

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

House Bill 1122
Judiciary

(Delegate Lee, *et al.*)

Identity Fraud - Seizure and Forfeiture of Property

This bill authorizes seizure and forfeiture of property for felony identity fraud violations by a State or local law enforcement authority. The bill specifies that “victim” includes a business that loses money as a result of an identity fraud offense.

The bill takes effect June 1, 2009, has prospective application, and may not be applied to any offense committed before June 1, 2009.

Fiscal Summary

State Effect: Potential minimal general fund revenue increase from the proceeds of forfeited property for the State Police. It is expected that the bill’s provisions can be implemented with existing resources.

Local Effect: Potential minimal revenue increase from the proceeds of forfeited property. Although the bill may cause an increase in search and seizure activity, it is anticipated that most local law enforcement jurisdictions can handle such an increase with existing resources.

Small Business Effect: None.

Analysis

Bill Summary: A State or local law enforcement agency may seize the following items that were used or intended to be used in connection with felony identity fraud:

- property obtained by or through, or derived directly from, a felony identity fraud violation;
- property received as an inducement to commit felony identity fraud;
- property used or intended to be used to commit or facilitate a felony violation of the identity fraud law; and
- proceeds from any property subject to the bill's provisions.

Property or an interest in property is not subject to forfeiture if the owner establishes by a preponderance of the evidence that the violation was committed without the owner's actual knowledge.

Real property used as the principal family residence is subject to forfeiture only if one of the owners was convicted of a felony violation of the identity fraud law. However, a court may order forfeiture of real property used as the principal family residence without an identity fraud conviction if the owner fails to appear for a required court appearance and fails to surrender to the court within 180 days after the required court appearance. Real property used as the principal family residence by a husband and wife and held as tenants by the entirety may not be forfeited unless the property was used in connection with a felony identity fraud violation, or a conspiracy to commit such a violation, and both the husband and wife are convicted of the requisite violation.

A State or local law enforcement agency may seize the property specified in the bill's provisions on process issued by a court of competent jurisdiction and property may be seized without a warrant if the seizure is incident to an arrest, or search under a search warrant, or if the seizure is made with probable cause to believe that the property was used or was intended to be used for the purpose of identity fraud, and as otherwise specified.

The chief law enforcement officer of the seizing authority for a motor vehicle must recommend to the appropriate forfeiting authority in writing that the vehicle be forfeited, only if the seizing officer: (1) determines the names and addresses of all registered owners and secured parties; (2) personally reviews the facts and circumstances of the seizure; and (3) personally determines and represents in writing that the totality of the case justifies the seizure and forfeiture of the motor vehicle.

Circumstances to be considered in deciding whether seizure and forfeiture are justified include: (1) the extensive criminal record of the violator; (2) a previous conviction for identity fraud; (3) evidence that the motor vehicle was acquired by use of proceeds from a violation of the identity fraud law; (4) circumstances of the arrest; and (5) the way in which the motor vehicle was used. A sworn affidavit from the chief law enforcement officer that the officer followed these procedures is admissible as evidence. However,

the chief law enforcement officer is not subject to subpoena and may not otherwise be compelled to testify at a forfeiture proceeding if the officer who seized the vehicle appears and testifies at the proceeding. The forfeiting authority must surrender the motor vehicle upon the owner's request if the authority independently determines that seizure and forfeiture are not justified. The court may determine whether the seizing or forfeiting authority abused its discretion or was clearly erroneous in recommending forfeiture or in not surrendering a motor vehicle upon the owner's request.

Real property forfeiture proceedings may be brought where the criminal charges are pending, the owner resides, or the real property is located. If forfeiture proceedings are brought in a jurisdiction other than where the real property is located, a notice of pending litigation containing specified information must be filed in that jurisdiction. If the owner of real property that is the principal family residence is convicted of felony identity fraud and the owner appeals, the court must stay the real property forfeiture proceedings during the appeal.

Generally, a complaint seeking forfeiture for an identity fraud violation must be filed within 90 days after the earlier of a conviction of the criminal charge which led to initiation of the forfeiture proceedings or final disposition of those criminal charges. In the case of seized money, if the State or a political subdivision does not file proceedings about money within the 90-day period, the money seized must be returned to the owner on request by the owner. If the owner fails to ask for the return of the money within one year after the final disposition of criminal proceedings the money reverts to the State or locality, depending on which authority seized the money.

A complaint seeking forfeiture must contain the 10 elements as specified in the bill for controlled dangerous substance seizures. Within 20 days of complaint filing, notice must be delivered by certified mail.

