the difficulty of determining whether there is in fact a causal link between parental behavior and juvenile delinquency. It is true that the causation element of section 272 could be more difficult to apply when the question is whether a parent's failure to supervise or control a child caused the child to become delinquent than when the parent's potentially culpable conduct is of a more direct nature-for example, when the parent is an accomplice of the minor in the commission of a crime. Although there may be circumstances in which reasonable minds could differ as to whether a parent's inadequate supervision or control caused or tended to cause the child's delinquency, the same causation question has been an element of the tort liability of a parent for failure to exercise reasonable supervision and control. In that context, causation has not proved unduly troublesome. Furthermore, the opportunity for parental diversion from criminal prosecution under section 272 in less egregious cases suggests that as a practical matter a parent will face criminal penalties under section 272 for failure to supervise only in those cases in which the parent's culpability is great and the causal connection correspondingly clear. *577

We therefore conclude that the amendment to section 272 as construed herein does not "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Grayned v. City of Rockford, supra,* 408 U.S. at pp. 108-109 [33 L.Ed.2d at p. 228].) Although the amendment calls for sensitive judgment in both enforcement and adjudication, we would not be justified in assuming that police, prosecutors, and juries are unable to exercise such judgment.

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III. Overbreadth

(10a) Like a vagueness challenge, an overbreadth challenge implicates the constitutional interest in due process of law. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, §§ 7, subd. (a), 24.) The overbreadth doctrine provides that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (*NAACP v. Alabama* (1964) 377 U.S. 288, 307 [12 L.Ed.2d 325, 338, 84 S.Ct. 1302].)

(11a) Plaintiffs contend that the amendment is overbroad on its face because it infringes on the right of intimate family association protected by both the federal and state Constitutions. This contention is without merit.

(12) Plaintiffs emphasize the fundamental nature of the rights at stake in matters of child rearing. We need no convincing of their significance; we have already recognized that "[t]he concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government ... extends to ... [citations] such basic liberties and rights not explicitly listed in the Constitution [as] the right 'to marry, establish a home and bring up children' [citation]; the right to educate one's children as one chooses [citation]; ... and the right to privacy and to be let alone by the government in 'the private realm of family life.' [Citations.]" (*City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 266-267 [85 Cal.Rptr. 1 [466 P.2d 225, 37 A.L.R.3d 1313].)

(10b) Nevertheless, a facial overbreadth challenge is difficult to sustain. The high court has emphasized that "[a]pplication of the overbreadth doctrine ... is, manifestly, strong medicine. It has been employed ... sparingly and only as a last resort." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 613 [101 L.Ed.2d 1, 17, 108 S.Ct. 2225].) Consequently, to justify a conclusion of facial overbreadth, "the overbreadth of a statute must not only be real, but substantial as well ...." (*Id.* at p. 615 [37 L.Ed.2d at p. 842].)*578 Applying this test, the high court declined to strike down a statute altering the definition of "private" clubs for antidiscrimination purposes because the plaintiff failed to "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally .... No record was made in this respect, we are not informed of the characteristics of any particular clubs, and hence we cannot conclude that the [statute] threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them." (*New York State Club Assn. v. New York City* (1988) 487 U.S. 1, 14 [101 L.Ed.2d 1, 17, 108 S.Ct. 2225].)

(11b) Here plaintiffs likewise fail to show that the amendment is substantially overbroad. Their argument consists of brief and general assertions of the amendment's "limitless reach" into "virtually every aspect of child rearing and intimate family association," authorizing "law enforcement personnel to second guess *every* parental decision ...." (Italics added.) These assertions lack the kind of particularity required by the high court in *New York State Club Assn. v. New York City, supra,* 487 U.S. at page 14 [101 L.Ed.2d at pages 16-17], and, by themselves, do not compel the conclusion that the statute is overbroad. Although the right of intimate family association is constitutionally protected, a statute that seeks to regulate parental behavior is not overbroad per se.

Moreover, plaintiffs premise their assertions on the contention that the amendment makes a "standardless intrusion ... into the intimate area of parent-child relationships." As discussed in our vagueness analysis (pt. II, *ante*), however, the amendment is not standardless: it incorporates the definition and limits of the parental tort duty of supervision and control. That definition and those limits guard against any excessive sweep by the criminal prohibition. Because plaintiffs do not show that "a substantial number of instances exist in which the [amendment as construed] cannot be applied constitutionally" (*New York State Club Assn. v. New York City, supra,* 487 U.S. at p. 14 [101 L.Ed.2d at p. 17]), we "cannot conclude that the [amendment] is substantially overbroad and must assume that 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' [Citation.]" (*Ibid.*)

We therefore conclude that the amendment to section 272 does not, on its face, "sweep unnecessarily broadly and thereby invade the area of protected freedoms.' " (*NAACP v. Alabama, supra,* 377 U.S. at

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p. 307 [12 L.Ed.2d at p. 338].)*579

The judgment of the Court of Appeal is reversed with directions to affirm the judgment of the trial court.

Lucas, C. J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred. *580

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C

Effective:[See Notes]

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter III. Credit Reporting Agencies (Refs & Annos)
→ **§ 1681g. Disclosures to consumers**

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that--

(A) if the consumer to whom the file relates requests that the first 5 digits of the social security number (or similar identification number) of the consumer not be included in the disclosure and the consumer reporting agency has received appropriate proof of the identity of the requester, the consumer reporting agency shall so truncate such number in such disclosure; and

(B) nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided*, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3)(A) Identification of each person (including each end-user identified under section 1681e(e)(1) of this title) that procured a consumer report--

(i) for employment purposes, during the 2-year period preceding the date on which the request is made; or

(ii) for any other purpose, during the 1-year period preceding the date on which the request is made.

(B) An identification of a person under subparagraph (A) shall include--

(i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and

(ii) upon request of the consumer, the address and telephone number of the person.

(C) Subparagraph (A) does not apply if--

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(i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(ii) the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

(5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

(6) If the consumer requests the credit file and not the credit score, a statement that the consumer may request and obtain a credit score.

(b) Exempt information

The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(c) Summary of rights to obtain and dispute information in consumer reports and to obtain credit scores

(1) Commission summary of rights required

(A) In general

The Commission shall prepare a model summary of the rights of consumers under this subchapter.

(B) Content of summary

The summary of rights prepared under subparagraph (A) shall include a description of--

(i) the right of a consumer to obtain a copy of a consumer report under subsection (a) of this section from each consumer reporting agency;

(ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 1681j of this title;

(iii) the right of a consumer to dispute information in the file of the consumer under section 1681i of this title;

(iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;

(v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting

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agency without charge, as provided in the regulations of the Commission prescribed under section 211(c) of the Fair and Accurate Credit Transactions Act of 2003; and

(vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 1681a(w) of this title, as provided in the regulations of the Commission prescribed under section 1681j(a)(1)(C) of this title.

(C) Availability of summary of rights

The Commission shall--

(i) actively publicize the availability of the summary of rights prepared under this paragraph;

(ii) conspicuously post on its Internet website the availability of such summary of rights; and

(iii) promptly make such summary of rights available to consumers, on request.

(2) Summary of rights required to be included with agency disclosures

A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section--

(A) the summary of rights prepared by the Commission under paragraph (1);

(B) in the case of a consumer reporting agency described in section 1681a(p) of this title, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter, and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated under section 1681c of this title or cannot be verified.

(d) Summary of rights of identity theft victims

(1) In general

The Commission, in consultation with the Federal banking agencies and the National Credit Union Administration, shall prepare a model summary of the rights of consumers under this subchapter with respect to the procedures for remedying the effects of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor.

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(2) Summary of rights and contact information

Beginning 60 days after the date on which the model summary of rights is prescribed in final form by the Commission pursuant to paragraph (1), if any consumer contacts a consumer reporting agency and expresses a belief that the consumer is a victim of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor, the consumer reporting agency shall, in addition to any other action that the agency may take, provide the consumer with a summary of rights that contains all of the information required by the Commission under paragraph (1), and information on how to contact the Commission to obtain more detailed information.

(e) Information available to victims

(1) In general

For the purpose of documenting fraudulent transactions resulting from identity theft, not later than 30 days after the date of receipt of a request from a victim in accordance with paragraph (3), and subject to verification of the identity of the victim and the claim of identity theft in accordance with paragraph (2), a business entity that has provided credit to, provided for consideration products, goods, or services to, accepted payment from, or otherwise entered into a commercial transaction for consideration with, a person who has allegedly made unauthorized use of the means of identification of the victim, shall provide a copy of application and business transaction records in the control of the business entity, whether maintained by the business entity or by another person on behalf of the business entity, evidencing any transaction alleged to be a result of identity theft to--

(A) the victim;

(B) any Federal, State, or local government law enforcement agency or officer specified by the victim in such a request; or

(C) any law enforcement agency investigating the identity theft and authorized by the victim to take receipt of records provided under this subsection.

(2) Verification of identity and claim

Before a business entity provides any information under paragraph (1), unless the business entity, at its discretion, otherwise has a high degree of confidence that it knows the identity of the victim making a request under paragraph (1), the victim shall provide to the business entity--

(A) as proof of positive identification of the victim, at the election of the business entity--

(i) the presentation of a government-issued identification card;

(ii) personally identifying information of the same type as was provided to the business entity by the unauthorized person; or

(iii) personally identifying information that the business entity typically requests from new applicants or for new transactions, at the time of the victim's request for information, including any documentation described in clauses (i) and (ii); and

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(B) as proof of a claim of identity theft, at the election of the business entity--

(i) a copy of a police report evidencing the claim of the victim of identity theft; and

(ii) a properly completed--

(I) copy of a standardized affidavit of identity theft developed and made available by the Commission; or

(II) an [FN1] affidavit of fact that is acceptable to the business entity for that purpose.

(3) Procedures

The request of a victim under paragraph (1) shall--

(A) be in writing;

(B) be mailed to an address specified by the business entity, if any; and

(C) if asked by the business entity, include relevant information about any transaction alleged to be a result of identity theft to facilitate compliance with this section including--

(i) if known by the victim (or if readily obtainable by the victim), the date of the application or transaction; and

(ii) if known by the victim (or if readily obtainable by the victim), any other identifying information such as an account or transaction number.

(4) No charge to victim

Information required to be provided under paragraph (1) shall be so provided without charge.

(5) Authority to decline to provide information

A business entity may decline to provide information under paragraph (1) if, in the exercise of good faith, the business entity determines that--

(A) this subsection does not require disclosure of the information;

(B) after reviewing the information provided pursuant to paragraph (2), the business entity does not have a high degree of confidence in knowing the true identity of the individual requesting the information;

(C) the request for the information is based on a misrepresentation of fact by the individual requesting the information relevant to the request for information; or

(D) the information requested is Internet navigational data or similar information about a person's visit to a website or online service.

(6) Limitation on liability

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Except as provided in section 1681s of this title, sections 1681n and 1681o of this title do not apply to any violation of this subsection.

(7) Limitation on civil liability

No business entity may be held civilly liable under any provision of Federal, State, or other law for disclosure, made in good faith pursuant to this subsection.

(8) No new recordkeeping obligation

Nothing in this subsection creates an obligation on the part of a business entity to obtain, retain, or maintain information or records that are not otherwise required to be obtained, retained, or maintained in the ordinary course of its business or under other applicable law.

(9) Rule of construction

(A) In general

No provision of subtitle A of title V of Public Law 106-102, prohibiting the disclosure of financial information by a business entity to third parties shall be used to deny disclosure of information to the victim under this subsection.

(B) Limitation

Except as provided in subparagraph (A), nothing in this subsection permits a business entity to disclose information, including information to law enforcement under subparagraphs (B) and (C) of paragraph (1), that the business entity is otherwise prohibited from disclosing under any other applicable provision of Federal or State law.

(10) Affirmative defense

In any civil action brought to enforce this subsection, it is an affirmative defense (which the defendant must establish by a preponderance of the evidence) for a business entity to file an affidavit or answer stating that--

(A) the business entity has made a reasonably diligent search of its available business records; and

(B) the records requested under this subsection do not exist or are not reasonably available.

(11) Definition of victim

For purposes of this subsection, the term "victim" means a consumer whose means of identification or financial information has been used or transferred (or has been alleged to have been used or transferred) without the authority of that consumer, with the intent to commit, or to aid or abet, an identity theft or a similar crime.

(12) Effective date

This subsection shall become effective 180 days after December 4, 2003.

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(13) Effectiveness study

Not later than 18 months after December 4, 2003, the Comptroller General of the United States shall submit a report to Congress assessing the effectiveness of this provision.

(f) Disclosure of credit scores

(1) In general

Upon the request of a consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender, and a notice which shall include--

(A) the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the credit reporting agency for a purpose related to the extension of credit;

(B) the range of possible credit scores under the model used;

(C) all of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed 4, subject to paragraph (9);

(D) the date on which the credit score was created; and

(E) the name of the person or entity that provided the credit score or credit file upon which the credit score was created.

(2) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Credit score

The term "credit score"--

(i) means a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a "risk predictor" or "risk score"); and

(ii) does not include--

(I) any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan to value ratio, the amount of down payment, or the financial assets of a consumer; or

(II) any other elements of the underwriting process or underwriting decision.

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(B) Key factors

The term "key factors" means all relevant elements or reasons adversely affecting the credit score for the particular individual, listed in the order of their importance based on their effect on the credit score.

(3) Timeframe and manner of disclosure

The information required by this subsection shall be provided in the same timeframe and manner as the information described in subsection (a) of this section.

(4) Applicability to certain uses

This subsection shall not be construed so as to compel a consumer reporting agency to develop or disclose a score if the agency does not--

(A) distribute scores that are used in connection with residential real property loans; or

(B) develop scores that assist credit providers in understanding the general credit behavior of a consumer and predicting the future credit behavior of the consumer.

(5) Applicability to credit scores developed by another person

(A) In general

This subsection shall not be construed to require a consumer reporting agency that distributes credit scores developed by another person or entity to provide a further explanation of them, or to process a dispute arising pursuant to section 1681i of this title, except that the consumer reporting agency shall provide the consumer with the name and address and website for contacting the person or entity who developed the score or developed the methodology of the score.

(B) Exception

This paragraph shall not apply to a consumer reporting agency that develops or modifies scores that are developed by another person or entity.

(6) Maintenance of credit scores not required

This subsection shall not be construed to require a consumer reporting agency to maintain credit scores in its files.

(7) Compliance in certain cases

In complying with this subsection, a consumer reporting agency shall--

(A) supply the consumer with a credit score that is derived from a credit scoring model that is widely distributed to users by that consumer reporting agency in connection with residential real property loans or with a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer and predictions about the future credit behavior of the consumer; and

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(B) a statement indicating that the information and credit scoring model may be different than that used by the lender.

(8) Fair and reasonable fee

A consumer reporting agency may charge a fair and reasonable fee, as determined by the Commission, for providing the information required under this subsection.

(9) Use of enquiries as a key factor

If a key factor that adversely affects the credit score of a consumer consists of the number of enquiries made with respect to a consumer report, that factor shall be included in the disclosure pursuant to paragraph (1)(C) without regard to the numerical limitation in such paragraph.

(g) Disclosure of credit scores by certain mortgage lenders

(1) In general

Any person who makes or arranges loans and who uses a consumer credit score, as defined in subsection (f) of this section, in connection with an application initiated or sought by a consumer for a closed end loan or the establishment of an open end loan for a consumer purpose that is secured by 1 to 4 units of residential real property (hereafter in this subsection referred to as the "lender") shall provide the following to the consumer as soon as reasonably practicable:

(A) **Information required under subsection (f)--**

(i) In general

A copy of the information identified in subsection (f) of this section that was obtained from a consumer reporting agency or was developed and used by the user of the information.

(ii) Notice under subparagraph (D)

In addition to the information provided to it by a third party that provided the credit score or scores, a lender is only required to provide the notice contained in subparagraph (D).

(B) Disclosures in case of automated underwriting system

(i) In general

If a person that is subject to this subsection uses an automated underwriting system to underwrite a loan, that person may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(ii) Numerical credit score

However, if a numerical credit score is generated by an automated underwriting system used by an enterprise, and that score is disclosed to the person, the score shall be disclosed to the consumer consistent with subpara-

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graph (C).

(iii) Enterprise defined

For purposes of this subparagraph, the term "enterprise" has the same meaning as in paragraph (6) of section 4502 of Title 12.

(C) Disclosures of credit scores not obtained from a consumer reporting agency

A person that is subject to the provisions of this subsection and that uses a credit score, other than a credit score provided by a consumer reporting agency, may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(D) Notice to home loan applicants

A copy of the following notice, which shall include the name, address, and telephone number of each consumer reporting agency providing a credit score that was used:

NOTICE TO THE HOME LOAN APPLICANT

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

(E) Actions not required under this subsection

This subsection shall not require any person to--

(i) explain the information provided pursuant to subsection (f) of this section;

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(ii) disclose any information other than a credit score or key factors, as defined in subsection (f) of this section;

(iii) disclose any credit score or related information obtained by the user after a loan has closed;

(iv) provide more than 1 disclosure per loan transaction; or

(v) provide the disclosure required by this subsection when another person has made the disclosure to the consumer for that loan transaction.

(F) No obligation for content

(i) In general

The obligation of any person pursuant to this subsection shall be limited solely to providing a copy of the information that was received from the consumer reporting agency.

(ii) Limit on liability

No person has liability under this subsection for the content of that information or for the omission of any information within the report provided by the consumer reporting agency.

(G) Person defined as excluding enterprise

As used in this subsection, the term "person" does not include an enterprise (as defined in paragraph (6) of section 4502 of Title 12).

