

Legislative Analysis



ID THEFT: INCLUDE AS RACKETEERING AND ALLOW FORFEITURE

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House Bill 4325 as introduced
Sponsor: Rep. Dudley Spade

House Bill 4326 with committee amendment
Sponsor: Rep. Lee Gonzales
Committee: Judiciary

First Analysis (7-27-09)

BRIEF SUMMARY: House Bill 4325 would allow forfeiture of property associated with a violation of the Identity Theft Protection Act, establish forfeiture procedures, and require annual reports regarding forfeiture activities to be sent to the attorney general and legislature. House Bill 4326 would amend the definition of racketeering so as to include felony violations of the Identity Theft Protection Act and violations of Section 145d of the Michigan Penal Code, which pertains to certain violations involving the Internet or a computer.

FISCAL IMPACT: Both bills would have an indeterminate fiscal impact on the state and local units of government. A more detailed discussion follows later in the analysis.

THE APPARENT PROBLEM:

Despite state and federal laws criminalizing identity theft, attempts to educate the public on how to protect personal information, and technological advances to thwart unauthorized uses of personal identifying information, identity theft remains the fastest growing crime in the nation. The Federal Trade Commission (FTC) reported in a February 2009 press release that "for the ninth year in a row, identity theft was the number one complaint category," constituting 26 percent of all fraud-related complaints (almost 314,000 of approximately 1.22 million reported cases). Within the category of identity theft, credit card fraud accounted for 20 percent of reported identity theft, followed by government documents/benefits fraud at 15 percent, employment fraud at 15 percent, phone or utilities fraud at 13 percent, bank fraud at 11 percent, and loan fraud at four percent.

Where at one time an incident of identity theft was typically the act of one or two criminals, increasingly it is conducted by sophisticated and highly organized rings. According to the website of the Department of State Police, "[p]roceeds of these types of crimes are often used to facilitate and fund terrorist activities and other organized criminal enterprises." This has led some to believe that state racketeering laws (usually associated with anti-mafia and organized crime activities) should be allowed to be used by law enforcement officials to crack down on perpetrators of identity theft.

In addition, some feel that property and profits from identity theft activities should be allowed to be seized and forfeited similarly to items seized in drug raids. Last session, legislation to address these concerns passed the House but failed to be enacted. Supporters of the package have reintroduced the legislation.

THE CONTENT OF THE BILLS:

House Bill 4325

The bill, which would take effect on November 1, 2009, would add several new sections to the Identity Theft Protection Act (MCL 445.74 et al.) to identify property subject to forfeiture, establish forfeiture procedures, authorize the seizing agency to retain or sell seized property, and require a seizing agency to submit a summary report annually to the attorney general for forwarding to the legislature regarding forfeiture of property. The provisions are similar to those in the Public Health Code regarding the seizure and forfeiture of property related to crimes involving controlled substances.

Property Subject to Forfeiture

The bill would subject the following property to forfeiture when used (or intended to be used) to commit a felony violation of the Identity Theft Protection Act (ITPA):

- Equipment of any kind.
- With some exceptions, a conveyance used or intended to be used to facilitate the transportation of property. "Conveyance" would include aircraft, vehicles, and watercraft.
- Books, records, and research products and materials, including formulas, microfilm, tapes, and data.
- Any thing of value furnished or intended to be furnished in exchange for identity information obtained in a felony violation of the act. This would include, but not be limited to, money, negotiable instruments, or securities. Money found in close proximity to property subject to forfeiture would be presumed to also be subject to forfeiture; this presumption could be rebutted by clear and convincing evidence. If the owner of the thing of value could establish that an act or omission had been committed or omitted without his or her knowledge or consent, the item would not be subject to forfeiture.

Process for Seizure

Property subject to forfeiture could be seized upon process issued by the circuit court with jurisdiction over the property. Seizure without process could be made incident to a lawful arrest, under a search warrant, or under an administrative inspection warrant; if the property was the subject of a prior judgment in favor of Michigan in an injunction or forfeiture proceeding under the act; if probable cause existed to believe the property was directly or indirectly dangerous to health or safety; or if probable cause existed to believe the property was used or intended to be used to commit a felony violation of the act.

