

Assembly Bill No. 364

Passed the Assembly May 2, 2011

Chief Clerk of the Assembly

Passed the Senate July 11, 2011

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2011, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 186.11 of the Penal Code, relating to restitution.

LEGISLATIVE COUNSEL'S DIGEST

AB 364, Bonilla. Restitution: asset seizures: fraud and embezzlement.

Existing law provides for enhanced penalties in the case of a person who commits 2 or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking or loss of more than \$100,000, and further provides that assets or property may be preserved by the court, as specified, in order to pay restitution and fines imposed in connection with those enhanced penalties.

This bill would, in addition, provide for the preservation of assets and property by the court in order to pay all restitution and fines, and would apply those preservation of assets provisions in the case of a person who commits a single felony, a material element of which is fraud or embezzlement, if that conduct involves the taking or loss of more than \$100,000.

By expanding the scope of restitution provisions for crimes, this bill would impose a state-mandated local program.

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.

This bill would provide that no reimbursement is required by this act for a specified reason.

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

SECTION 1. Section 186.11 of the Penal Code is amended to read:

186.11. (a) (1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern

of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars (\$100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. For purposes of this section, “pattern of related felony conduct” means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events. For purposes of this section, “two or more related felonies” means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.

(2) If the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than five hundred thousand dollars (\$500,000), the additional term of punishment shall be two, three, or five years in the state prison.

(3) If the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars (\$100,000), but not more than five hundred thousand dollars (\$500,000), the additional term of punishment shall be the term specified in paragraph (1) or (2) of subdivision (a) of Section 12022.6.

(b) (1) The additional prison term and penalties provided for in subdivisions (a), (c), and (d) shall not be imposed unless the facts set forth in subdivision (a) are charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(2) The additional prison term provided in paragraph (2) of subdivision (a) shall be in addition to any other punishment provided by law, including Section 12022.6, and shall not be limited by any other provision of law.

(c) Any person convicted of two or more felonies, as specified in subdivision (a), shall also be liable for a fine not to exceed five hundred thousand dollars (\$500,000) or double the value of the taking, whichever is greater, if the existence of facts that would

make the person subject to the aggravated white collar crime enhancement have been admitted or found to be true by the trier of fact. However, if the pattern of related felony conduct involves the taking of more than one hundred thousand dollars (\$100,000), but not more than five hundred thousand dollars (\$500,000), the fine shall not exceed one hundred thousand dollars (\$100,000) or double the value of the taking, whichever is greater.

(d) (1) If a person is alleged to have committed two or more felonies, as specified in subdivision (a), and the aggravated white collar crime enhancement is also charged, or a person is charged in an accusatory pleading with a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), and an allegation as to the existence of those facts, any asset or property that is in the control of that person, and any asset or property that has been transferred by that person to a third party, subsequent to the commission of any criminal act alleged pursuant to subdivision (a), other than in a bona fide purchase, whether found within or outside the state, may be preserved by the superior court in order to pay restitution and fines. Upon conviction of two or more felonies, as specified in subdivision (a), or a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), this property may be levied upon by the superior court to pay restitution and fines if the existence of facts that would make the person subject to the aggravated white collar crime enhancement or that demonstrate the taking or loss of more than one hundred thousand dollars (\$100,000) in the commission of a felony, a material element of which is fraud or embezzlement, have been charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(2) To prevent dissipation or secreting of assets or property, the prosecuting agency may, at the same time as or subsequent to the filing of a complaint or indictment charging two or more felonies, as specified in subdivision (a), and the enhancement specified in subdivision (a), or a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), and an allegation as to the existence of those facts, file a petition with the criminal division of the superior court of the county in which the accusatory pleading

was filed, seeking a temporary restraining order, preliminary injunction, the appointment of a receiver, or any other protective relief necessary to preserve the property or assets. This petition shall commence a proceeding that shall be pendent to the criminal proceeding and maintained solely to affect the criminal remedies provided for in this section. The proceeding shall not be subject to or governed by the provisions of the Civil Discovery Act as set forth in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. The petition shall allege that the defendant has been charged with two or more felonies, as specified in subdivision (a), and is subject to the aggravated white collar crime enhancement specified in subdivision (a) or that the defendant has been charged with a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), and an allegation as to the existence of those facts. The petition shall identify that criminal proceeding and the assets and property to be affected by an order issued pursuant to this section.