(2) Prohibition on disclosure clauses null and void

(A) In general

Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer reporting agency is void.

(B) No liability for disclosure under this subsection

A lender shall not have liability under any contractual provision for disclosure of a credit score pursuant to this subsection.

CREDIT(S)

(Pub.L. 90-321, Title VI, § 609, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1131, and amended Pub.L. 103-325, Title III, § 339, Sept. 23, 1994, 108 Stat. 2237; Pub.L. 104-208, Div. A, Title II, § 2408(a) to (d)(1), (e)(5)(A), Sept. 30, 1996, 110 Stat. 3009-436, 3009-437, 3009-439; Pub.L. 105-347, § 4(a), Nov. 2, 1998, 112 Stat. 3210; Pub.L. 108-159, Title I, §§ 115, 151(a)(1), Title II, §§ 211(c), 212(a) to (c), Title VIII, § 811(d), Dec. 4, 2003, 117 Stat. 1961, 1970, 1973 to 1975, 2011.)

[FN1] So in original. The word "an" probably should not appear.

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2003 Acts. Unless otherwise specifically provided, amendments by Pub.L. 108-159 effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations [see 16 C.F.R. § 602.1(c)(2)(vi), and 12 C.F.R. § 222.1(c)(2)(vi), providing effective date of March 31, 2004 for amendments made to subsec. (a)(2), (3) of this section by Pub.L. 108-159, § 811 and see 16 C.F.R. § 602.1(c)(3)(iii), (iv), (ix), (x), and 12 C.F.R. § 222.1(c)(3)(iii), (iv), (ix), (x), providing effective date of Dec. 1, 2004 for amendments made to subsecs. (a)(1), (6), and (c) of this section and enactment of subsecs. (d), (f), and (g) of this section by Pub.L. 108-159, §§ 115, 151(a)(1), 211(c), 212(a) to (c)], see Pub.L. 108-159, § 3, set out as an Effective and Applicability Provisions note under 15 U.S.C.A. § 1681.

Current through P.L. 111-2 approved 1-29-09

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Effective: July 1, 2003

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Civil Code (Refs & Annos)
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Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 1.6. Consumer Credit Reporting Agencies Act (Refs & Annos)
Chapter 2. Obligations of Consumer Credit Reporting Agencies (Refs & Annos)
→ **§ 1785.15.3. Statement of rights; monthly credit reports**

(a) In addition to any other rights the consumer may have under this title, every consumer credit reporting agency, after being contacted by telephone, mail, or in person by any consumer who has reason to believe he or she may be a victim of identity theft, shall promptly provide to that consumer a statement, written in a clear and conspicuous manner, describing the statutory rights of victims of identity theft under this title.

(b) Every consumer credit reporting agency shall, upon the receipt from a victim of identity theft of a police report prepared pursuant to Section 530. 6 of the Penal Code, or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status regarding the public offenses described in Section 530.5 of the Penal Code, provide the victim, free of charge and upon request, with up to 12 copies of his or her file during a consecutive 12-month period, not to exceed one copy per month, following the date of the police report. Notwithstanding any other provision of this title, the maximum number of free reports a victim of identity theft is entitled to obtain under this title is 12 per year, as provided by this subdivision.

(c) Subdivision (a) does not apply to a consumer reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer reporting agency or agencies and that does not maintain a permanent database of credit information from which new credit reports are produced.

(d) The provisions of this section shall become effective July 1, 2003.

CREDIT(S)

(Added by Stats.2002, c. 860 (S.B.1239), § 2, operative July 1, 2003.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 1.6. Consumer Credit Reporting Agencies Act (Refs & Annos)
Chapter 2. Obligations of Consumer Credit Reporting Agencies (Refs & Annos)

→ § 1785.16. Disputes as to completeness or accuracy of information in file; reinvestigation and recording of current status; notice of results; deletion and reinsertion of information; statement of dispute; agency procedures; block of information appearing as a result of Penal Code § 530.5; unblocking information

(a) If the completeness or accuracy of any item of information contained in his or her file is disputed by a consumer, and the dispute is conveyed directly to the consumer credit reporting agency by the consumer or user on behalf of the consumer, the consumer credit reporting agency shall within a reasonable period of time and without charge, reinvestigate and record the current status of the disputed information before the end of the 30-business-day period beginning on the date the agency receives notice of the dispute from the consumer or user, unless the consumer credit reporting agency has reasonable grounds to believe and determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure of the consumer to provide sufficient information, as requested by the consumer credit reporting agency, to investigate the dispute. Unless the consumer credit reporting agency determines that the dispute is frivolous or irrelevant, before the end of the five-business-day period beginning on the date the consumer credit reporting agency receives notice of dispute under this section, the agency shall notify any person who provided information in dispute at the address and in the manner specified by the person. A consumer credit reporting agency may require that disputes by consumers be in writing.

(b) In conducting that reinvestigation the consumer credit reporting agency shall review and consider all relevant information submitted by the consumer with respect to the disputed item of information. If the consumer credit reporting agency determines that the dispute is frivolous or irrelevant, it shall notify the consumer by mail or, if authorized by the consumer for that purpose, by any other means available to the consumer credit reporting agency, within five business days after that determination is made that it is terminating its reinvestigation of the item of information. In this notification, the consumer credit reporting agency shall state the specific reasons why it has determined that the consumer's dispute is frivolous or irrelevant. If the disputed item of information is found to be inaccurate, missing, or can no longer be verified by the evidence submitted, the consumer credit reporting agency shall promptly add, correct, or delete that information from the consumer's file.

(c) No information may be reinserted in a consumer's file after having been deleted pursuant to this section unless the person who furnished the information certifies that the information is accurate. If any information deleted from a consumer's file is reinserted in the file, the consumer credit reporting agency shall promptly notify the consumer of the reinsertion in writing or, if authorized by the consumer for that purpose, by any other means available to the consumer credit reporting agency. As part of, or in addition to, this notice the consumer credit reporting agency shall, within five business days of reinserting the information, provide the consumer in writing (1) a statement that the disputed information has been reinserted, (2) a notice that the agency will provide to the consumer, within 15 days following a request, the name, address, and telephone number of any furnisher of information contacted or which contacted the consumer credit reporting agency in connection with the reinsertion, (3) the toll-free telephone number

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of the consumer credit reporting agency that the consumer can use to obtain this name, address, and telephone number, and (4) a notice that the consumer has the right to a reinvestigation of the information reinserted by the consumer credit reporting agency and to add a statement to his or her file disputing the accuracy or completeness of the information.

(d) A consumer credit reporting agency shall provide written notice to the consumer of the results of any reinvestigation under this subdivision, within five days of completion of the reinvestigation. The notice shall include (1) a statement that the reinvestigation is completed, (2) a consumer credit report that is based on the consumer's file as that file is revised as a result of the reinvestigation, (3) a description or indication of any changes made in the consumer credit report as a result of those revisions to the consumer's file and a description of any changes made or sought by the consumer that were not made and an explanation why they were not made, (4) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the consumer credit reporting agency, including the name, business address, and telephone number of any furnisher of information contacted in connection with that information, (5) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information, (6) a notice that the consumer has the right to request that the consumer credit reporting agency furnish notifications under subdivision (h), (7) a notice that the dispute will remain on file with the agency as long as the credit information is used, and (8) a statement about the details of the dispute will be furnished to any recipient as long as the credit information is retained in the agency's data base. A consumer credit reporting agency shall provide the notice pursuant to this subdivision respecting the procedure used to determine the accuracy and completeness of information, not later than 15 days after receiving a request from the consumer.

(e) The presence of information in the consumer's file that contradicts the contention of the consumer shall not, in and of itself, constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

(f) If the consumer credit reporting agency determines that the dispute is frivolous or irrelevant, or if the reinvestigation does not resolve the dispute, or if the information is reinserted into the consumer's file pursuant to subdivision (c), the consumer may file a brief statement setting forth the nature of the dispute. The consumer credit reporting agency may limit these statements to not more than 100 words if it provides the consumer with assistance in writing a clear summary of the dispute.

(g) Whenever a statement of dispute is filed, the consumer credit reporting agency shall, in any subsequent consumer credit report containing the information in question, clearly note that the information is disputed by the consumer and shall include in the report either the consumer's statement or a clear and accurate summary thereof.

(h) Following the deletion of information from a consumer's file pursuant to this section, or following the filing of a statement of dispute pursuant to subdivision (f), the consumer credit reporting agency, at the request of the consumer, shall furnish notification that the item of information has been deleted or that the item of information is disputed. In the case of disputed information, the notification shall include the statement or summary of the dispute filed pursuant to subdivision (f). This notification shall be furnished to any person designated by the consumer who has, within two years prior to the deletion or the filing of the dispute, received a consumer credit report concerning the consumer for employment purposes, or who has, within 12 months of the deletion or the filing of the dispute, received a consumer credit report concerning the consumer for any other purpose, if these consumer credit reports contained the deleted or disputed information. The consumer credit reporting agency shall clearly and conspicuously disclose to the consumer his or her rights to make a request for this notification. The disclosure shall be made at or prior to the time the information is deleted pursuant to this section or the consumer's statement regarding the disputed information is received pursuant to subdivision (f).

(i) A consumer credit reporting agency shall maintain reasonable procedures to prevent the reappearance in a consumer's file and in consumer credit reports of information that has been deleted pursuant to this section and not reinserted pursuant to subdivision (c).

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(j) If the consumer's dispute is resolved by deletion of the disputed information within three business days, beginning with the day the consumer credit reporting agency receives notice of the dispute in accordance with subdivision (a), and provided that verification thereof is provided to the consumer in writing within five business days following the deletion, then the consumer credit reporting agency shall be exempt from requirements for further action under subdivisions (d), (f), and (g).

(k) If a consumer submits to a credit reporting agency a copy of a valid police report, or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status, filed pursuant to Section 530.5 of the Penal Code, the consumer credit reporting agency shall promptly and permanently block reporting any information that the consumer alleges appears on his or her credit report as a result of a violation of Section 530.5 of the Penal Code so that the information cannot be reported. The consumer credit reporting agency shall promptly notify the furnisher of the information that the information has been so blocked. Furnishers of information and consumer credit reporting agencies shall ensure that information is unblocked only upon a preponderance of the evidence establishing the facts required under paragraph (1), (2), or (3). The permanently blocked information shall be unblocked only if: (1) the information was blocked due to a material misrepresentation of fact by the consumer or fraud, or (2) the consumer agrees that the blocked information, or portions of the blocked information, were blocked in error, or (3) the consumer knowingly obtained possession of goods, services, or moneys as a result of the blocked transaction or transactions or the consumer should have known that he or she obtained possession of goods, services, or moneys as a result of the blocked transaction or transactions. If blocked information is unblocked pursuant to this subdivision, the consumer shall be promptly notified in the same manner as consumers are notified of the reinsertion of information pursuant to subdivision (c). The prior presence of the blocked information in the consumer credit reporting agency's file on the consumer is not evidence of whether the consumer knew or should have known that he or she obtained possession of any goods, services, or moneys. For the purposes of this subdivision, fraud may be demonstrated by circumstantial evidence. In unblocking information pursuant to this subdivision, furnishers and consumer credit reporting agencies shall be subject to their respective requirements pursuant to this title regarding the completeness and accuracy of information.

(l) In unblocking information as described in subdivision (k), a consumer reporting agency shall comply with all requirements of this section and 15 U. S.C. Sec. 1681i relating to reinvestigating disputed information. In addition, a consumer reporting agency shall accept the consumer's version of the disputed information and correct or delete the disputed item when the consumer submits to the consumer reporting agency documentation obtained from the source of the item in dispute or from public records confirming that the report was inaccurate or incomplete, unless the consumer reporting agency, in the exercise of good faith and reasonable judgment, has substantial reason based on specific, verifiable facts to doubt the authenticity of the documentation submitted and notifies the consumer in writing of that decision, explaining its reasons for unblocking the information and setting forth the specific, verifiable facts on which the decision was based.

(m) Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer credit reporting agency is void. A lender shall not have liability under any contractual provision for disclosure of a credit score.

CREDIT(S)

(Added by Stats.1975, c. 1271, p. 3373, § 1. Amended by Stats.1976, c. 666, p. 1640, § 4; Stats.1980, c. 1113, p. 3581, § 3; Stats.1990, c. 1315 (S.B.2750), § 1; Stats.1992, c. 1194 (A.B.1629), § 7, operative July 1, 1993; Stats.1993, c. 285 (A.B.1340), § 7, eff. Aug. 2, 1993; Stats.1997, c. 768 (A.B.156), § 2, operative July 1, 1998; Stats.2000, c. 978 (S.B.1607), § 5, operative July 1, 2001; Stats.2001, c. 354 (A.B.655), § 3.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the

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→ § 1785.16.1. Deletion of inquiries for credit reports from consumer credit report with respect to identity theft

A consumer credit reporting agency shall delete from a consumer credit report inquiries for credit reports based upon credit requests that the consumer credit reporting agency verifies were initiated as the result of identity theft, as defined in Section 1798.92.

CREDIT(S)

(Added by Stats.2001, c. 354 (A.B.655), § 4.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 1.6. Consumer Credit Reporting Agencies Act (Refs & Annos)
Chapter 2. Obligations of Consumer Credit Reporting Agencies (Refs & Annos)

→ § 1785.16.2. Sale of consumer debt to debt collector; identity theft; subsidiaries or affiliates; interstate commerce requirement

(a) No creditor may sell a consumer debt to a debt collector, as defined in 15 U.S.C. Sec. 1692a, if the consumer is a victim of identity theft, as defined in Section 1798.2, and with respect to that debt, the creditor has received notice pursuant to subdivision (k) of Section 1785.16.

(b) Subdivision (a) does not apply to a creditor's sale of a debt to a subsidiary or affiliate of the creditor, if, with respect to that debt, the subsidiary or affiliate does not take any action to collect the debt.

(c) For the purposes of this section, the requirement in 15 U.S.C. Sec. 1692a, that a person must use an instrumentality of interstate commerce or the mails in the collection of any debt to be considered a debt collector, does not apply.

CREDIT(S)

(Added by Stats.2001, c. 354 (A.B.655), § 4.5. Amended by Stats.2002, c. 1030 (A.B.1068), § 1, eff. Sept. 28, 2002.)

HISTORICAL AND STATUTORY NOTES

2009 Electronic Pocket Part Update

2001 Legislation

For letter of intent regarding Stats.2001, c. 354 (A.B.655), see Historical and Statutory Notes under Civil Code § 1785.10.

2002 Legislation

Stats.2002, c. 1030 (A.B.1068), rewrote subd. (a); in subd. (b), added ", if, with respect to that debt, the subsidiary or affiliate does not take any action to collect the debt"; and added subd. (c). Prior to amendment, subd. (a) had read:

"(a) No creditor may sell a consumer debt if the consumer's file with a consumer credit reporting agency is blocked with respect to that debt pursuant to subdivision (k) of Section 1785.16, or if the consumer has provided the creditor with sufficient information in writing that the consumer is not obligated to pay the debt because he or she is a victim

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of identity theft, as defined in subdivision (d) of Section 1798.92, for the creditor to have reasonable grounds to determine that consumer's statement of identity theft is not frivolous."

Section 11 of Stats.2002, c. 1030, provides:

"This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

"In order to clarify confusion over the operational provisions of Chapter 354 of the Statutes of 2001, and further protect consumer interests in relation to credit information and identity theft, it is necessary that this act take immediate effect."

The Senate Daily Journal for the 2001-2002 Regular Session, page 5908, contained the following letter dated August 27, 2002, from Assembly Member Roderick D. Wright regarding the intent of Stats.2002, c. 1030 (A.B.1068):

"Dear Senator Burton:

"Since the passage of A.B. 655 in 2001, questions have arisen about the proper interpretation of a number of provisions of that legislation. Some of the most pertinent questions were in regards to the effective date and provisions regarding the sale of consumer debt, verifying the accuracy of consumer information, and investigative consumer reports, among others.

"I authored AB 655 to provide California consumers with additional protections against identity theft. This year I authored AB 1068 to clarify the provisions of AB 655 and ensure that they were implemented without inconvenience or undue cost to California consumers. Near the end of the legislative process AB 1068 language characterizing this bill as clarification of existing law was deleted because some felt that it actually changed existing laws.

"Nevertheless, it is important to recognize that certain provisions of AB 1068 were, in fact, clarifications of the original intent of AB 655. Businesses, which prior to the passage of AB 1068 were already meeting the requirements of these provisions, were complying with the spirit and intent of AB 655. For example, AB 1068 clarifies that it was the original intent of Section 1785.20.3 of the Civil Code to require consumer report users to verify the accuracy of a consumer's address when the address in the credit application and the one listed in the credit report did not match, with a reasonable degree of certainty. Similarly AB 655 intended that reasonable efforts to verify the accuracy of the consumer's address would include, but would not be limited to, and did not require communicating with the consumer.

"Sincerely,

"RODERICK D. WRIGHT

"Assembly Member, 48th District"

CROSS REFERENCES

Identity theft civil actions, seeCivil Code § 1798.92 et seq.

West's Ann. Cal. Civ. Code § 1785.16.2, CA CIVIL § 1785.16.2

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Title 1.6. Consumer Credit Reporting Agencies Act (Refs & Annos)
Chapter 3. Requirements on Users of Consumer Credit Reports (Refs & Annos)

→ § 1785.20.3. Consumer credit reports with approval of credit based on application for credit extension; consumer address error with respect to identity theft; verification safeguard; violations

(a) Any person who uses a consumer credit report in connection with the approval of credit based on an application for an extension of credit, and who discovers that the consumer's first and last name, address, or social security number, on the credit application does not match, within a reasonable degree of certainty, the consumer's first and last name, address or addresses, or social security number listed, if any, on the consumer credit report, shall take reasonable steps to verify the accuracy of the consumer's first and last name, address, or social security number provided on the application to confirm that the extension of credit is not the result of identity theft, as defined in Section 1798.92.