Except as otherwise provided, there is a rebuttable presumption that the seized property is subject to forfeiture as proceeds if the State establishes by clear and convincing evidence that the person has committed a felony violation of the identity fraud law, the property was acquired by the person during the violation or within a reasonable time thereafter, and there was no other likely source for the property. A claimant of the property has the burden to rebut the presumption.

Forfeited property must be disposed of in the order provided in the bill. The governing body where the property was seized must sell the forfeited property at public auction. Proceeds must first be used to pay all the proper expenses of forfeiture proceedings and the sale including seizure and maintenance expenses, advertising, and court costs. Secondly, remaining proceeds must be distributed for court-ordered restitution to the person or persons whose identity was stolen to pay for identifiable losses as defined in

the bill. Third, any remaining proceeds are distributed to other victims to pay for identifiable losses. Any remaining proceeds must then be distributed to the State general fund.

Current Law

Seizure and Forfeiture Provisions: The only properties subject to summary forfeiture pursuant to a violation of the controlled dangerous substances law are controlled dangerous substances and plants from which they are derived. A Schedule I substance must be seized and summarily forfeited to the State if the substance is: (1) possessed, transferred, sold, or offered for sale in violation of the law; or (2) possessed by the State and its owner is not known. A plant may be seized and summarily forfeited if it is one from which a Schedule I or Schedule II substance may be derived and it: (1) has been planted or cultivated in violation of the law; (2) has an unknown owner or cultivator; or (3) is a wild growth.

The complaint seeking forfeiture must contain:

- a description of the property seized;
- the date and place of the seizure;
- the name of the owner, if known;
- the name of the person in possession, if known;
- the name of each lienholder, if known or reasonably subject to discovery;
- an allegation that the property is subject to forfeiture;
- if seeking forfeiture of a lien holder's interest in property, an allegation that the lien was created with actual knowledge that the property was being or was to be used in violation of the controlled dangerous substances law;
- a statement of the facts and circumstances surrounding the seizure;
- a statement setting forth the specific grounds for forfeiture; and
- an oath or affirmation that the contents of the complaint are true to the best of the affiant's knowledge, information, and belief.

Within 20 days after the filing of the complaint, copies of the summons and complaint must be sent by certified mail requesting "restricted delivery – show to whom, date, address of delivery" and first class mail to all known owners and lien holders whose identities are reasonably subject to discovery, including all real property owners and lien holders shown in the records required by law for notice or perfection of the lien.

Notice of the proceedings must be given by posting at the courthouse, on the land if the property is real property, and in a newspaper for three consecutive weeks. If the owner does not timely file an answer to the complaint, the court may order forfeiture of the property without a hearing. Otherwise, a hearing must be held. Subsequent to a full hearing, a court may order that the property be released, forfeited to the appropriate governing body, or released within five days to the first priority lienholder if the property is subject to a valid lien and the lienholder did not have actual knowledge of the property's unlawful use.

A "seizing authority" means a law enforcement unit in the State that is authorized to investigate violations of the controlled dangerous substances law and that has seized property pursuant to State law.

Identity Fraud Provisions: The term "personal identifying information" means: a name, address, telephone number, driver's license number, Social Security number, place of employment, employee identification number, mother's maiden name, bank or other financial institution account number, date of birth, personal identification number, credit card number, or other payment device number.

A person may not knowingly, willfully, and with fraudulent intent possess, obtain, or help another to possess or obtain any individual's personal identifying information without the consent of that individual to use, sell, or transfer the information to get a benefit, credit, good, service, or other thing of value in the name of that individual. A person may not knowingly and willfully assume the identity of another to avoid identification, apprehension, or prosecution for a crime or with fraudulent intent to get a benefit, credit, good, service, or other thing of value or to avoid payment of debts or other legal obligations. A person may not knowingly and willfully claim to represent another person without the knowledge and consent of that person, with the intent to solicit, request, or take any action to otherwise induce another person to provide personal identifying information or a payment device number.

If the benefit, credit, good, service, or other thing that is the subject of the crime is valued at \$500 or more, then a person who violates this identity fraud provision is guilty of a felony and is subject to maximum penalties of five years imprisonment and/or a fine of \$25,000. If the benefit or other thing has a value of less than \$500, or if a person knowingly and willfully assumes the identity of another to avoid identification, apprehension, or prosecution for a crime, then the violator is guilty of a misdemeanor and is subject to maximum penalties of 18 months imprisonment and/or a fine of \$5,000.