Forfeiture Proceedings

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

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

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

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

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

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

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

Disposition of Forfeited Property

The seizing agency could do any of the following:

- Retain the property for official use.
- Sell whatever is not required to be destroyed by law or harmful to the public. The proceeds of the sale and any money or other thing of value forfeited would have to be deposited with the treasurer of the entity having budgetary authority over the seizing agency. These funds would be applied to cover expenses relating to the forfeiture and sale. The remaining balance would be distributed equitably among the agencies involved in the forfeiture. Money and all interest and other earnings on forfeited money received by a seizing agency would have to be used to enhance law enforcement efforts pertaining to identity theft. A seizing agency could direct its portion of the forfeiture to nonprofit organizations whose primary activity is to assist law enforcement agencies with criminal investigations and obtaining information for solving crimes related to identity theft (for example, Crime Stoppers).
- Forward it to the Department of State Police for disposition.

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

Reporting Duties

Before February 1 of each year, each local unit of government that -- during its preceding fiscal year -- had forfeiture proceedings pending in the circuit court; had seized property without a court order as allowed in the bill; or had received money, negotiable instruments, or any other thing of value would have to submit a report to the attorney general for analysis and transmittal to the Secretary of the Senate and Clerk of the House of Representatives. The report would have to summarize the local unit of government's activities regarding forfeiture of property and include information as specified in the bill such as the number of forfeiture proceedings instituted, still pending, or concluded in the circuit court; the number accomplished without a court order; the net total proceeds of all property forfeited statutorily required to be accounted for and reported to the state treasurer; an inventory of the property received; and a statement explaining how the money received by the local unit had been used or was being used to enhance the law enforcement efforts pertaining to the Identity Theft Protection Act.

Further, the records of a local unit of government regarding the forfeiture of property would have to be audited in accordance with either Public Act 71 of 1919 or the Uniform Budgeting and Accounting Act. The records could also be audited by an auditor of the local unit of government.

House Bill 4326

Under the Michigan Penal Code, "racketeering" means committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit, for financial gain, an offense listed in the definition. House Bill 4326 would amend the code (MCL 750.159g) to include a felony violation of the Identity Theft Protection Act and a violation of Section 145d of the penal code as a predicate offense in the code's definition of racketeering. The bill would also delete an obsolete reference to Section 17766a of the Public Health Code pertaining to androgenic anabolic steroids (Section 17766a was repealed by Public Act 236 of 2001).

(Section 145d prohibits use of the Internet, a computer, or a computer program, network, or system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another to commit any of the following:

- When the victim or intended victim is a minor or believed to be a minor— involvement in child sexually abusive activity or material, kidnaping, first-, second-, third-, or fourth-degree criminal sexual conduct (CSC), or assault with intent to commit CSC, solicitation of a child for immoral purposes, recruitment or inducement of a minor to commit a felony, kidnaping of a child under the age of 14, or disseminating sexually explicit material to a minor.
- Stalking or aggravated stalking.
- An explosives offense listed in Chapter 33 of the code; causing a death by explosives; selling explosives to a minor; or intentionally reporting a crime relating to a bombing, attempted bombing, or threat to bomb, knowing that the report is false.)

BACKGROUND INFORMATION:

The bills are identical to a package introduced last session (2007-2008) that was passed by the House but died in the Senate.

FISCAL INFORMATION:

The fiscal impact of House Bill 4326 would depend on how it affected racketeering-related convictions and forfeitures. To the extent that more offenders were sentenced to prison, the state could incur increased costs averaging about \$32,500 per offender per year, a figure that includes allocated portions of various fixed administrative and operational costs. To the extent that more felons were sentenced to felony probation, the state could incur increased costs of probation supervision. Costs of parole and probation

supervision, exclusive of the cost of any electronic monitoring, average about \$2,100 per supervised offender per year.