(b) Any person who uses a consumer credit report in connection with the approval of credit based on an application for an extension of credit, and who has received notification pursuant to subdivision (k) of Section 1785.16 that the applicant has been a victim of identity theft, as defined in Section 1798.92, may not lend money or extend credit without taking reasonable steps to verify the consumer's identity and confirm that the application for an extension of credit is not the result of identity theft.

(c) Any consumer who suffers damages as a result of a violation of this section by any person may bring an action in a court of appropriate jurisdiction against that person to recover actual damages, court costs, attorney's fees, and punitive damages of not more than thirty thousand dollars ($30,000) for each violation, as the court deems proper.

(d) As used in this section, "identity theft" has the meaning given in subdivision (b) of Section 1798.92.

(e) For the purposes of this section, "extension of credit" does not include an increase in an existing open-end credit plan, as defined in Regulation Z of the Federal Reserve System (12 C.F.R. 226.2), or any change to or review of an existing credit account.

(f) If a consumer provides initial written notice to a creditor that he or she is a victim of identity theft, as defined in subdivision (d) of Section 1798.92, the creditor shall provide written notice to the consumer of his or her rights under subdivision (k) of Section 1785.16.

(g) The provisions of subdivisions (k) and (l) of Section 1785.16 do not apply to a consumer credit reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer credit reporting agency or the databases of multiple consumer credit reporting agencies, and does not maintain a permanent database of credit information from which new credit reports are produced.

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(h) This section does not apply if one of the addresses at issue is a United States Army or Air Force post office address or a United States Fleet post office address.

CREDIT(S)

(Added by Stats.2001, c. 354 (A.B.655), § 5. Amended by Stats.2002, c. 1030 (A.B.1068), § 2, eff. Sept. 28, 2002; Stats.2003, c. 41 (A.B.1610), § 1.)

OPERATIVE EFFECT

<For operative effect of Stats.2002, c. 1030 (A.B.1068), with respect to subd. (f), see § 10 of that act.>

HISTORICAL AND STATUTORY NOTES

2009 Electronic Pocket Part Update

2001 Legislation

For letter of intent regarding Stats.2001, c. 354 (A.B.655), see Historical and Statutory Notes under Civil Code § 1785.10.

2002 Legislation

Stats.2002, c. 1030 (A.B.1068), rewrote subds. (a) and (b); in subd. (d), substituted "subdivision (b) of Section 1798.92" for "Section 1798.90"; and added subds. (e), (f), (g), and (h). Prior to amendment, subds. (a) and (b) had read:

"(a) Any person who uses a consumer credit report in connection with a credit transaction, and who discovers that the address on the consumer credit report does not match the address of the consumer requesting or being offered credit, shall take reasonable steps to verify the accuracy of the consumer's address, and shall either communicate to consumer by telephone, or write the consumer, to confirm that the credit transaction is not the result of identity theft, as defined in Section 1798.90.

"(b) Any person who uses a consumer credit report in connection with a credit transaction, and who receives a clearly identifiable notification, consisting of more than a tradeline, from a consumer credit reporting agency that information in the report has been blocked pursuant to Section 1785.16 as the result of an identity theft, shall not lend money or extend credit without taking reasonable steps to verify the consumer's identity and to confirm that the credit transaction is not the result of identity theft."

Section 10 of Stats.2002, c. 1030 (A.B.1068), provides:

"SEC. 10. The changes made by this act to subdivision (f) of Section 1785.20.3 of the Civil Code shall become operative 90 days after the effective date of this act."

Section 11 of Stats.2002, c. 1030 (A.B.1068), provides:

"This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within

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the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

"In order to clarify confusion over the operational provisions of Chapter 354 of the Statutes of 2001, and further protect consumer interests in relation to credit information and identity theft, it is necessary that this act take immediate effect."

For letter of intent regarding Stats.2002, c. 1030 (A.B.1068), see Historical and Statutory Notes under Civil Code § 1785.16.2.

2003 Legislation

Stats.2003, c. 41 (A.B.1610), in subd. (a), inserted "consumer's first and last name," in three places, and inserted ", or social security number," in three places.

CROSS REFERENCES

Identity theft civil actions, see Civil Code § 1798.92 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Practice tips: New California identity theft legislation. Chad C. Coombs and Keenen Milner (2004) L.A.Law 21.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Consumer and Borrower Protection Laws § 511, Actions Related to Credit Reporting.

Treatises and Practice Aids

Residential Mortgage Lending: State Regulation Manual - West California § 2:3, Application Practices.

4 Witkin, California Summary 10th Sales § 298, Disclosure of Information.

West's Ann. Cal. Civ. Code § 1785.20.3, CA CIVIL § 1785.20.3

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 1.6C. Fair Debt Collection Practices (Refs & Annos)
Article 2. Debt Collector Responsibilities (Refs & Annos)
→ **§ 1788.18. Debtor as an alleged victim of identity theft; sworn statement; inferences and presumptions; duties after collection terminated**

(a) Upon receipt from a debtor of all of the following, a debt collector shall cease collection activities until completion of the review provided in subdivision (d):

(1) A copy of a police report filed by the debtor alleging that the debtor is the victim of an identity theft crime, including, but not limited to, a violation of Section 530.5 of the Penal Code, for the specific debt being collected by the debt collector.

(2) The debtor's written statement that the debtor claims to be the victim of identity theft with respect to the specific debt being collected by the debt collector.

(b) The written statement described in paragraph (2) of subdivision (a) shall consist of any of the following:

(1) A Federal Trade Commission's Affidavit of Identity Theft.

(2) A written statement that contains the content of the Identity Theft Victim's Fraudulent Account Information Request offered to the public by the California Office of Privacy Protection.

(3) A written statement that certifies that the representations are true, correct, and contain no material omissions of fact to the best knowledge and belief of the person submitting the certification. A person submitting the certification who declares as true any material matter pursuant to this subdivision that he or she knows to be false is guilty of a misdemeanor. The statement shall contain or be accompanied by the following, to the extent that an item listed below is relevant to the debtor's allegation of identity theft with respect to the debt in question:

(A) A statement that the debtor is a victim of identity theft.

(B) A copy of the debtor's driver's license or identification card, as issued by the state.

(C) Any other identification document that supports the statement of identity theft.

(D) Specific facts supporting the claim of identity theft, if available.

(E) Any explanation showing that the debtor did not incur the debt.

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(F) Any available correspondence disputing the debt after transaction information has been provided to the debtor.

(G) Documentation of the residence of the debtor at the time of the alleged debt. This may include copies of bills and statements, such as utility bills, tax statements, or other statements from businesses sent to the debtor, showing that the debtor lived at another residence at the time the debt was incurred.

(H) A telephone number for contacting the debtor concerning any additional information or questions, or direction that further communications to the debtor be in writing only, with the mailing address specified in the statement.

(I) To the extent the debtor has information concerning who may have incurred the debt, the identification of any person whom the debtor believes is responsible.

(J) An express statement that the debtor did not authorize the use of the debtor's name or personal information for incurring the debt.

(K) The certification required pursuant to this paragraph shall be sufficient if it is in substantially the following form:

"I certify the representations made are true, correct, and contain no material omissions of fact.

____________________________ ____________________________"

(Date and Place) (Signature)

(c) If a debtor notifies a debt collector orally that he or she is a victim of identity theft, the debt collector shall notify the debtor, orally or in writing, that the debtor's claim must be in writing. If a debtor notifies a debt collector in writing that he or she is a victim of identity theft, but omits information required pursuant to subdivision (a) or, if applicable, the certification required pursuant to paragraph (3) of subdivision (b), if the debt collector does not cease collection activities, the debt collector shall provide written notice to the debtor of the additional information that is required, or the certification required pursuant to paragraph (3) of subdivision (b), as applicable, or send the debtor a copy of the Federal Trade Commission's Affidavit of Identity Theft form.

(d) Upon receipt of the complete statement and information described in subdivision (a), the debt collector shall review and consider all of the information provided by the debtor and other information available to the debt collector in its file or from the creditor. The debt collector may recommence debt collection activities only upon making a good faith determination that the information does not establish that the debtor is not responsible for the specific debt in question. The debt collector's determination shall be made in a manner consistent with the provisions of subsection (1) of Section 1692 of Title 15 of the United States Code, as incorporated by Section 1788.17of this code. The debt collector shall notify the debtor in writing of that determination and the basis for that determination before proceeding with any further collection activities. The debt collector's determination shall be based on all of the information provided by the debtor and other information available to the debt collector in its file or from the creditor.

(e) No inference or presumption that the debt is valid or invalid, or that the debtor is liable or not liable for the debt, shall arise if the debt collector decides after the review described in subdivision (d) to cease or recommence the debt collection activities. The exercise or nonexercise of rights under this section is not a waiver of any other right or defense of the debtor or debt collector.

(f) The statement and supporting documents that comply with subdivision (a) may also satisfy, to the extent those documents meet the requirements of, the notice requirement of paragraph (5) of subdivision (c) of Section 1798.93.

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(g) A debt collector who ceases collection activities under this section and does not recommence those collection activities shall do all of the following:

(1) If the debt collector has furnished adverse information to a consumer credit reporting agency, notify the agency to delete that information.

(2) Notify the creditor that debt collection activities have been terminated based upon the debtor's claim of identity theft.

(h) A debt collector who has possession of documents that the debtor is entitled to request from a creditor pursuant to Section 530.8 of the Penal Code is authorized to provide those documents to the debtor.

(i) Notwithstanding subdivision (h) of Section 1788.2, for the purposes of this section, "debtor" means a natural person, firm, association, organization, partnership, business trust, company, corporation, or limited liability company from which a debt collector seeks to collect a debt that is due and owing or alleged to be due and owing from the person or entity. The remedies provided by this title shall apply equally to violations of this section.

CREDIT(S)

(Added by Stats.2003, c. 287 (A.B.1294), § 1. Amended by Stats.2006, c. 521 (A.B.2043), § 2; Stats.2007, c. 130 (A.B.299), § 34.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 1.81.3. Identity Theft (Refs & Annos)
→ **§ 1798.93. Actions and judgment for identity theft**

(a) A person may bring an action against a claimant to establish that the person is a victim of identity theft in connection with the claimant's claim against that person. If the claimant has brought an action to recover on its claim against the person, the person may file a cross-complaint to establish that the person is a victim of identity theft in connection with the claimant's claim.

(b) A person shall establish that he or she is a victim of identity theft by a preponderance of the evidence.

(c) A person who proves that he or she is a victim of identity theft, as defined in Section 530.5 of the Penal Code, as to a particular claim, shall be entitled to a judgment providing all of the following, as appropriate:

(1) A declaration that he or she is not obligated to the claimant on that claim.

(2) A declaration that any security interest or other interest the claimant had purportedly obtained in the victim's property in connection with that claim is void and unenforceable.

(3) An injunction restraining the claimant from collecting or attempting to collect from the victim on that claim, from enforcing or attempting to enforce any security interest or other interest in the victim's property in connection with that claim, or from enforcing or executing on any judgment against the victim on that claim.

(4) If the victim has filed a cross-complaint against the claimant, the dismissal of any cause of action in the complaint filed by the claimant based on a claim which arose as a result of the identity theft.

(5) Actual damages, attorney's fees, and costs, and any equitable relief that the court deems appropriate. In order to recover actual damages or attorney's fees in an action or cross-complaint filed by a person alleging that he or she is a victim of identity theft, the person shall show that he or she provided written notice to the claimant that a situation of identity theft might exist, including, upon written request of the claimant, a valid copy of the police report or the Department of Motor Vehicles investigative report promptly filed pursuant to Section 530.5 of the Penal Code at least 30 days prior to his or her filing of the action, or within his or her cross-complaint pursuant to this section.

(6) A civil penalty, in addition to any other damages, of up to thirty thousand dollars ($30,000) if the victim establishes by clear and convincing evidence all of the following:

(A) That at least 30 days prior to filing an action or within the cross-complaint pursuant to this section, he or she provided written notice to the claimant at the address designated by the claimant for complaints related to credit reporting issues that a situation of identity theft might exist and explaining the basis for that belief.

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(B) That the claimant failed to diligently investigate the victim's notification of a possible identity theft.

(C) That the claimant continued to pursue its claim against the victim after the claimant was presented with facts that were later held to entitle the victim to a judgment pursuant to this section.

CREDIT(S)

(Added by Stats.2001, c. 354 (A.B.655), § 21.)

Current with urgency legislation through Ch. 1 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., and Ch. 20 of the 2009-2010 3rd Ex.Sess.

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Title 1. General
Division 7. Miscellaneous
Chapter 3.5. Inspection of Public Records (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

→ § 6253. Public records open to inspection; agency duties; time limits

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

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(d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

(e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

CREDIT(S)

(Added by Stats.1998, c. 620 (S.B.143), § 5. Amended by Stats.1999, c. 83 (S.B.966), § 64; Stats.2000, c. 982 (A.B.2799), § 1; Stats.2001, c. 355 (A.B.1014), § 2.)

FEES AND CHARGES

<Commissioner's authority to increase or decrease fees, and schedule of fees and charges, see Insurance Code § 12978.>

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Division 7. Miscellaneous
Chapter 3.5. Inspection of Public Records (Refs & Annos)
Article 1. General Provisions (Refs & Annos)
→ **§ 6254. Exemption of particular records**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the California Emergency Management

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Agency, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5,

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288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph may not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. Nothing in this paragraph shall be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code.

(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under this chapter.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall

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be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q) Records of state agencies related to activities governed by Article 2. 6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office. The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Care Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Part 2 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

(u)(1) Information contained in applications for licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

(2) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

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(3) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(v)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.3 (commencing with Section 12695) and Part 6.5 (commencing with Section 12700) of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2)(A) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Part 6.3 (commencing with Section 12695) or Part 6.5 (commencing with Section 12700) of Division 2 of the Insurance Code, on or after July 1, 1991, shall be open to inspection one year after their effective dates.

(B) If a contract that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (3).

(w)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (2).

(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with

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entities contracting or seeking to contract with the board, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2)(A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after their effective dates.

(B) If a contract entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff shall also apply to the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code.

(z) Records obtained pursuant to paragraph (2) of subdivision (c) of Section 2891.1 of the Public Utilities Code.

(aa) A document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

(ab) Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the California Emergency Management Agency for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

(ac) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

(ad) The following records of the State Compensation Insurance Fund:

(1) Records related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed.

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(2) Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations.

(3) Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code.

(4) Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers.

(5)(A) Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

(B) Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(6)(A) Internal audits containing proprietary information and the following records that are related to an internal audit:

(i) Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund.

(ii) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information.

(B) Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(7)(A) Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed.

(B) If a contract entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(C) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the

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contract or amendment containing the rates of payment shall be open to inspection.

(D) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this paragraph.

(E) Nothing in this paragraph is intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity.

(F) For purposes of this paragraph, "fully executed" means the point in time when all of the necessary parties to the contract have signed the contract.

Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

Nothing in this section prevents any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158).

CREDIT(S)

(Added by Stats.1981, c. 684, p. 2484, § 1.5, eff. Sept. 23, 1981, operative Jan. 1, 1982. Amended by Stats.1982, c. 83, p. 242, § 1, eff. March 1, 1982; Stats.1982, c. 1492, p. 5778, § 2; Stats.1982, c. 1594, p. 6299, § 2, eff. Sept. 30, 1982; Stats.1983, c. 200, § 1, eff. July 12, 1983; Stats.1983, c. 621, § 1; Stats.1983, c. 955, § 1; Stats.1983, c. 1315, § 1; Stats.1984, c. 1516, § 1, eff. Sept. 28, 1984; Stats.1985, c. 103, § 1; Stats.1985, c. 1218, § 1; Stats.1986, c. 185, § 2; Stats.1987, c. 634, § 1, eff. Sept. 14, 1987; Stats.1987, c. 635, § 1; Stats.1988, c. 870, § 1; Stats.1988, c. 1371, § 2; Stats.1989, c. 191, § 1; Stats.1990, c. 1106 (S.B.2106), § 2; Stats.1991, c. 278 (A.B.99), § 1.2, eff. July 30, 1991; Stats.1991, c. 607 (S.B.98), § 4; Stats.1992, c. 3 (A.B.1681), § 1, eff. Feb. 10, 1992; Stats.1992, c. 72 (A.B.1525), § 2, eff. May 28, 1992; Stats.1992, c. 1128 (A.B.1672), § 2, operative July 1, 1993; Stats.1993, c. 606 (A.B.166), § 1, eff. Oct. 1, 1993; Stats.1993, c. 610 (A.B.6), § 1, eff. Oct. 1, 1993; Stats.1993, c. 611 (S.B.60), § 1, eff. Oct. 1, 1993; Stats.1993, c. 1265 (S.B.798), § 14; Stats.1994, c. 82 (A.B.2547), § 1; Stats.1994, c. 1263 (A.B.1328), § 1.5; Stats.1995, c. 438 (A.B.985), § 1; Stats.1995, c. 777 (A.B.958), § 2; Stats.1995, c. 778 (S.B.1059), § 1.5; Stats.1996, c. 1075 (S.B.1444), § 11; Stats.1997, c. 623 (A.B.1126), § 1; Stats.1998, c. 485 (A.B.2803), § 83; Stats.1998, c. 13 (A.B.487), § 1; Stats.1998, c. 110 (A.B.1795), § 1; Stats.2000, c. 184 (A.B.1349), § 1; Stats.2001, c. 159 (S.B.662), § 105; Stats.2002, c. 175 (S.B.1643), § 1; Stats.2003, c. 230 (A.B.1762), § 1, eff. Aug. 11, 2003; Stats.2004, c. 8 (A.B.1209), § 1, eff. Jan. 22, 2004; Stats.2004, c. 183 (A.B.3082), § 134; Stats.2004, c. 228 (S.B.1103), § 2, eff. Aug. 16, 2004; Stats.2004, c. 882 (A.B.2445), § 1; Stats.2004, c. 937 (A.B.1933), § 2.5; Stats.2005, c. 22 (S.B.1108), § 71; Stats.2005, c. 476 (A.B.1495), § 1, eff. Oct. 4, 2005; Stats.2005, c. 670 (S.B.922), § 1.5, eff. Oct. 7, 2005; Stats.2006, c. 538 (S.B.1852), § 232; Stats.2007, c. 577 (A.B.1750), § 1, eff. Oct. 13, 2007; Stats.2007, c. 578 (S.B.449), § 1.5; Stats.2008, c. 344 (S.B.1145), § 1, eff. Sept. 26, 2008; Stats.2008, c. 358 (A.B.2810), § 2; Stats.2008, c. 372 (A.B.38), § 1.3.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 8. Of Crimes Against the Person
Chapter 4. Robbery (Refs & Annos)
→ **§ 211. Definition**

Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Effective: [See Text Amendments]

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 8. Of Crimes Against the Person
Chapter 4. Robbery (Refs & Annos)
→ **§ 215. Carjacking; punishment**

(a) "Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.