If circumstances reasonably indicate that a person's intent was to manufacture, distribute, or dispense another individual's personal identifying information without the individual's consent, the violator is guilty of a felony and is subject to imprisonment for up to five years and/or a fine up to \$25,000. If the violation is committed pursuant to a scheme or

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continuing course of conduct, the conduct may be considered one offense. The value of goods or services may be combined to determine whether the violation is a felony or misdemeanor.

Notwithstanding any other provision of law, the State may institute a prosecution for the misdemeanor of identity fraud at any time. Under the Maryland Constitution, a person convicted of the misdemeanor offense of identity fraud is deemed to have committed a misdemeanor whose punishment is confinement in the penitentiary and may reserve a point or question for *in banc* review as provided by the Maryland Constitution. A violator of any of these provisions is subject to a court order for restitution and paying costs, including reasonable attorney's fees, related to restoring a victim's identity. A sentence under the identity fraud provisions may be imposed separate from and consecutive to, or concurrent with, a sentence for any crime based on the acts establishing the violation.

Law enforcement officers may operate without regard to jurisdictional boundaries to investigate identity fraud provisions, within specified limitations. The authority may be exercised only if an act related to the crime was committed in the jurisdiction of an investigative agency or a complaining witness resides in an investigating agency's jurisdiction. Notification of an investigation must be made to appropriate law enforcement personnel.

Background: Although the Task Force to Study Identity Theft did not have adequate time to come to agreement on the details of specific legislation, the task force was in agreement that legislation should be enacted to authorize a court to order forfeiture of all property obtained by an identity fraud criminal. The task force unanimously recommended that forfeiture legislation allow for due process and fully protect lien holders while allowing for at least part of the proceeds from forfeited property to be distributed to victims of identity fraud.

The task force found that since identity fraud offenders are not required to forfeit the proceeds of their crimes, they are able to keep the cash obtained from their crimes or retain the valuables and convert them to cash. After convicted offenders have completed their sentences, they are able to return to society with an advanced financial position. Thus, not only can those offenders who are not apprehended benefit from committing this crime, even those who are convicted can benefit financially. In contrast, victims are left to repair what is left of their finances, often spending additional time and money to do so.

According to the National Conference of State Legislatures, Iowa, Kentucky, Rhode Island, and Tennessee authorize the seizure and forfeiture of property illegally obtained due to identity theft.

The Identity Theft Data Clearinghouse, sponsored by the Federal Trade Commission (FTC) and the Consumer Sentinel, a consortium of national and international law enforcement and private security entities, released *Identity Theft Victim Complaint Data* for calendar 2007 (the latest information available). In calendar 2007, FTC received 258,427 identity theft complaints. In calendar 2006, the number of identity theft complaints was 246,124. In Maryland, residents reported 4,821 instances of identity theft in 2007, or 85.8 complaints per 100,000 population, ranking Maryland tenth in the nation for identity theft. As has been the case for the last several years, the most common type of identity theft was credit card fraud, which comprised 28% of all complaints. The second most prevalent type of identity fraud involved the opening of new accounts for wireless devices, utilities, and the telephone, at 19% of all complaints.

In November 2007, FTC released a national survey, *The 2006 Identity Theft Survey Report*. FTC reports that the survey suggests that 8.5 million United States adults discovered that they were victimized by some form of identity theft in calendar 2005.

Local Fiscal Effect: Montgomery County advises that the bill will not have a significant impact on the sheriff's office. Garrett County advises that the bill will not have a fiscal impact. Howard County estimates that it will cost \$165,000 to employ one person to manage and administer the program and maintain a pool of funds for the upkeep of seized property. The City of Havre de Grace reports that the bill's fiscal impact will depend on the number of identity fraud cases and applicable seizures, which it cannot reliably determine at this time.

Additional Information

Prior Introductions: Similar bills have been introduced during previous sessions. SB 846 of 2008 passed the Senate and received an unfavorable report from the House Judiciary Committee. SB 306 of 2007 passed the Senate and was heard by the House Judiciary Committee, where no further action was taken. HB 1051 of 2007 was heard by the House Judiciary Committee, but no further action was taken. SB 517 and HB 692 of 2006 both received unfavorable reports from the Senate Judicial Proceedings and House Judiciary committees, respectively.

Cross File: None listed, however, SB 202 as introduced is similar.

Information Source(s): Garrett County, Howard County, City of Havre de Grace, Judiciary (Administrative Office of the Courts), State's Attorney's Association, Department of State Police, Department of General Services, Department of Natural Resources, Motor Vehicle Administration, National Conference of State Legislatures, Federal Trade Commission, Department of Legislative Services

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