Any increases in penal fine revenues could benefit local libraries, which are the constitutionally-designated recipients of those revenues. Any increases in revenue from disposing of forfeited racketeering-related property would benefit the seizing law enforcement agencies.

Although there are no data to indicate how many additional offenders would be sanctioned under the bill, preliminary data on felony dispositions in 2007 indicate that there were 743 offenders sentenced for the predicate offenses that the bill would include in the racketeering statute (Table 1).

2007 Felony Dispositions for Selected Crimes (Preliminary Data; Includes Attempts)

MCL	Description	Prison	Probation	Jail	Other	Total
750.145d	Internet/computer crimes	102	84	3	2	191
445.65	Identity theft	100	300	51	33	484
445.67	Identity theft; obtain ID with intent to commit	<u>17</u>	<u>35</u>	<u>8</u>	<u>8</u>	<u>68</u>
Totals		219	419	62	43	743

Table 1

Also in 2007, of the 66 offenders sentenced for racketeering violations, 50 received prison sentences (Table 2).

Table 2

2007 Felony Dispositions for Racketeering Violations (Preliminary Data; Includes Attempts)

MCL	Description	Prison	Probation	Jail	Other	Total
750.159i (1)	Criminal enterprise - conducting	44	10	4	2	60
750.159i (4)	Criminal enterprise - conspiracy	<u>6</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>6</u>
Totals		50	10	4	2	66

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

ARGUMENTS:

For:

The state racketeering laws target certain specified criminal activity in which the purpose of that activity is to profit financially. The bills are therefore seen by supporters as necessary tools in the fight against the ever-growing problem of identity theft. Increasingly, identity theft is being committed by large, organized gangs of criminals,

with profits sometimes being used to support terrorism. Some acts of identity theft greatly impact victims and so perpetrators deserve the harsher penalties available under the racketeering statute. For instance, identity theft played a large role in the mortgage meltdown – with organized rings obtaining home loans with stolen identities, taking the money, and leaving the abandoned homes to go into foreclosure – which has in turn fed the world recession. Including violations of the Identity Theft Protection Act as a predicate offense in the definition of "racketeering," as House Bill 4326 would do, will allow prosecutors more options in charging so to adequately fit a punishment to a crime.

The seizure and forfeiture provisions of House Bill 4325, modeled after existing state seizure and forfeiture laws for drug crimes, will create a strong disincentive to engage in identity theft and large scale computer crimes and will enable law enforcement to recoup some of the expenses in investigating and prosecuting such crimes.

Against:

Critics of forfeiture laws maintain that such laws are often broad, applying even to "intended" acts, such as House Bill 4325 would do, and thus often result in punishing businesses and innocent family members and friends who can have their own property seized by the actions or perceived actions of another. The bill also provides an expedited forfeiture process for seizures under \$50,000. This means that the family car can be seized and forfeited on the actions or alleged actions of one family member – even without a conviction – if the local prosecutor or, in a state case, the attorney general approves. Unlike seizure and forfeiture provisions in the Revised Judicature Act that pertain to other crimes, there is no automatic return of property if charges are never brought or the owner acquitted.

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

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

Response:

Though true that forfeiture of property in an identity theft case could go forward without a criminal conviction, property would still have to go through a civil proceeding in circuit court before being forfeited. This would be true for property seized under court order as well as for property seized without a warrant, such as at the time of an arrest. Even if the property was valued at less than \$50,000, for which an expedited forfeiture proceeding

would be allowed, the court forfeiture proceeding would be triggered if a claim was filed and the requisite bond was posted. During the court proceeding, defenses can be presented; for example, the owner of the property could establish he or she had no knowledge of the defendant's actions, did not give the defendant consent to use the property in the commission of a crime, or that no charges were brought or sustained against the defendant.

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

POSITIONS:

The Department of State Police supports the bills. (7-23-09)

The ACLU of Michigan indicated support for the bills. (7-15-09)

The Insurance Institute of Michigan opposes House Bill 4325 and has no position on House Bill 4326. (7-16-09)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.