(b) Carjacking is punishable by imprisonment in the state prison for a term of three, five, or nine years.

(c) This section shall not be construed to supersede or affect Section 211. A person may be charged with a violation of this section and Section 211. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.

CREDIT(S)

(Added by Stats.1993, c. 611 (S.B.60), § 6, eff. Oct. 1, 1993.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Effective: January 1, 2001

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 5. Larceny [Theft] (Refs & Annos)
→ **§ 484. Theft defined**

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question . The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

(b)(1) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and that property has a value greater than one thousand dollars ($1,000) and is not a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 10 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(2) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and where the property has a value no greater than one thousand dollars ($1,000), or where the property is a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.

(d) The presumptions created by subdivisions (b) and (c) are presumptions affecting the burden of producing evi-

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dence.

(e) Within 30 days after the lease or rental agreement has expired, the owner shall make written demand for return of the property so leased or rented. Notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement and to any other known address shall constitute proper demand. Where the owner fails to make such written demand the presumption created by subdivision (b) shall not apply.

CREDIT(S)

(Enacted 1872. Amended by Stats.1927, c. 619, p. 1046, § 1; Stats.1935, c. 802, p. 2194, § 1; Stats.1965, c. 1602, p. 3694, § 1; Stats.1967, c. 1335, p. 3167, § 1; Stats.1980, c. 1090, p. 3500, § 1; Stats.2000, c. 176 (S.B.1867), § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Effective: January 1, 2003

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 5. Larceny [Theft] (Refs & Annos)
→ **§ 487. Grand theft defined**

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400), except as provided in subdivision (b).

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:

(1)(A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding one hundred dollars ($100).

(B) For the purposes of establishing that the value of avocados or citrus fruit under this paragraph exceeds one hundred dollars ($100), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft avocados or citrus fruit of the same variety and weight exceeded one hundred dollars ($100) in wholesale value.

(2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding one hundred dollars ($100).

(3) Where the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates four hundred dollars ($400) or more in any 12 consecutive month period.

(c) When the property is taken from the person of another.

(d) When the property taken is any of the following:

(1) An automobile, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow, or pig.

(2) A firearm.

(e) This section shall become operative on January 1, 1997.

CREDIT(S)

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(Added by Stats.1993, c. 1125 (A.B.1630), § 5, eff. Oct. 11, 1993, operative Jan. 1, 1997. Amended by Stats.2002, c. 787 (S.B.1798), § 12.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 5. Larceny [Theft] (Refs & Annos)
→ **§ 488. Petty theft defined**

Theft in other cases is petty theft.

CREDIT(S)

(Enacted 1872. Amended by Stats.1927, c. 619, p. 1047, § 5.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 5. Larceny [Theft] (Refs & Annos)

→ § 496. Receiving stolen property; punishment; swap meet vendors and others dealing in or collecting merchandise or personal property; damages and costs; attempted offenses; penalties

(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars ($400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.

(b) Every swap meet vendor, as defined in Section 21661 of the Business and Professions Code, and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that person, who buys or receives any property of a value in excess of four hundred dollars ($400) that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year.

Every swap meet vendor, as defined in Section 21661 of the Business and Professions Code, and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that person, who buys or receives any property of a value of four hundred dollars ($400) or less that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, shall be guilty of a misdemeanor.

(c) Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees.

(d) Notwithstanding Section 664, any attempt to commit any act prohibited by this section, except an offense specified in the accusatory pleading as a misdemeanor, is punishable by imprisonment in the state prison, or in a county jail for not more than one year.

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(Formerly § 496bb, added by Stats.1935, c. 434, p. 1483, § 1. Renumbered § 496 and amended by Stats.1951, c. 97, p. 354, § 2. Amended by Stats.1959, c. 734, p. 2723, § 1; Stats.1963, c. 1605, p. 3183, § 1; Stats.1968, c. 1085, p. 2089, § 1; Stats.1972, c. 963, p. 1739, § 1; Stats.1976, c. 1139, p. 5124, § 224, operative July 1, 1977; Stats.1980, c. 1163, p. 3914, § 4; Stats.1982, c. 935, p. 3393, § 1; Stats.1992, c. 1146 (A.B.3326), § 1; Stats.1997, c. 161 (A.B.143), § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 503. Definition**

Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 6. Embezzlement (Refs & Annos)

→ § 504. Officers and deputies, etc., of state, political subdivisions, public or private corporations, societies, or associations

Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of that officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of that person's trust, any property in his or her possession or under his or her control by virtue of that trust, or secretes it with a fraudulent intent to appropriate it to that use or purpose, is guilty of embezzlement.

CREDIT(S)

(Enacted 1872. Amended by Code Am.1880, c. 42, p. 8, § 4; Stats.2002, c. 787 (S.B.1798), § 13.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 504a. Fraudulent removal, concealment or disposal of personal property under lease, conditional sale or vendor's lien**

Every person who shall fraudulently remove, conceal or dispose of any goods, chattels or effects, leased or let to him by any instrument in writing, or any personal property or effects of another in his possession, under a contract of purchase not yet fulfilled, and any person in possession of such goods, chattels, or effects knowing them to be subject to such lease or contract of purchase who shall so remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof, is guilty of embezzlement.

CREDIT(S)

(Added by Stats.1917, c. 180, p. 273, § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 6. Embezzlement (Refs & Annos)
→ **§ 504b. Sale of property covered by security agreement; willful failure to pay secured party and appropriation of proceeds to own use; punishment**

Where under the terms of a security agreement, as defined in paragraph (73) of subdivision (a) of Section 9102 of the Commercial Code, the debtor has the right to sell the property covered thereby and is to account to the secured party for, and pay to the secured party the indebtedness secured by the security agreement from, the proceeds of the sale of any of the property, and where the debtor, having sold the property covered by the security agreement and having received the proceeds of the sale, willfully and wrongfully, and with the intent to defraud, fails to pay to the secured party the amounts due under the security agreement, or the proceeds of the sale, whichever is the lesser amount, and appropriates the money to his or her own use, the debtor shall be guilty of embezzlement and shall be punishable as provided in Section 514.

CREDIT(S)

(Added by Stats.1963, c. 1519, p. 3100, § 1. Amended by Stats.1967, c. 189, p. 1293, § 1; Stats.1999, c. 991 (S.B.45), § 53.2, operative July 1, 2001.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 505. Carrier or individual transporting property for hire**

WHEN CARRIER OR OTHER PERSON HAVING PROPERTY FOR TRANSPORTATION, FOR HIRE, GUILTY OF EMBEZZLEMENT. Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)

→ § 506. Person controlling or intrusted with property of another; misappropriations; payment of laborers and materialmen as use of contract price

Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, and any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement, and the payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied.

CREDIT(S)

(Enacted 1872. Amended by Stats.1907, c. 490, p. 892, § 1; Stats.1919, c. 518, p. 1090, § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 506a. Collector of accounts or debts; definition; prosecution and punishment**

Any person who, acting as collector, or acting in any capacity in or about a business conducted for the collection of accounts or debts owing by another person, and who violates Section 506 of the Penal Code, shall be deemed to be an agent or person as defined in Section 506, and subject for a violation of Section 506, to be prosecuted, tried, and punished in accordance therewith and with law; and "collector" means every such person who collects, or who has in his or her possession or under his or her control property or money for the use of any other person, whether in his or her own name and mixed with his or her own property or money, or otherwise, or whether he or she has any interest, direct or indirect, in or to such property or money, or any portion thereof, and who fraudulently appropriates to his or her own use, or the use of any person other than the true owner, or person entitled thereto, or secretes that property or money, or any portion thereof, or interest therein not his or her own, with a fraudulent intent to appropriate it to any use or purpose not in the due and lawful execution of his or her trust.

CREDIT(S)

(Added by Stats.1917, c. 603, p. 931, § 1. Amended by Stats.1987, c. 828, § 30.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 506b. Violation of real property sales contracts provisions; punishment**

Any person who violates Section 2985.3 or 2985.4 of the Civil Code, relating to real property sales contracts, is guilty of a public offense punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in the county jail not exceeding one year, or by both such fine and imprisonment.

CREDIT(S)

(Added by Stats.1963, c. 560, p. 1441, § 7. Amended by Stats.1976, c. 1139, p. 5127, § 229, operative July 1, 1977; Stats.1983, c. 1092, § 294, eff. Sept. 27, 1983, operative Jan. 1, 1984.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 507. Bailee; tenant; lodger; attorney in fact**

WHEN BAILEE, TENANT, OR LODGER GUILTY OF EMBEZZLEMENT. Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 508. Clerk; agent; servant**

WHEN CLERK, AGENT, OR SERVANT GUILTY OF EMBEZZLEMENT. Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 509. Distinct act of taking not necessary**

DISTINCT ACT OF TAKING. A distinct act of taking is not necessary to constitute embezzlement.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 510. Evidence of debt as subject**

EVIDENCE OF DEBT UNDELIVERED MAY BE SUBJECT OF EMBEZZLEMENT. Any evidence of debt, negotiable by delivery only, and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 511. Defenses; claim of title; unlawful retention of property to offset or pay demands not excused**

CLAIM OF TITLE A GROUND OF DEFENSE. Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him.

CREDIT(S)

(Enacted 1872.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 512. Defenses; mitigation of punishment; intent to restore property; time**

The fact that the accused intended to restore the property embezzled, is no ground of defense or mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, or an indictment found by a grand jury, charging the commission of the offense.

CREDIT(S)

(Enacted 1872. Amended by Stats.1905, c. 520, p. 682, § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 513. Defenses; mitigation of punishment; restoration of property or tender before indictment or information**

Whenever, prior to an information laid before a magistrate, or an indictment found by a grand jury, charging the commission of embezzlement, the person accused voluntarily and actually restores or tenders restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense, but it authorizes the court to mitigate punishment, in its discretion.

CREDIT(S)

(Enacted 1872. Amended by Stats.1905, c. 520, p. 682, § 2.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 514. Punishment; determination of value; defalcation of public funds; disenfranchisement**

Every person guilty of embezzlement is punishable in the manner prescribed for theft of property of the value or kind embezzled; and where the property embezzled is an evidence of debt or right of action, the sum due upon it or secured to be paid by it must be taken as its value; if the embezzlement or defalcation is of the public funds of the United States, or of this state, or of any county or municipality within this state, the offense is a felony, and is punishable by imprisonment in the state prison; and the person so convicted is ineligible thereafter to any office of honor, trust, or profit in this state.

CREDIT(S)

(Enacted 1872. Amended by Code Am.1880, c. 42, p. 8, § 5; Stats.1905, c. 520, p. 682, § 3; Stats.1959, c. 581, p. 2541, § 1; Stats.1976, c. 1139, p. 5127, § 230, operative July 1, 1977.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 6. Embezzlement (Refs & Annos)
→ **§ 515. Felony convictions; aggravating circumstances; elder or dependent person victims**

Upon conviction of a felony violation under this chapter, the fact that the victim was an elder or dependent person, as defined in Section 288, shall be considered a circumstance in aggravation when imposing a term under subdivision (b) of Section 1170.

CREDIT(S)

(Added by Stats.1996, c. 788 (A.B.1205), § 2. Amended by Stats.2004, c. 823 (A.B.20), § 9.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 8. False Personation and Cheats (Refs & Annos)

→ § 530.5. Unauthorized use of personal identifying information of another person; punishment for first and subsequent violations; intent to defraud; accomplices; mail theft

(a) Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

(b) In any case in which a person willfully obtains personal identifying information of another person, uses that information to commit a crime in addition to a violation of subdivision (a), and is convicted of that crime, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime.

(c)(1) Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment.

(2) Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and who has previously been convicted of a violation of this section, upon conviction therefor shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

(3) Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of 10 or more other persons is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

(d)(1) Every person who, with the intent to defraud, sells, transfers, or conveys the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

(2) Every person who, with actual knowledge that the personal identifying information, as defined in subdivision (b) of Section 530.55, of a specific person will be used to commit a violation of subdivision (a), sells, transfers, or conveys that same personal identifying information is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in the state prison, or by both a fine and imprisonment.

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(e) Every person who commits mail theft, as defined in Section 1708 of Title 18 of the United States Code, is guilty of a public offense, and upon conviction therefor shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment. Prosecution under this subdivision shall not limit or preclude prosecution under any other provision of law, including, but not limited to, subdivisions (a) to (c), inclusive, of this section..

(f) An interactive computer service or access software provider, as defined in subsection (f) of Section 230 of Title 47 of the United States Code, shall not be liable under this section unless the service or provider acquires, transfers, sells, conveys, or retains possession of personal information with the intent to defraud.

CREDIT(S)

(Added by Stats.1997, c. 768 (A.B.156), § 6, operative Jan. 1, 1998. Amended by Stats.1998, c. 488 (S.B.1374), § 1; Stats.2000, c. 956 (A.B.1897), § 1; Stats.2001, c. 478 (A.B.245), § 1; Stats.2002, c. 254 (S.B.1254), § 1; Stats.2005, c. 432 (A.B.1566), § 1; Stats.2006, c. 10 (A.B.424), § 1, eff. Feb. 25, 2006; Stats.2006, c. 522 (A.B.2886), § 2; Stats.2007, c. 302 (S.B.425), § 10.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Part 1. Of Crimes and Punishments
Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 8. False Personation and Cheats (Refs & Annos)

→ § 530.6. Unlawful use of personal identifying information by another; issuance of law enforcement investigation; initiation of expedited proceedings; factual innocence of victim

(a) A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence or place of business, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

(b) A person who reasonably believes that he or she is the victim of identity theft may petition a court, or the court, on its own motion or upon application of the prosecuting attorney, may move, for an expedited judicial determination of his or her factual innocence, where the perpetrator of the identity theft was arrested for, cited for, or convicted of a crime under the victim's identity, or where a criminal complaint has been filed against the perpetrator in the victim's name, or where the victim's identity has been mistakenly associated with a record of criminal conviction. Any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or other material, relevant, and reliable information submitted by the parties or ordered to be part of the record by the court. Where the court determines that the petition or motion is meritorious and that there is no reasonable cause to believe that the victim committed the offense for which the perpetrator of the identity theft was arrested, cited, convicted, or subject to a criminal complaint in the victim's name, or that the victim's identity has been mistakenly associated with a record of criminal conviction, the court shall find the victim factually innocent of that offense. If the victim is found factually innocent, the court shall issue an order certifying this determination.

(c) After a court has issued a determination of factual innocence pursuant to this section, the court may order the name and associated personal identifying information contained in court records, files, and indexes accessible by the public deleted, sealed, or labeled to show that the data is impersonated and does not reflect the defendant's identity.

(d) A court that has issued a determination of factual innocence pursuant to this section may at any time vacate that determination if the petition, or any information submitted in support of the petition, is found to contain any material misrepresentation or fraud.

(e) The Judicial Council of California shall develop a form for use in issuing an order pursuant to this section.

(f) For purposes of this section, "person" means a natural person, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity.

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(Added by Stats.2000, c. 956 (A.B.1897), § 2. Amended by Stats.2002, c. 851 (A.B.1219), § 1; Stats.2003, c. 533 (S.B.602), § 6; Stats.2006, c. 10 (A.B.424), § 2, eff. Feb. 25, 2006.)

Current with urgency legislation through Ch. 1 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., and Ch. 20 of the 2009-2010 3rd Ex.Sess.

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Part 1. Of Crimes and Punishments
Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 8. False Personation and Cheats (Refs & Annos)
→ **§ 530.7. Data base of identity theft victims**

(a) In order for a victim of identity theft to be included in the data base established pursuant to subdivision (c), he or she shall submit to the Department of Justice a court order obtained pursuant to any provision of law, a full set of fingerprints, and any other information prescribed by the department.

(b) Upon receiving information pursuant to subdivision (a), the Department of Justice shall verify the identity of the victim against any driver's license or other identification record maintained by the Department of Motor Vehicles.

(c) The Department of Justice shall establish and maintain a data base of individuals who have been victims of identity theft. The department shall provide a victim of identity theft or his or her authorized representative access to the data base in order to establish that the individual has been a victim of identity theft. Access to the data base shall be limited to criminal justice agencies, victims of identity theft, and individuals and agencies authorized by the victims.

(d) The Department of Justice shall establish and maintain a toll-free telephone number to provide access to information under subdivision (c).

(e) This section shall be operative September 1, 2001.

CREDIT(S)

(Added by Stats.2000, c. 631 (A.B.1862), § 1, operative Sept. 1, 2001. Amended by Stats.2001, c. 854 (S.B.205), § 30.)

HISTORICAL AND STATUTORY NOTES

2009 Electronic Pocket Part Update

2001 Legislation

Stats.2001, c. 854 (S.B.205) made technical revisions and nonsubstantive changes to maintain the Code.

LAW REVIEW AND JOURNAL COMMENTARIES

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West's Ann. Cal. Penal Code § 530.7, CA PENAL § 530.7

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 8. False Personation and Cheats (Refs & Annos)
→ **§ 530.55. "Person"; "personal identifying information"**

(a) For purposes of this chapter, "person" means a natural person, living or deceased, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity, or any other legal entity.

(b) For purposes of this chapter, "personal identifying information" means [FN1]

any name, address, telephone number, health insurance number, taxpayer identification number, school identification number, state or federal driver's license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person, or an equivalent form of identification.

CREDIT(S)

(Added by Stats.2006, c. 522 (A.B.2886), § 3.)

[FN1] Punctuation -- so in enrolled bill.

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 3. Additional Provisions Regarding Criminal Procedure (Refs & Annos)
Chapter 1. Of the Local Jurisdiction of Public Offenses
→ **§ 786. Property crimes occurring in one jurisdictional territory where property is taken to another jurisdictional territory; criminal actions for unauthorized use of personal identifying information of another; jurisdiction of offense**

(a) When property taken in one jurisdictional territory by burglary, carjacking, robbery, theft, or embezzlement has been brought into another, or when property is received in one jurisdictional territory with the knowledge that it has been stolen or embezzled and the property was stolen or embezzled in another jurisdictional territory, the jurisdiction of the offense is in any competent court within either jurisdictional territory, or any contiguous jurisdictional territory if the arrest is made within the contiguous territory, the prosecution secures on the record the defendant's knowing, voluntary, and intelligent waiver of the right of vicinage, and the defendant is charged with one or more property crimes in the arresting territory.

(b)(1) The jurisdiction of a criminal action for unauthorized use, retention, or transfer of personal identifying information, as defined in subdivision (b) of Section 530.55, shall also include the county where the theft of the personal identifying information occurred, the county in which the victim resided at the time the offense was committed, or the county where the information was used for an illegal purpose. If multiple offenses of unauthorized use of personal identifying information, all involving the same defendant or defendants and the same personal identifying information belonging to the one person, occur in multiple jurisdictions, any one of those jurisdictions is a proper jurisdiction for all of the offenses.

(2) When charges alleging multiple offenses of unauthorized use of personal identifying information occurring in multiple territorial jurisdictions are filed in one county pursuant to this section, the court shall hold a hearing to consider whether the matter should proceed in the county of filing, or whether one or more counts should be severed. The district attorney filing the complaint shall present evidence to the court that the district attorney in each county where any of the charges could have been filed has agreed that the matter should proceed in the county of filing. In determining whether all counts in the complaint should be joined in one county for prosecution, the court shall consider the location and complexity of the likely evidence, where the majority of the offenses occurred, the rights of the defendant and the people, and the convenience of, or hardship to, the victim and witnesses.

(3) When an action for unauthorized use, retention, or transfer of personal identifying information is filed in the county in which the victim resided at the time the offense was committed, and no other basis for the jurisdiction applies, the court, upon its own motion or the motion of the defendant, shall hold a hearing to determine whether the county of the victim's residence is the proper venue for trial of the case. In ruling on the matter, the court shall consider the rights of the parties, the access of the parties to evidence, the convenience to witnesses, and the interests of justice.

(c) This section shall not be interpreted to alter victims' rights under Section 530.6.

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(Enacted 1872. Amended by Stats.1951, c. 1674, p. 3833, § 17; Stats.1981, c. 318, p. 1458, § 1; Stats.1990, c. 156 (A.B.2551), § 1; Stats.1993, c. 610 (A.B.6), § 13, eff. Oct. 1, 1993; Stats.1993, c. 611 (S.B.60), § 14, eff. Oct. 1, 1993; Stats.2002, c. 908 (A.B.1773), § 1; Stats.2008, c. 47 (S.B.612), § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 3. Additional Provisions Regarding Criminal Procedure (Refs & Annos)
Chapter 1. Of the Local Jurisdiction of Public Offenses
→ **§ 789. Theft or receipt of stolen goods; offense committed out of state and property brought into state**

The jurisdiction of a criminal action for stealing or embezzling, in any other state, the property of another, or receiving it knowing it to have been stolen or embezzled, and bringing the same into this State, is in any competent court into or through the jurisdictional territory of which such stolen or embezzled property has been brought.

CREDIT(S)

(Enacted 1872. Amended by Code Am.1880, c. 47, p. 11, § 5; Stats.1905, c. 529, p. 693, § 5; Stats.1951, c. 1674, p. 3833, § 18.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 3. Additional Provisions Regarding Criminal Procedure (Refs & Annos)
Chapter 4.5. Peace Officers (Refs & Annos)
→ **§ 830.1. Persons who are peace officers; extent of authority**

(a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county, any chief of police of a city or chief, director, or chief executive officer of a consolidated municipal public safety-agency that performs police functions, any police officer, employed in that capacity and appointed by the chief of police or chief, director, or chief executive of a public safety agency, of a city, any chief of police, or police officer of a district, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department, any marshal or deputy marshal of a superior court or county, any port warden or port police officer of the Harbor Department of the City of Los Angeles, or any inspector or investigator employed in that capacity in the office of a district attorney, is a peace officer. The authority of these peace officers extends to any place in the state, as follows:

(1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves.

(2) Where the peace officer has the prior consent of the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by him or her to give consent, if the place is within a city, or of the sheriff, or person authorized by him or her to give consent, if the place is within a county.

(3) As to any public offense committed or which there is probable cause to believe has been committed in the peace officer's presence, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of the offense.

(b) The Attorney General and special agents and investigators of the Department of Justice are peace officers, and those assistant chiefs, deputy chiefs, chiefs, deputy directors, and division directors designated as peace officers by the Attorney General are peace officers. The authority of these peace officers extends to any place in the state where a public offense has been committed or where there is probable cause to believe one has been committed.

(c) Any deputy sheriff of the County of Los Angeles, and any deputy sheriff of the Counties of Butte, Calaveras, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Mariposa, Mendocino, Plumas, Riverside, San Benito, San Diego, Santa Barbara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, and Tuolumne who is employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, supervision, security, movement, and transportation of inmates, is a peace officer whose authority extends to any place in the state only while engaged in the performance of the duties of his or her respective employment and for the purpose of carrying out the primary function of employment relating to his or her custodial assignments, or when performing other law enforcement duties directed by his or her employing agency during a local state of emergency.

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(Added by Stats.1968, c. 1222, p. 2303, § 1. Amended by Stats.1977, c. 220, p. 1014, § 1; Stats.1980, c. 1340, p. 4720, § 5, eff. Sept. 30, 1980; Stats.1981, c. 744, p. 2915, § 1; Stats.1989, c. 950, § 1; Stats.1989, c. 1165, § 20.1; Stats.1990, c. 1695 (S.B.2140), § 9; Stats.1992, c. 882 (A.B.3603), § 1; Stats.1994, c. 200 (A.B.1591), § 1; Stats.1996, c. 872 (A.B.3472), § 115; Stats.1996, c. 950 (A.B.574), § 1; Stats.1998, c. 159 (S.B.1452), § 2; Stats.1998, c. 931 (S.B.2139), § 365, eff. Sept. 28, 1998; Stats.1998, c; 931 (S.B.2139), § 365.5, eff. Sept. 28, 1998, operative Jan. 1, 1999; Stats.2000, c. 61 (S.B.1762), § 1; Stats.2001, c. 68 (S.B.926), § 1; Stats.2002, c. 784 (S.B.1316), § 531; Stats.2002, c. 56 (S.B.183), § 7; Stats.2002, c. 185 (A.B.2346), § 2; Stats.2003, c. 47 (A.B.354), § 1; Stats.2003, c. 70 (A.B.1254), § 1; Stats.2003, c. 149 (S.B.79), § 67; Stats.2003, c. 710 (S.B.570), § 3; Stats.2004, c. 516 (A.B.1931), § 1; Stats.2006, c. 127 (A.B.272), § 1, eff. Aug. 21, 2006; Stats.2007, c. 84 (A.B.151), § 1, eff. July 17, 2007; Stats.2008, c. 15 (A.B.2215), § 1, eff. May 16, 2008.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Title 3. Additional Provisions Regarding Criminal Procedure (Refs & Annos)
Chapter 5. Arrest, by Whom and How Made (Refs & Annos)
→ **§ 851.8. Sealing and destruction of arrest records; determination of factual innocence**

(a) In any case where a person has been arrested and no accusatory pleading has been filed, the person arrested may petition the law enforcement agency having jurisdiction over the offense to destroy its records of the arrest. A copy of the petition shall be served upon the prosecuting attorney of the county or city having jurisdiction over the offense. The law enforcement agency having jurisdiction over the offense, upon a determination that the person arrested is factually innocent, shall, with the concurrence of the prosecuting attorney, seal its arrest records, and the petition for relief under this section for three years from the date of the arrest and thereafter destroy its arrest records and the petition. The law enforcement agency having jurisdiction over the offense shall notify the Department of Justice, and any law enforcement agency that arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this subdivision, of the sealing of the arrest records and the reason therefor. The Department of Justice and any law enforcement agency so notified shall forthwith seal their records of the arrest and the notice of sealing for three years from the date of the arrest, and thereafter destroy their records of the arrest and the notice of sealing. The law enforcement agency having jurisdiction over the offense and the Department of Justice shall request the destruction of any records of the arrest which they have given to any local, state, or federal agency or to any other person or entity. Each agency, person, or entity within the State of California receiving the request shall destroy its records of the arrest and the request, unless otherwise provided in this section.

(b) If, after receipt by both the law enforcement agency and the prosecuting attorney of a petition for relief under subdivision (a), the law enforcement agency and prosecuting attorney do not respond to the petition by accepting or denying the petition within 60 days after the running of the relevant statute of limitations or within 60 days after receipt of the petition in cases where the statute of limitations has previously lapsed, then the petition shall be deemed to be denied. In any case where the petition of an arrestee to the law enforcement agency to have an arrest record destroyed is denied, petition may be made to the superior court that would have had territorial jurisdiction over the matter. A copy of the petition shall be served on the law enforcement agency and the prosecuting attorney of the county or city having jurisdiction over the offense at least 10 days prior to the hearing thereon. The prosecuting attorney and the law enforcement agency through the district attorney may present evidence to the court at the hearing. Notwithstanding Section 1538.5 or 1539, any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable. A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made. If the court finds the arrestee to be factually innocent of the charges for which the arrest was

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made, then the court shall order the law enforcement agency having jurisdiction over the offense, the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this section to seal their records of the arrest and the court order to seal and destroy the records, for three years from the date of the arrest and thereafter to destroy their records of the arrest and the court order to seal and destroy such records. The court shall also order the law enforcement agency having jurisdiction over the offense and the Department of Justice to request the destruction of any records of the arrest which they have given to any local, state, or federal agency, person or entity. Each state or local agency, person or entity within the State of California receiving such a request shall destroy its records of the arrest and the request to destroy the records, unless otherwise provided in this section. The court shall give to the petitioner a copy of any court order concerning the destruction of the arrest records.

(c) In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made. A copy of the petition shall be served on the prosecuting attorney of the county or city in which the accusatory pleading was filed at least 10 days prior to the hearing on the petitioner's factual innocence. The prosecuting attorney may present evidence to the court at the hearing. The hearing shall be conducted as provided in subdivision (b). If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b).

(d) In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading.

(e) Whenever any person is acquitted of a charge and it appears to the judge presiding at the trial at which the acquittal occurred that the defendant was factually innocent of the charge, the judge may grant the relief provided in subdivision (b).

(f) In any case where a person who has been arrested is granted relief pursuant to subdivision (a) or (b), the law enforcement agency having jurisdiction over the offense or court shall issue a written declaration to the arrestee stating that it is the determination of the law enforcement agency having jurisdiction over the offense or court that the arrestee is factually innocent of the charges for which the person was arrested and that the arrestee is thereby exonerated. Thereafter, the arrest shall be deemed not to have occurred and the person may answer accordingly any question relating to its occurrence.

(g) The Department of Justice shall furnish forms to be utilized by persons applying for the destruction of their arrest records and for the written declaration that one person was found factually innocent under subdivisions (a) and (b).

(h) Documentation of arrest records destroyed pursuant to subdivision (a), (b), (c), (d), or (e) that are contained in investigative police reports shall bear the notation "Exonerated" whenever reference is made to the arrestee. The arrestee shall be notified in writing by the law enforcement agency having jurisdiction over the offense of the sealing and destruction of the arrest records pursuant to this section.

(i) Any finding that an arrestee is factually innocent pursuant to subdivision (a), (b), (c), (d), or (e) shall not be admissible as evidence in any action.

(j) Destruction of records of arrest pursuant to subdivision (a), (b), (c), (d), or (e) shall be accomplished by permanent obliteration of all entries or notations upon the records pertaining to the arrest, and the record shall be prepared again so that it appears that the arrest never occurred. However, where (1) the only entries on the record pertain to the arrest and (2) the record can be destroyed without necessarily affecting the destruction of other records, then the

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document constituting the record shall be physically destroyed.

(k) No records shall be destroyed pursuant to subdivision (a), (b), (c), (d), or (e) if the arrestee or a codefendant has filed a civil action against the peace officers or law enforcement jurisdiction which made the arrest or instituted the prosecution and if the agency which is the custodian of the records has received a certified copy of the complaint in the civil action, until the civil action has been resolved. Any records sealed pursuant to this section by the court in the civil actions, upon a showing of good cause, may be opened and submitted into evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties and any other person authorized by the court. Immediately following the final resolution of the civil action, records subject to subdivision (a), (b), (c), (d), or (e) shall be sealed and destroyed pursuant to subdivision (a), (b), (c), (d), or (e).

(l) For arrests occurring on or after January 1, 1981, and for accusatory pleadings filed on or after January 1, 1981, petitions for relief under this section may be filed up to two years from the date of the arrest or filing of the accusatory pleading, whichever is later. Until January 1, 1983, petitioners can file for relief under this section for arrests which occurred or accusatory pleadings which were filed up to five years prior to the effective date of the statute. Any time restrictions on filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice.

(m) Any relief which is available to a petitioner under this section for an arrest shall also be available for an arrest which has been deemed to be or described as a detention under Section 849.5 or 851.6.

(n) This section shall not apply to any offense which is classified as an infraction.

(o)(1) This section shall be repealed on the effective date of a final judgment based on a claim under the California or United States Constitution holding that evidence that is relevant, reliable, and material may not be considered for purposes of a judicial determination of factual innocence under this section. For purposes of this subdivision, a judgment by the appellate division of a superior court is a final judgment if it is published and if it is not reviewed on appeal by a court of appeal. A judgment of a court of appeal is a final judgment if it is published and if it is not reviewed by the California Supreme Court.

(2) Any decision referred to in this subdivision shall be stayed pending appeal.

(3) If not otherwise appealed by a party to the action, any decision referred to in this subdivision which is a judgment by the appellate division of the superior court shall be appealed by the Attorney General.

(p) A judgment of the court under subdivision (b), (c), (d), or (e) is subject to the following appeal path:

(1) In a felony case, appeal is to the court of appeal.

(2) In a misdemeanor case, or in a case in which no accusatory pleading was filed, appeal is to the appellate division of the superior court.

CREDIT(S)

(Added by Stats.1980, c. 1172, p. 3939, § 2, eff. Sept. 29, 1980. Amended by Stats.1998, c. 931 (S.B.2139), § 367, eff. Sept. 28, 1998; Stats.2002, c. 784 (S.B.1316), § 532; Stats.2006, c. 901 (S.B.1422), § 8.2; Stats.2007, c. 390 (A.B.475), § 1.)

Current with urgency legislation through Ch. 1 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., and

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Effective: January 1, 2001

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 4. Prevention of Crimes and Apprehension of Criminals (Refs & Annos)
Title 1. Investigation and Control of Crimes and Criminals (Refs & Annos)
Chapter 2. Control of Crimes and Criminals (Refs & Annos)
Article 2.5. Child Abuse and Neglect Reporting Act (Refs & Annos)
→ **§ 11164. Short title; intent and purpose of article**

(a) This article shall be known and may be cited as the Child Abuse and Neglect Reporting Act.

(b) The intent and purpose of this article is to protect children from abuse and neglect. In any investigation of suspected child abuse or neglect, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim.

CREDIT(S)

(Added by Stats.1987, c. 1444, § 1.5. Amended by Stats.2000, c. 916 (A.B.1241), § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Effective: January 1, 2007

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Title 1. Investigation and Control of Crimes and Criminals (Refs & Annos)
Chapter 2. Control of Crimes and Criminals (Refs & Annos)
Article 2.5. Child Abuse and Neglect Reporting Act (Refs & Annos)
→ **§ 11165.9. Reports of suspected child abuse or neglect**

Reports of suspected child abuse or neglect shall be made by mandated reporters, or in the case of reports pursuant to Section 11166.05, may be made, to any police department or sheriff's department, not including a school district police or security department, county probation department, if designated by the county to receive mandated reports, or the county welfare department. Any of those agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person, or referred by another agency, even if the agency to whom the report is being made lacks subject matter or geographical jurisdiction to investigate the reported case, unless the agency can immediately electronically transfer the call to an agency with proper jurisdiction. When an agency takes a report about a case of suspected child abuse or neglect in which that agency lacks jurisdiction, the agency shall immediately refer the case by telephone, fax, or electronic transmission to an agency with proper jurisdiction. Agencies that are required to receive reports of suspected child abuse or neglect may not refuse to accept a report of suspected child abuse or neglect from a mandated reporter or another person unless otherwise authorized pursuant to this section, and shall maintain a record of all reports received.

CREDIT(S)

(Added by Stats.2000, c. 916 (A.B.1241), § 8. Amended by Stats.2001, c. 133 (A.B.102), § 4, eff. July 31, 2001; Stats.2005, c. 713 (A.B.776), § 2; Stats.2006, c. 701 (A.B.525), § 2.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Chapter 2. Control of Crimes and Criminals (Refs & Annos)
Article 2.5. Child Abuse and Neglect Reporting Act (Refs & Annos)
→ **§ 11165.14. Abuse of a pupil at a schoolsite; investigation of complaint; transmission of substantiated report**

The appropriate local law enforcement agency shall investigate a child abuse complaint filed by a parent or guardian of a pupil with a school or an agency specified in Section 11165.9 against a school employee or other person that commits an act of child abuse, as defined in this article, against a pupil at a schoolsite and shall transmit a substantiated report, as defined in Section 11165.12, of that investigation to the governing board of the appropriate school district or county office of education. A substantiated report received by a governing board of a school district or county office of education shall be subject to the provisions of Section 44031 of the Education Code.

CREDIT(S)

(Added by Stats.1991, c. 1102 (A.B.2232), § 5. Amended by Stats.2000, c. 916 (A.B.1241), § 12.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Effective: January 1, 2002

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 4. Prevention of Crimes and Apprehension of Criminals (Refs & Annos)
Title 5. Law Enforcement Response to Domestic Violence (Refs & Annos)
Chapter 4. Data Collection (Refs & Annos)
→ **§ 13730. Recordation system for domestic violence calls; annual report; incident report form**

(a) Each law enforcement agency shall develop a system, by January 1, 1986, for recording all domestic violence-related calls for assistance made to the department including whether weapons are involved. All domestic violence-related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident. Monthly, the total number of domestic violence calls received and the numbers of those cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General.

(b) The Attorney General shall report annually to the Governor, the Legislature, and the public the total number of domestic violence-related calls received by California law enforcement agencies, the number of cases involving weapons, and a breakdown of calls received by agency, city, and county.

(c) Each law enforcement agency shall develop an incident report form that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic violence, a report shall be written and shall be identified on the face of the report as a domestic violence incident. The report shall include at least all of the following:

(1) A notation of whether the officer or officers who responded to the domestic violence call observed any signs that the alleged abuser was under the influence of alcohol or a controlled substance.

(2) A notation of whether the officer or officers who responded to the domestic violence call determined if any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

(3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

CREDIT(S)

(Added by Stats.1984, c. 1609, § 3. Amended by Stats.1993, c. 1230 (A.B.2250), § 2; Stats.1995, c. 965 (S.B.132), § 2; Stats.2001, c. 483 (A.B.469), § 1.)

Current with legislation through Ch. 765 of the 2008 Reg.Sess., Ch. 1 of the 2007-2008 1st Ex.Sess., Ch. 1 of the 2007-2008 2nd Ex.Sess., Ch. 7 of the 2007-2008 3rd Ex.Sess., and all propositions on 2008 ballots.

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Date of Hearing: May 24, 2000

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

AB 1897 (Davis) - As Amended: May 16, 2000

Policy Committee: Public SafetyVote: 7-0

Urgency: No State Mandated Local Program: Yes Reimbursable: Yes

SUMMARY

This bill:

1) Authorizes a person who reasonably suspects he or she is a victim of identity theft to initiate an investigation at the local law enforcement agency, and requires the law enforcement agency to conduct an immediate investigation.

2) Authorizes a person who suspects he or she is a victim of identity theft, based on the findings of a law enforcement investigation, to petition the court for an expedited determination of the facts and an order to seal or destroy fraudulent criminal record material.

FISCAL EFFECT

Minor local law enforcement and state court costs as this bill clarifies an identity theft victim's standing to seek vindication. In most jurisdictions, the provisions of this bill are current practice.

COMMENTS

Rationale . The author's intent is to provide expedited remedies for a victim of identity theft to clear his or her name.

Analysis Prepared by : Geoff Long / APPR. / (916)319-2081

Date of Hearing: July 1, 2003

ASSEMBLY COMMITTEE ON JUDICIARY
Ellen M. Corbett, Chair
SB 602 (Figueroa) - As Amended: June 26, 2003

SENATE VOTE : 24-13

SUBJECT : IDENTITY THEFT PREVENTION AND ASSISTANCE ACT

KEY ISSUES :

1) IN ORDER TO ENSURE THAT CONSUMERS ARE ABLE TO PROTECT THEMSELVES FROM IDENTITY THEFT, SHOULD A CREDIT REPORTING AGENCY THAT RECKLESSLY, WILLFULLY OR INTENTIONALLY FAILS TO PLACE A SECURITY ALERT BE LIABLE FOR A CIVIL PENALTY OF UP TO $2500?

2) SHOULD THE FEE THAT A CREDIT REPORTING AGENCY MAY CHARGE FOR FREEZING, REMOVING A FREEZE, OR TEMPORARILY LIFTING A FREEZE ON ACCESS TO A CONSUMER CREDIT REPORT BE LIMITED TO NO MORE THAN $10?

3) IN ORDER TO PROTECT CONSUMERS' PERSONAL INFORMATION FROM MISUSE, SHOULD BUSINESSES THAT USE THE ENCODED STRIP OF DRIVER'S LICENSES FOR VERIFICATION BE PROHIBITED FROM STORING OR FURTHER USING THE INFORMATION?

4) IN ORDER TO HELP PREVENT IDENTITY THEFT, SHOULD BUSINESSES PROVIDING TELEPHONE AND CREDIT ACCOUNTS BE REQUIRED TO SEND CHANGE OF ADDRESS NOTIFICATION TO THE PREVIOUS CONTACT INFORMATION FOR THE CONSUMER WHEN THEY RECEIVE A REQUEST FOR A CHANGE OF ADDRESS?

SYNOPSIS

This bill makes a number of changes intended to help consumers prevent and address identity theft. The bill requires a credit reporting agency to inform a consumer who has requested that a security alert be placed on his or her credit report of the expiration date of the alert. It creates a new civil penalty for a credit reporting agency that recklessly, willfully or intentionally fails to place a security alert on a credit report when so requested. SB 602 limits the fee that may be charged by a credit reporting agency in order for a consumer to freeze

access to his or her credit report. It prohibits a business that uses the encoded strip on driver's licenses for verification purposes from storing or further using the information so accessed. It requires businesses that provide credit or telephone accounts to send notification to a consumer's old address, e-mail, or telephone number, if the business receives a change of address request for that consumer. The bill strengthens the ability of a victim of identity theft to get access to records relating to the identity theft.

SB 602 is supported by consumer advocates and prosecutorial offices as an important step to help consumers combat identity theft.

Credit reporting agencies oppose several provisions of the bill. It appears that recent amendments have addressed many of their concerns, although they have not responded specifically since the amendments. As to the remaining provisions, agencies argue that the cap on the fee for freezing access to a credit report will not allow them to recoup the costs of maintaining the system permitting such a freeze. Proponents respond that the cap is necessary to ensure that consumers are not dissuaded from placing a freeze when needed.

SUMMARY : Makes changes regarding protections regarding consumer credit information. Specifically, this bill :

1) Requires a consumer credit reporting agency to notify a consumer who has requested that a security alert be placed on his or her consumer credit report of the expiration date of the report.

2) Creates a civil penalty of up to $2500 for a consumer credit reporting agency that recklessly, willfully, or intentionally fails to place a security alert when properly requested to do so.

3) Limits to no more than $10 the fee that a consumer credit reporting agency may charge for each freeze, removal of a freeze, or temporary lift of a freeze on access to a consumer credit report.

4) Prohibits a business that uses the electronic information encoded on a driver's license for purposes of verification of age or authentication of the driver's license from retaining

the information or further using it for any purpose.

5) Requires any business entity providing credit, installment or telephone accounts to send, within thirty days of receipt of a change of address request from any individual with an existing account, to the previous address of record for the individual, notification of the request. Permits the business to provide notification by telephone or e-mail if the business reasonably believes that it has the consumer's current telephone number or e-mail address.

6) Clarifies that the law enforcement agency with jurisdiction over a consumer's actual residence is responsible for taking a police report when the consumer believes that he or she has been the victim of identity theft and has primary responsibility for investigation of the crime.

7) Permits the Attorney General (AG), the district attorney, or the prosecuting city attorney, upon request by a victim of identity theft, to move to compel the production of records regarding unauthorized applications and accounts that businesses are required to produce under existing law.

8) Permits a victim of identity theft to bring a civil action against a business that fails to produce information regarding unauthorized applications and accounts, as required under existing law, and creates a penalty of $100 per day for noncompliance.

9) Creates an exemption to the prohibition against telephone companies releasing specified information without written consent from the subscriber, for information that is provided in response to a request pursuant to the Penal Code provision requiring specified information regarding unauthorized applications and accounts to be released when requested by a victim of identity theft.

EXISTING LAW :

1) Provides that a consumer who suspects that he or she may have been a victim of identity theft may place a "security alert" in his or her credit file. This security alert must remain in place for at least 90 days. (Civil Code Section 1785.11.1.)

2) Provides that a consumer may place a "security freeze" on his

or her credit file which prohibits the release of the file except in certain limited circumstances. Existing law requires that a victim of identity theft may not be charged for a freeze but authorizes agencies to charge a "reasonable" fee for other individuals. (Civil Code Section 1785.11.2.)

3) Prohibits businesses from requiring a consumer to provide a driver's license number in connection with certain transactions, such as a credit card transaction or club card application. (Civil Code Sections 1747.8, 1749.64, 1749.65.)

4) Provides that a person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the matter, or if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for investigation of the facts. (Penal CodeSection 530.6.)

5) Provides that if a person discovers that an unauthorized application has been submitted in his or her name for certain accounts (including credit or public utility service), that person may request a copy of the information used to apply for the account. This request must be honored by the business within 10 days if the person provides a copy of the police report on the incident. Existing law also authorizes a law enforcement officer to make this request on the consumer's behalf. (Penal Code Section 530.8.)

6) Prohibits a telephone or telegraph corporation from releasing specified information without first obtaining a residential subscriber's consent in writing, and makes specified exceptions. (Public Utilities Code Section 2891.)

FISCAL EFFECT : The bill as currently in print is keyed fiscal.

COMMENTS : This bill is sponsored by the California Public Interest Research Group (CalPIRG), the LA County District Attorney's Office and the American Association of Retired Person. It seeks to enact the "Identity Theft Prevention and

Assistance Act," a series of measures designed to prevent identity theft and help consumers to address it when it occurs.

In response to rising concerns over identity theft, the author held a hearing of the Senate Business and Professions Committee in March of this year to identify areas where further legislation might be needed. This bill stems from that hearing as well as other discussions between the author's office and various consumer groups.

Strengthening the security alert system . Under existing law, a consumer may place in his or her credit file a "security alert" for 90 days that is intended to alert potential creditors that the consumer in question may be the victim of identity theft. Created by Senator Bowen, (SB 168, Ch. 720, Statutes of 2001) the security alert aims to prevent identity theft by warning creditors of potential identity theft prior to the extension of credit to a perpetrator of identity theft.

This bill seeks to increase the efficacy of the security alerts in two ways. First, it requires the credit reporting agency to notify the consumer of the expiration date of the security alert. This provision is included in response to reports that some consumers are unaware that the security alert will expire and therefore do not seek renewal of the alert even if they have continuing reason for concern. Second, the bill seeks to increase compliance with the security alert provisions by creating a civil penalty of $2,500 against any agency that recklessly, wilfully or intentionally fails to place the security alert.

Credit reporting agencies argue, with regard to the penalty, that this is unnecessary as there is no evidence that there has been a problem for consumers placing a freeze. Proponents respond that if the agencies are appropriately carrying out their responsibilities under existing law, the penalty will not be used; if, however, a case arises in which there is a dereliction of duty, the penalty should be available.

Cap on fee for freezing credit report . SB 602 caps the fee that may be charged by a credit reporting agency for freezing, removing a freeze, or temporarily lifting a freeze on access to a consumer credit report. Under existing law, a consumer can request a "security freeze" on his or her credit report that prohibits the release of the report without the express

authorization of the consumer. Procedures for obtaining that authorization are specified in existing law, including a requirement that the consumer be given a password or number to authorize a release. Victims of identity theft may not be charged for the freeze, but other consumers may be charged a reasonable" fee.

These security freeze provisions enacted under SB 168 went into effect January 1 of this year. Currently, the charge for a freeze at the three largest reporting agencies varies greatly. Experian is charging approximately $60 a year, while Equifax charges $12 to place the freeze, plus additional fees of $8 to $25 to release information. The agencies argue that these

charges reflect the costs of developing and implementing the system mandated by the state. They further argue that in the discussions last year regarding SB 168, they were assured that they would be able to recover their costs for the freeze system.

Supporters respond that the existing fees are not reasonable when one considers that a consumer must freeze reports at all three major agencies to effectively prevent identity theft. Supporters further argue that in order for consumers to be able to prevent and combat identity theft, the fee for a freeze should be at a level that will not discourage a consumer from placing a freeze when he or she believes it to be necessary, for example, when the consumer's wallet has been stolen.

Restrictions on information taken electronically from drivers' licenses . SB 602 would permit businesses to swipe the magnetic strips on driver's licenses to verify age or authenticate the license but would prohibit businesses who swipe a license in this manner from retaining the encoded information for any other purpose, except where otherwise required by law. Violation of this provision would be a misdemeanor.

These provisions stem from recent press reports that some businesses, such as bars and clubs, have been retaining information from licenses swiped to verify age. According to press accounts, in some instances this information has been used to market to individuals who have had their licenses read in this way.

Proponents of SB 602 argue that aside from consumers' objections to the marketing use of this information, restriction on the storage of the information is needed to combat identity theft.

When businesses create databases using the information from swiping drivers' licenses, those databases may then be susceptible to being illicitly accessed and used for purposes of identity theft.

The provisions of SB 602 regarding use of the encoded information on drivers' licenses are similar to the provisions of AB 224 (Kehoe), which passed this Committee on March 4 and is referred next to the Assembly Business and Professions Committee.

Notification of change of address requests . The bill would require any business that provides credit, installment, or telephone accounts that receives a change of address request from an existing customer to send an address change notification to the previous address within 30 days, or to notify the consumer by telephone or e-mail. This provision is intended to

help prevent the "hijacking" of existing consumer accounts by identity thieves, who change the addresses on accounts in order to prevent the consumer from becoming aware of unauthorized activity on those accounts.

Capital One raised concerns with regard to an earlier version of SB 602 as to whether the intent was for the business to receive a response regarding the notification, in which case Capital One argued the result would likely be problematic as consumers rarely would respond. The current version of the bill is clear in requiring notification but does not require that the business verify the change of address through a response from the consumer.

Changes to Penal Code provisions regarding identity theft . SB 602 makes two changes to Penal Code provisions regarding identity theft. First, the bill clarifies the language of Penal Code Section 530.6 to clearly state that the law enforcement agency with jurisdiction over a consumer's actual residence is responsible both for taking a police report and beginning investigation. Under existing law, the language is confusing as to whether investigation can be referred to another agency in the jurisdiction where the crime occurred. Second, the bill permits the AG, a district attorney, or prosecuting city attorney to file a motion on behalf of a victim of identity theft in order to compel a business to produce records relating to unauthorized accounts - records already required to be produced under existing law. The bill further creates a civil

right of action against a business that fails to produce the records as required, with a penalty of $100 per day for noncompliance. These provisions of the bill, which strengthen the ability of victims of identity theft to limit the damage done by the thieves, have no opposition.

REGISTERED SUPPORT / OPPOSITION :

Support

American Association of Retired Persons, California (co-sponsor)
California Public Interest Research Group (CALPIRG) (co-sponsor)
Los Angeles County District Attorney's Office (co-sponsor)
Congress of California Seniors
Consumers Union
Office of the Attorney General
Privacy Rights Clearinghouse

Opposition

Capital One
Equifax, Inc.
Experian
Transunion

Analysis Prepared by : Kathy Sher / JUD. / (916) 319-2334

Tips for Victims

This information is provided to assist individuals who are victims or suspect they may be victims of identity theft. It is intended as a general guide, not as legal advice.

SOME THINGS TO DO IMMEDIATELY

Victims of identity theft must act quickly to minimize the damage. It is very important to keep good notes of all conversations and records of all correspondence with your financial institutions and law enforcement agencies, including a log of the names, dates and phone number of persons you contacted. You also should confirm the information in writing. Sending your letters by certified mail, return receipt requested, will provide you with a record of your correspondence.

REPORT ID THEFT TO MAJOR CREDIT BUREAUS.

Contact the fraud departments of each of the three major credit bureaus and report that your identity has been stolen. Ask that a "fraud alert" be placed in your file.

Trans Union
P.O. Box 1000
Chester, PA 19016-1000
Phone: (800) 680-7289

Experian (formerly TRW)
P.O. Box 9532
Allen, TX 75013
Phone: 888-EXPERIAN ((888)397-3742)

Equifax
P.O. Box 105069
Atlanta, GA 30348
Phone: (800) 525-6285

top

FILE A POLICE REPORT WITH LOCAL POLICE OR POLICE WHERE IDENTITY THEFT OCCURRED.

Get a copy of the police report and retain for your records. Credit card companies and financial institutions may require you to show a copy of this report to verify the crime. Keep the phone number of your investigator and provide it to creditors and others who require verification of your case.

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CONTACT ALL CREDITORS.

For any accounts that have been fraudulently accessed or opened, contact the billing inquiries and security departments of the appropriate creditors or financial institutions. Close these accounts. Use passwords - not your mother's maiden name - on any new accounts opened.

Confirm your contact in writing. Ask that old accounts be processed as "account closed at consumer's request." Having a "card lost or stolen" reference because when this statement is reported to credit bureaus, it can be interpreted as blaming you for the loss. Carefully monitor your mail and credit card bills and report immediately any new fraudulent activity to credit grantors.

top

OBTAIN FREE COPY OF YOUR CREDIT REPORT, MONITOR REGULARLY.

As a victim of identity theft, you may obtain a free copy of your credit report and should monitor activity every few months. Ask the credit bureaus for names and phone numbers of credit grantors with whom fraudulent accounts have been opened. Ask the credit bureaus to remove inquiries that have been generated due to the fraudulent access. Other consumers seeking a copy of their credit report may be charged a fee.

Equifax Phone: (800) 685-1111

Experian (formerly TRW) Phone: 888-EXPERIAN ((888) 397-3742)

Trans Union Phone: (800) 888-4213

Under state law (California Civil Code 1785.16(k)), a consumer submitting a valid police report can have the credit reporting agency block the reporting of any information that the consumer alleges appears on the credit report as a result of identity theft. You also may want to ask the credit bureaus to notify those who have received your credit report in the last six months in order to alert them to the disputed and erroneous information.

top

CONTEST BILLS THAT RESULT FROM IDENTITY THEFT.

Consumer and privacy advocates suggest not paying any portion of a bill which is a result of identity theft and not filing for bankruptcy. This will involve disputing credit card charges with the card company by writing to the address for "billing error" disputes - not the bill payment address. You should follow the directions given by the credit card company for disputing charges. This information must be provided by the company. Your credit rating should not be permanently affected, and no legal action should be taken against you as a result of identity theft. If any merchant, financial institution or collection agency suggests otherwise, simply restate your willingness to cooperate, but don't allow yourself to be coerced into paying fraudulent bills. Report such attempts to government regulators immediately.

top

ACCESS INFORMATION IF ACCOUNT OPENED FRAUDULENTLY IN YOUR NAME.

If a loan, credit or utility service account has been opened fraudulently in your name, you now can obtain a copy of the application used and a record of transactions or charges associated with that account. The information you learn may be useful in determining what personally identifying information was stolen, help clear your good name and credit, and even lead to the identity of the thief.

Here is a checklist for accessing account info under California Penal Code section 530.8:

- File a Police Report that you believe you are a victim of identity theft. Keep a copy of the police report.
- Fill out the request forms provided by the law enforcement agency or use the Fraudulent Account Information Request Form
- Fill out the Identity Theft Affidavit [PDF 50 kb / 7 pg]

- Send completed package (Info Request/ID Theft Affidavit/Police Report) to each creditor where the thief opened an account using your stolen identity.
- Provide account information you receive to the police officer investigating your ID theft case.

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FALSE CIVIL AND CRIMINAL JUDGMENTS.

Sometimes victims of identity theft are wrongfully accused of crimes committed by the identity thief. If a civil judgment has been entered in your name for actions taken or debts incurred by your impostor, contact the court where the judgment was entered and report that you are a victim of identity theft. If you are wrongfully prosecuted for criminal charges, contact the state Department of Justice and the FBI and obtain information on how to clear your name. The California Department of Justice will be establishing a statewide data base beginning September 2001to provide certain information about identity theft crimes to victims and law enforcement agencies.

top

FOR OTHER TYPES OF IDENTITY THEFT:

NOTIFY CALIFORNIA DEPARTMENT OF MOTOR VEHICLES OF MISUSE OF DRIVER'S LICENSE NUMBER.

You may need to change your driver's license number if someone is using yours as identification on bad checks. Call the DMV to see if another license was issued in your name. Put a fraud alert on your license. Go to your local DMV to request a new number. Also, fill out the DMV's complaint form to begin the fraud investigation process. Send supporting documents with the completed form to the nearest DMV investigation office. Web: Department of Motor Vehicles

top

REPORT STOLEN CHECKS AND STOP PAYMENT IMMEDIATELY.

If you have had checks stolen or bank accounts set up fraudulently, report it to the appropriate check verification companies. Put stop payments on any outstanding checks that you are unsure of. Cancel your checking and savings accounts and obtain new account numbers. Give the bank a secret password for your account (not mother's maiden name). If your own checks are rejected at stores where you shop, contact the check verification company that the merchant uses. To report fraudulent use of your checks:

Chexsystems: (800) 428-9623

CrossCheck: (800) 843-0760

Equifax: (800) 437-5120

International Check Services: (800) 631-9656

SCAN: (800) 262-7771

TeleCheck: (800) 710-9898

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REPORT STOLEN ATM CARDS AND CHANGE PASSWORDS IMMEDIATELY.

Get a new ATM card, account number and password. When creating a password, don't use common numbers like the last four digits of your SSN or your birth date. Monitor your account statement. You may be liable if fraud is not reported quickly.

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FOR SUSPECTED FRAUDULENT CHANGE OF ADDRESS, NOTIFY LOCAL POSTAL INSPECTOR.

Call the U.S. Post Office to obtain the phone number of the local Postal Inspector. Find out where fraudulent credit cards were sent. Notify the local Postmaster for that address to forward all mail in your name to your own address. You may also need to talk with the mail carrier. U.S. Postal Inspection Service

U.S. Post Office
Phone: (800) 275-8777

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REPORT MISUSE OF SOCIAL SECURITY NUMBER BY CALLING SECURITY ADMINISTRATION.

Order a copy of your Personal Earnings and Benefits Statement and check it for accuracy. The thief might be using your SSN for employment purposes. If you fit specific fraud victim criteria, the Social Security Administration may change your Social Security Number. Report fraud: (800) 269-0271. Order Personal Earnings and Benefits Statement: (800) 772-1213. Web: U.S. Social Security Administration

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FOR SUSPECTED MISUSE, CANCEL LONG DISTANCE CALLING CARD ACCOUNTS

If your long distance calling card has been stolen or you discover fraudulent charges, cancel the account and open a new one. Provide a password which must be used any time the account is changed.

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FOR MISSING OR FRAUDULENT PASSPORTS, NOTIFY THE US STATE DEPARTMENT.

Whether you have a passport or not, write the passport office to alert them to anyone ordering a passport fraudulently.

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SEEKING LEGAL ADVICE.

You may want to consult a lawyer to determine legal action to take against creditors and/or credit bureaus if they are not cooperative in removing fraudulent entries from your credit report or if negligence is a factor. Call the local Bar Association or Legal Aid office to find an attorney who specializes in consumer law, the Fair Credit Reporting Act and the Fair Credit Billing Act.

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IDENTITY THEFT RESOURCES

- California Office of Privacy Protection

- Electronic Privacy Information Center (EPIC)
- Federal Deposit Insurance Commission
- Federal Trade Commission (FTC)
- Privacy Rights Clearinghouse
- US Comptroller of the Currency
- US Justice Department
- US Postal Inspection Service
- US Public Interest Research Group
- US Secret Service

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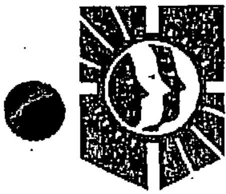


CALIFORNIA
OFFICE OF
PRIVACY
PROTECTION

866.785.9663 toll free
916.574.8611 fax
www.privacy.ca.gov

Know Your Rights: California Identity Theft Victims' Rights

Identity theft is taking someone's personal information and using it for an unlawful purpose, such as opening credit accounts or making charges on the victim's account.[1]

If you are a victim of identity theft you have rights that can help you clear up your records and avoid paying debts you did not create.

- **You have the right** to file a police report of identity theft with your local police department or sheriff's office, even if the crime was committed elsewhere.[2] A police report of identity theft is the key to getting the benefit of the other rights listed below.
- **You have the right** to get copies of documents relating to fraudulent transactions or accounts created using your personal information.[3]
- **You have the right** to have information resulting from identity theft removed (blocked) from your credit reporting agency files.[4]
- **You have the right** to receive up to 12 free credit reports, one per month, in the 12 months from the date of the police report.[5]
- **You have the right** to stop debt collection actions related to a debt resulting from identity theft. Before resuming collection, the collector must make a good faith determination that the evidence does not establish that the consumer is not responsible for the debt.[6]
- **You have the right** to bring an action or assert a defense against anyone claiming a right to money or property in connection with a transaction resulting from identity theft.[7]

If you are a victim of criminal identity theft, which occurs when an identity thief creates a false criminal record in your name, you have additional rights.

- **You have the right** to an expedited proceeding in Superior Court for getting a judge's order finding that you are factually innocent. The judge may order the deletion, sealing, or labeling of records.[8]

- **You have the right** to be listed in the California Department of Justice's Identity Theft Victim Registry. This gives victims of criminal identity theft a mechanism for confirming their innocence.[9]

For more information on identity theft, including a Victim Checklist, go to www.privacy.ca.gov or call 1-866-785-9663.

This fact sheet is for informational purposes and should not be construed as legal advice or as policy of the State of California. If you want advice on a particular case, you should consult an attorney or other expert. The fact sheet may be copied, if (1) the meaning of the copied text is not changed or misrepresented, (2) credit is given to the California Office of Privacy Protection, and (3) all copies are distributed free of charge.

[1] California Penal Code Section 530.5.
[2] California Penal Code Section 530.6.
[3] California Penal Code Section 530.8; Fair Credit Reporting Act Section 609(e) [15 United States Code § 1681g].
[4] California Civil Code Sections 1785.16(k),1785.16.1, 1785.16.3, 1785.203(b); Fair Credit Reporting Act Section 605B [15 United States Code § 1681c-2].
[5] California Civil Code Section 1785.15.3(b).
[6] California Civil Code Section 1788.18.
[7] California Civil Code Section 1798.93.
[8] California Penal Code Section 530.6.
[9] California Penal Code Sections 530.6-530.7.

MEMORANDUM

To: Law Enforcement Officer
From: Division of Privacy and Identity Protection
The Federal Trade Commission
Re: Importance of Identity Theft Report

The purpose of this memorandum is to explain what an "Identity Theft Report" is, and its importance to identity theft victims in helping them to recover. A police report that contains specific details of an identity theft is considered an "Identity Theft Report" under section 605B of the Fair Credit Reporting Act (FCRA), and it entitles an identity theft victim to certain important protections that can help him or her recover more quickly from identity theft.

Specifically, under sections 605B, 615(f) and 623(a)(6) of the FCRA, an Identity Theft Report can be used to permanently block fraudulent information that results from identity theft, such as accounts or addresses, from appearing on a victim's credit report. It will also make sure these debts do not reappear on the credit reports. Identity Theft Reports can prevent a company from continuing to collect debts that result from identity theft, or selling them to others for collection. An Identity Theft Report is also needed to allow an identity theft victim to place an extended fraud alert on his or her credit report. A copy of these sections of the FCRA is enclosed.

In order for a police report to be considered an Identity Theft Report, and therefore entitle an identity theft victim to the protections discussed above, the police report must contain details about the accounts and inaccurate information that resulted from the identity theft. We advise victims to bring a printed copy of their ID Theft Complaint filed with the FTC with them to the police station in order to better assist you in creating a detailed police report so that these victims can access the important protections available to them if they have an Identity Theft Report. The victim should sign the ID Theft Complaint in your presence. If possible, you should attach or incorporate the ID Theft Complaint into the police report, and sign the "Law Enforcement Report Information" section of the FTC's ID Theft Complaint. In addition, please provide the identity theft victim with a copy of the Identity Theft Report (the police report with the victim's ID Theft Complaint attached or incorporated) to permit the victim to dispute the fraudulent accounts and debts created by the identity thief.

For additional information on Identity Theft Reports or identity theft, please visit our website at http://www.ftc.gov/bcp/edu/microsites/idtheft/.

Enclosures: FCRA Sections 605B, 615(f), 623(a)(6)

ENCLOSURE:
FCRA 605B (15 U.S.C. § 1681c-2) Block of Information Resulting from Identity Theft

(a) Block

Except as otherwise provided in this section, a consumer reporting agency shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft, not later than 4 business days after the date of receipt by such agency of--

(1) appropriate proof of the identity of the consumer;

(2) a copy of an identity theft report;

(3) the identification of such information by the consumer; and

(4) a statement by the consumer that the information is not information relating to any transaction by the consumer.

(b) Notification

A consumer reporting agency shall promptly notify the furnisher of information identified by the consumer under subsection (a) of this section--

(1) that the information may be a result of identity theft;

(2) that an identity theft report has been filed;

(3) that a block has been requested under this section; and

(4) of the effective dates of the block.

(c) Authority to decline or rescind

(1) In general

A consumer reporting agency may decline to block, or may rescind any block, of information relating to a consumer under this section, if the consumer reporting agency reasonably determines that--

(A) the information was blocked in error or a block was requested by the consumer in error;

(B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or

(C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions.

(2) Notification to consumer

If a block of information is declined or rescinded under this subsection, the affected consumer shall be notified promptly, in the same manner as consumers are notified of the reinsertion of information under section 1681i(a)(5)(B) of this title.

(3) Significance of block

For purposes of this subsection, if a consumer reporting agency rescinds a block, the presence of information in the file of a consumer prior to the blocking of such information is not evidence of whether the consumer knew or should have known that the consumer obtained possession of any goods, services, or money as a result of the block.

(d) Exception for resellers

(1) No reseller file

This section shall not apply to a consumer reporting agency, if the consumer reporting agency--

(A) is a reseller;

(B) is not, at the time of the request of the consumer under subsection (a) of this section, otherwise furnishing or reselling a consumer report concerning the information identified by the consumer; and

(C) informs the consumer, by any means, that the consumer may report the identity theft to the Commission to obtain consumer information regarding identity theft.

(2) Reseller with file

The sole obligation of the consumer reporting agency under this section, with regard to any request of a consumer under this section, shall be to block the consumer report maintained by the consumer reporting agency from any subsequent use, if--

(A) the consumer, in accordance with the provisions of subsection (a) of this section, identifies, to a consumer reporting agency, information in the file of the consumer that resulted from identity theft; and

(B) the consumer reporting agency is a reseller of the identified information.

(3) Notice

In carrying out its obligation under paragraph (2), the reseller shall promptly provide a notice to the consumer of the decision to block the file. Such notice shall contain the name, address, and telephone number of each consumer reporting agency from which the consumer information was obtained for resale.

(e) Exception for verification companies

The provisions of this section do not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, except that, beginning 4 business days after receipt of information described in paragraphs (1) through (3) of subsection (a) of this section, a check services company shall not report to a national consumer reporting agency described in section 1681a(p) of this title, any information identified in the subject identity theft report as resulting from identity theft.

(f) Access to blocked information by law enforcement agencies

No provision of this section shall be construed as requiring a consumer reporting agency to prevent a Federal, State, or local law enforcement agency from accessing blocked information in a consumer file to which the agency could otherwise obtain access under this title.

ENCLOSURE:
FCRA 615(f) (15 U.S.C. § 1681m(f)) Requirements on Users of Consumer Reports – Prohibition on Sale or Transfer of Debt Caused by Identity Theft

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general

No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 1681c-2 of this title has resulted from identity theft.

(2) Applicability

The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to prohibit--

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

ENCLOSURE:

FCRA 623(a)(6) (15 U.S.C. § 1681s-2(a)(6)) Responsibilities of Furnishers of Information to Consumer Reporting Agencies – Duties of Furnishers upon Notice of Identity Theft-Related Information

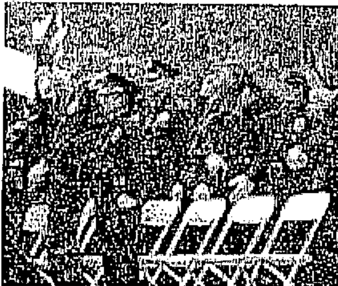
(6) Duties of furnishers upon notice of identity theft-related information

(A) Reasonable procedures

A person that furnishes information to any consumer reporting agency shall have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency under section 1681c-2 of this title relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information.

(B) Information alleged to result from identity theft

If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency at the address specified by that person for receiving such reports stating that information maintained by such person that purports to relate to the consumer resulted from identity theft, the person may not furnish such information that purports to relate to the consumer to any consumer reporting agency, unless the person subsequently knows or is informed by the consumer that the information is correct.



Reports and Other Services

REPORTS

Arrest Reports: Although some arrest information is available to the public if the arrest was made within the past six months, arrest reports are generally not authorized for release to the public, and can only be obtained with a subpoena or court order when there is a pending civil case. If you have a criminal case pending, contact your defense attorney or public defender. If you are representing yourself, contact the Office of the City Attorney (for misdemeanor arrests) or the District Attorney (for felony arrests) at the court where the trial is pending. If you are seeking a copy of an arrest report for a juvenile, or would like to obtain arrest information from an arrest that occurred within the past six months, contact the Discovery Unit of Risk Management Group at (213) 978-2100 to determine if you are eligible to receive this information.

Crime Reports: If you want to request a copy of a crime report, you must mail your written request to R&I Division (see below for mailing address). You may only receive a crime report if you are the victim, the victim's representative, or as provided in Section 6254 of the Government Code.

To obtain a copy of a crime report, you must provide:

1. A check or money order payable to the LAPD in the amount of $23.00. This is a non-refundable administrative fee charged to cover the cost of the record search, and will not be refunded even if it is determined that no report exists.
2. The name(s) and address(es) of the victim(s).
3. The insurance policy number if the requestor is an insurance company.
4. A release from the victim if the request is from an attorney.
5. The type of report - robbery, assault, etc.
6. The date and location of occurrence.
7. A report (DR) number, if known.

EXCEPTION (FEE WAIVER) FOR VICTIMS OF DOMESTIC VIOLENCE - Recent California legislation provides that victims of domestic violence may request a copy of their crime report without charge. Due to the severe time constraints imposed upon local law enforcement agencies for providing a copy of the report, victims of domestic violence should apply directly to the concerned Area of occurrence for a copy of their report. (Records and Identification Division will continue to process requests received by mail from victims of domestic violence as expeditiously as possible. There will be no fee charged to the victim.)

Mail to:
Los Angeles Police Department
Records and Identification Division

Document Processing Unit
P.O. Box 30158
Los Angeles, CA 90030

Traffic Reports: To obtain a copy of a traffic report, you must mail your request to R&I Division. Traffic reports can be released to authorized persons such as the victim, the victim's representative, or as provided in Section 20012 of the Vehicle Code.

To obtain a copy of a traffic report, please provide:

1. A check or money order payable to LAPD in the amount of $23.00. This is a non-refundable administrative fee charged to cover the cost of the records search, and will not be refunded even if it is determined that no report exists.
2. The location and the party(ies) involved in the collision, if known.
3. The insurance policy number if the requestor is an insurance company.
4. A release from an involved party if the request is from an attorney.
5. The type of report – traffic.
6. The date and location of occurrence.
7. A report (DR) number, if known.
8. The vehicle license number, when applicable.

Mail to:
Los Angeles Police Department
Records and Identification Division
Document Processing Unit
P.O. Box 30158
Los Angeles, CA 90030

Obtaining Detention Date Information
Requests for information regarding detention date information for LAPD arrests, known as "Detention Letters," may be directed to the R&I Division's Watch Commander's Office at Parker Center, 150 North Los Angeles Street, Room 210, between 7:00 a.m. and 8:00 p.m., Monday through Friday, excluding weekends and holidays.

Your detention letter request can only be processed for arrests made by the LAPD, and only if you were released from LAPD custody. The fee for this information is $15.00, payable by check, money order, or currency.

If the LAPD arrested you, but you were held in County custody, please visit the Los Angeles County Sheriff's Office Records Bureau at 12440 East Imperial Highway, Norwalk, or contact them at (562) 465-7825.

FINGERPRINT SERVICES
The LAPD's fingerprinting capabilities are for law enforcement support only and, therefore, the LAPD does not provide fingerprinting services for the public. For information regarding obtaining fingerprints, please refer to the Yellow Pages telephone listings under the headings of "Fingerprints," "Immigration," or "Passports."

PHOTOGRAPHS

Crime Scene Photographs: Crime scene photographs are not released except pursuant to a court order.

Traffic Collision Photographs: You may obtain traffic collision photographs if you have a legal right to obtain them. An initial fee of $13.00 is charged to determine whether photographs exist and your right to receive them. If photographs do exist, R&I Division personnel will contact you to outline the subsequent charges that will vary depending on the quantity and size of the photographs. If you are requesting a traffic collision report at the same time you are requesting the photographs, please prepare two separate checks.

Please mail your traffic collision photograph request to:
Los Angeles Police Department
Records and Identification Division

Document Processing Unit
P.O. Box 30158
Los Angeles, CA 90030

To obtain traffic collision photographs, please provide:

1. A check or money order payable to Los Angeles Police Department in the amount of $13.00. This is a non-refundable administrative fee charged to cover the cost of the records search, and will not be refunded even if it is determined that no photographs exist.
2. The location and the party(ies) involved in the collision, if known.
3. The insurance policy number if the requestor is an insurance company.
4. A release from an involved party if the request is from an attorney.
5. The date and location of occurrence.
6. A report (DR) number, if known.
7. The vehicle license number.

REGISTRATION

Arson and Narcotics Offender Registrations: If you are required to register for an arson or narcotics offense with the LAPD, you must:

1. 1. Register in person.
2. 2. Bring a photo identification.
3. 3. Provide your parole or probation officer's name and address, if required.

Location: Parker Center, Front Lobby Desk, 150 North Los Angeles Street, Los Angeles.

Registration Availability: Monday through Friday excluding weekends and holidays beginning at 4:00 a.m. and ending at 10:00 a.m. For further information, contact the R&I Division Registration Unit at 213-485-2007.

Sex Offender Registrations: As of October 1, 1995, the sex offender registration process was decentralized. If you reside within the LAPD's jurisdiction and are required to register as a sex offender, you must report to the LAPD Community Police Station that covers the area of your residence and ask for a REACT detective to complete the registration process. Several Community Police Stations require an appointment to register. Please contact your local station and request appointment information.

Vehicles - Repossessed
If your vehicle was repossessed, you may be required to obtain an LAPD repossession release certificate. Repossession release certificates are only available at Parker Center, 150 North Los Angeles Street, Room 205. Business hours are 7:00 AM until 9:00 PM, Monday through Friday, excluding holidays. The fee is $15.00.

Wants or Warrants
If you want to know whether an outstanding want or warrant exists for you, you must appear in person at an LAPD Community Police Station. No specific want or warrant information is provided telephonically.

contact us / terms & conditions / los angeles police foundation

The Los Angeles Police D

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Newport Beach Police Department

Copies of Reports

- **Arrest Reports** are available 14 days after the date of arrest. Request for copies of arrest reports may be made by the arrestee only. Some exceptions may apply, please contact the Front Desk (949) 644-3681, 8:00 am to 6:00 pm, 7 days a week for more information.

- **Crime Reports** are available shortly after the report is filed. Requests for copies of crime reports may be made by any involved party except the listed suspect(s). Some exceptions may apply per Section 6254 of the Government Code. Please contact the Front Desk (949) 644-3681, 8:00 am to 6:00 pm, 7 days a week for more information.

- **Traffic Collision Reports** are not automatically mailed; they must be requested. These reports are usually ready in 7-10 days. Before making your request, please call Records at (949) 644 3682. Have your case number (DR#) ready, and verify that the report is ready for release.

- **Request for Copies of Reports** may be made in person or through the mail.

  - If requesting in person, please present valid photo ID and payment of $4.00 at the Front Desk between the hours of 8:00 am and 6:00 pm any day of the week.

  - If requesting through the mail, please enclosed a note with the following information:

    - your name (if your name is not listed on the report tell us how you were involved in the case)

    - your case number, (if known, please supply date/time of incident and other pertinent information).

    - and address/phone number so that we can contact you if we need more information.

  - All mail requests must also include a check for $4.00 and a photocopy of valid photo ID.

  - Please make checks payable to "The City of Newport Beach".

SENATE COMMITTEE ON Public Safety
Senator John Vasconcellos, Chair
1999-2000 Regular Session

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AB 1897 (Davis)
As Amended June 20, 2000
Hearing date: June 27, 2000
Penal Code
JM:mc

IDENTITY THEFT -

CLEARING THE NAMES OF VICTIMS

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation: AB 156 (Murray) - Ch 768, Sts. 1997; SB 1374 (Leslie) - Ch. 488, Sts. 1998

Support: California Public Interest Research Group; Consumers Union; League of California Cities; Privacy Rights Clearinghouse; Sacramento County Sheriff's Department; San Bernadino County Sheriff's Department; San Diego County Sheriff's Department; City of Lakewood; City of Dana Point; Culver City; California District Attorneys Association

Opposition: None known

Assembly Floor Vote: Ayes 78 - Noes 0

(NOTE: SEE COMMENT # 2 FOR A DISCUSSION OF AMENDMENTS TO BE

(More)

AB 1897 (Davis)

OFFERED IN COMMITTEE BY THE AUTHOR TO ADDRESS CONCERNS AS TO PROVISIONS IN THE BILL REFERRING TO THE STATUTE THAT ALLOWS AN ARRESTED PERSON TO OBTAIN A JUDICIAL DECLARATION OF INNOCENCE.)

KEY ISSUE

SHOULD THE VICTIM OF IDENTITY THEFT BE ALLOWED TO PETITION THE COURT FOR AN EXPEDITED DETERMINATION OF FACTUAL INNOCENCE IF THE PERPETRATOR OF THE THEFT WAS ARRESTED FOR OR CONVICTED OF A CRIME UNDER THE VICTIM'S NAME OR WHERE THE VICTIM'S NAME HAS BEEN MISTAKENLY ASSOCIATED WITH A RECORD OF CRIMINAL CONVICTION?

PURPOSE

The purpose of this bill is to create a judicial process whereby victims of identity theft can clear their names.

Existing law provides a process for a person arrested for a crime to obtain a court order for destruction of arrest records based upon the person's factual innocence. This process would be available to a victim of identity theft. (Pen. Code 851.8.)

Existing law provides that it is an alternative felony/misdemeanor for a person to willfully obtain personal identifying information, as defined, of another person and use another individual's personal identifying information and obtain, or attempt to obtain, credit, goods, or services in the name of the other person without the consent of that person. (Pen. Code 530.5.)

Existing law defines "personal identifying information" as the name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, or credit card number of an individual

(More)

person. (Pen. Code 530.5, subd. (b).)

Existing law provides that every person who falsely represents or identifies himself as another person or a fictitious person to certain enumerated peace officers upon a lawful detention or arrest to evade proper identification is guilty of a misdemeanor. (Pen. Code 148.9, subd. (a).)

Existing law provides that a person who manufactures or sells documents falsely purported to be government identification is guilty of a misdemeanor punishable by imprisonment in county jail for one year and/or by a fine of not more than $1,000 for a first-time conviction and not more than $5,000 for a subsequent conviction. (Pen. Code 529.5.)

Existing law provide that any person who possesses a document falsely purported to be government identification knowing that it is not a government issued document is guilty of a misdemeanor, punishable by a fine of not less than $1,000 and not more than $2,500. (Pen. Code 529.5, subd. (c).)

Existing law provides that any person who gives false information to a peace officer performing his or her duties under the Vehicle Code is guilty of an infraction. (Veh. Code 31.)

This bill would allow a person who suspects that he or she is a victim of identity theft to initiate an investigation at his or her local law enforcement agency and to obtain a police report to document the fact of the identity theft and that the law enforcement agency "shall begin an investigation of the facts, or if the suspected crime occurred in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed . . ."

This bill provides that a victim of suspected identity theft may petition the court for an "expedited" judicial determination of factual innocence under the following circumstances and pursuant to the following procedures:

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Where the perpetrator of the identity theft was convicted of a crime under the victim's identity.

Where the identity theft victim's name has been mistakenly associated with a record of criminal conviction.

Judicial determination of these issues shall be made after

consideration of declarations, affidavits, police report and reliable information submitted by the parties.

- Where the court finds the petitioner factually innocent, the court shall issue an order certifying that fact.

This bill further provides that where the "perpetrator" of identity theft was arrested but not convicted of a crime, the identity theft victim may seek a judicial determination of factual innocence pursuant to Penal Code section 851.8. (Author's amendments to be offered will delete this provision and combine this process with the other provisions added by this bill.)

COMMENTS

1. Need for This Bill

According to the sponsor, the Los Angeles County District Attorney:

> "Criminal identity theft" - the use of another's identity information during arrest or through prosecution - is sharply on the rise. Criminal identity theft creates a false criminal record for a blameless victim. Today, growing numbers of innocent victims of this practice are subject to erroneous arrest and incarceration, or collateral harm such as denial of employment, because a false criminal history has been created by criminal's use of their identifying information.

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> AB 1897 would provide that an identity theft victim can petition for an expedited judicial determination of factual innocence upon presentation of a valid police report and other specified information, where the perpetrator of the identity theft was arrested or the victim's name was mistakenly associated with a record of criminal conviction. The existing statute for declaring factual innocence - Penal Code section 851.8 - will remain available where the perpetrator of identity theft was arrested for, but not convicted of, a crime.

2. Establishing Factual Innocence Under Penal Code Section 851.8

a. General Background on Penal Code Section 851.8

Penal Code sections 851.8 and 851.85 were enacted in 1980 pursuant to AB 2861 (Hannigan) - Chapter 1172. Penal Code section 851.8 provides a procedure whereby a person who has been arrested or detained and is factually innocent may request a law enforcement agency or the court to provide for the sealing and destruction of the arrest record.

Specifically, under Penal Code section 851.8, a person can petition to have arrest records sealed and destroyed where no accusatory pleading is filed. If the law enforcement agency determines that the person arrested is factually innocent, the records will be sealed for three years and then destroyed. That law enforcement agency must notify the Department of Justice (DOJ) that the person has been found factually innocent. Affidavits, police reports or other evidence may support any judicial determination of factual innocence. The petitioner has the initial burden of proof to show that no reasonable cause exists to believe that the arrestee committed the offense. If the court finds that not reasonable cause exists, the burden then shifts to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense.

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b. Use of Section 851.8 by Victims of Identity Theft Under Current Law

Clearly, a victim of identity theft who has been arrested for a crime that another person committed while using the name of the victim could obtain a declaration of factual innocence under Penal Code section 851.8. This bill would not affect that process.

3. New Section for Clearing the Name of a Victim of Identity Theft

As amended on June 20, 2000, the bill provides that a victim of identity theft may petition for an expedited certificate of factual innocence under Penal Code section 530.6 (created by this bill) if the "perpetrator of identity theft was convicted of a crime under the victim's identity." Such circumstances

would likely be relatively rare. More often, the perpetrator would be convicted of fraud related to the identity theft (fraudulent use of a credit card to obtain services, etc.) and also the identity theft, per se.

4. Provision Purporting to Allow Victim of Identity Theft to Avail Himself or Herself of the Relief Provided by Penal Code Section 851.8

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The bill also states that a victim of identity theft may petition the court for relief under Penal Code section 851.8 where the perpetrator of the theft was arrested under the victim's identity, but not convicted. This would essentially act as "remote" amendment of Penal Code section 851.8 without a direct change to that section, as Penal Code section 851.8 only applies to allow a factually innocent person who has been arrested for a crime that he or she did not do to obtain a declaration of his or her innocence.<1>

The reference to section 851.8 in this bill is apparently an attempt to confer standing (the right to appear in court in a matter) on a person who was not arrested to appear in a proceeding under section 851.8. A person who was not arrested for a crime could not otherwise appear in such an action.

5. Problems with Using Section 851.8 to Clear the Name of an Identity Theft Victim Who was not Arrested for a Crime

a. Basic Inapplicability of Section 851.8 to Situations Where ID Theft Victim was not Arrested

The determination of factual innocence under Penal Code section 851.8 is interwoven with or indistinguishable from an order declaring that a person's arrest records must be destroyed and the arrest treated as though it never occurred. Where the identity theft victim was not arrested, the use of section 851.8 would create a rather tortured process.

Consider this provision in Penal Code section 851.8: "If the court finds the arrestee to be factually innocent of the charges for which the arrest was made, then the court shall order the law enforcement agency having jurisdiction over the offense, the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the

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<1> Section 851.8 also can extend to situations where people have been charged with crimes that have been dismissed and even where the person was wrongly convicted.

petitioner has been found factually innocent under this section to seal their arrest records and the court order to seal and destroy such records . . ."

However, where a perpetrator of identity theft was arrested under the name of the victim of identity theft, the arrest was likely proper, it was merely done under the incorrect name. The perpetrator may well have committed a crime. The fact that a person was not convicted does not mean that he or she was factually innocent of the crime. A key witness could die or disappear. Evidence could be lost or be perceived by the jury as weak. The defendant may enter a plea bargain that included dismissal of the identity theft related crime. However, law enforcement must keep records of the crime and the arrest. The arrestee should be prosecuted if there is probable cause of his or her guilt.

b. Courts Would Need to Construct Undefined and Possibly Conflicting Remedies

Using Penal Code section 851.8 to clear the name of an identity theft victim would require the court to create some undefined, non-statutory remedy. This remedy would require the court, without statutory authority, to somehow remove the name of the victim of identity theft from the record of arrest and to somehow replace the victim's name with the name of the

perpetrator. Each judge could do this in his or her own way. There would be no uniformity of process or relief in such cases.

Although Judicial Council has apparently approved the current language in the bill, the fix appears to be extremely cumbersome. Some victims of identity theft would apply for relief under new Penal Code section 530.6, others would apply for relief under Penal Code section 851.8, a section that has only been used to clear the records of people who were incorrectly arrested for crimes they did not commit. This raises the possibility that different rules would develop for victims of identity theft who wished to clear their names.

6. Amendments to Cure Penal Code Section 851.8 Problems are Acceptable to the Author

These issues may be susceptible to a relatively simple fix. Perhaps the bill should be amended to reflect that a victim of identity theft could obtain a certificate of factual innocence where a perpetrator of identity theft was "arrested for and not convicted or convicted of a crime under the victim's identity." (See, page 5, line 24.)

SHOULD THE BILL BE AMENDED TO PROVIDE THAT A PERSON WHO WAS THE VICTIM OF IDENTITY THEFT COULD OBTAIN A CERTIFICATE OR DECLARATION OF FACTUAL INNOCENCE WHERE THE PERPETRATOR OF THE IDENTITY THEFT WAS ARRESTED FOR OR CONVICTED OF A CRIME UNDER THE VICTIM'S IDENTITY?

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