(3) A notice regarding the petition shall be provided, by personal service or registered mail, to every person who may have an interest in the property specified in the petition. Additionally, the notice shall be published for at least three successive weeks in a newspaper of general circulation in the county where the property affected by an order issued pursuant to this section is located. The notice shall state that any interested person may file a verified claim with the superior court stating the nature and amount of their claimed interest. The notice shall set forth the time within which a claim of interest in the protected property is required to be filed.

(4) If the property to be preserved is real property, the prosecuting agency shall record, at the time of filing the petition, a lis pendens in each county in which the real property is situated which specifically identifies the property by legal description, the name of the owner of record as shown on the latest equalized assessment roll, and the assessor's parcel number.

(5) If the property to be preserved are assets under the control of a banking or financial institution, the prosecuting agency, at the time of the filing of the petition, may obtain an order from the court directing the banking or financial institution to immediately disclose the account numbers and value of the assets of the accused held by the banking or financial institution. The prosecuting agency

shall file a supplemental petition, specifically identifying which banking or financial institution accounts shall be subject to a temporary restraining order, preliminary injunction, or other protective remedy.

(6) Any person claiming an interest in the protected property may, at any time within 30 days from the date of the first publication of the notice of the petition, or within 30 days after receipt of actual notice, file with the superior court of the county in which the action is pending a verified claim stating the nature and amount of his or her interest in the property or assets. A verified copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate.

(7) The imposition of fines and restitution pursuant to this section shall be determined by the superior court in which the underlying criminal offense is sentenced. Any judge who is assigned to the criminal division of the superior court in the county where the petition is filed may issue a temporary restraining order in conjunction with, or subsequent to, the filing of an allegation pursuant to this section. Any subsequent hearing on the petition shall also be heard by a judge assigned to the criminal division of the superior court in the county in which the petition is filed. At the time of the filing of an information or indictment in the underlying criminal case, any subsequent hearing on the petition shall be heard by the superior court judge assigned to the underlying criminal case.

(e) Concurrent with or subsequent to the filing of the petition, the prosecuting agency may move the superior court for, and the superior court may issue, the following pendente lite orders to preserve the status quo of the property alleged in the petition:

(1) An injunction to restrain any person from transferring, encumbering, hypothecating, or otherwise disposing of that property.

(2) Appointment of a receiver to take possession of, care for, manage, and operate the assets and properties so that the property may be maintained and preserved. The court may order that a receiver appointed pursuant to this section shall be compensated for all reasonable expenditures made or incurred by him or her in connection with the possession, care, management, and operation of any property or assets that are subject to the provisions of this section.

(3) A bond or other undertaking, in lieu of other orders, of a value sufficient to ensure the satisfaction of restitution and fines imposed pursuant to this section.

(f) (1) No preliminary injunction may be granted or receiver appointed by the court without notice that meets the requirements of paragraph (3) of subdivision (d) to all known and reasonably ascertainable interested parties and upon a hearing to determine that an order is necessary to preserve the property pending the outcome of the criminal proceedings. A temporary restraining order may be issued by the court, ex parte, pending that hearing in conjunction with or subsequent to the filing of the petition upon the application of the prosecuting attorney. The temporary restraining order may be based upon the sworn declaration of a peace officer with personal knowledge of the criminal investigation that establishes probable cause to believe that aggravated white collar crime or a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000) has taken place and that the amount of restitution and fines exceeds or equals the worth of the assets subject to the temporary restraining order. The declaration may include the hearsay statements of witnesses to establish the necessary facts. The temporary restraining order may be issued without notice upon a showing of good cause to the court.

(2) The defendant, or a person who has filed a verified claim as provided in paragraph (6) of subdivision (d), shall have the right to have the court conduct an order to show cause hearing within 10 days of the service of the request for hearing upon the prosecuting agency, in order to determine whether the temporary restraining order should remain in effect, whether relief should be granted from any lis pendens recorded pursuant to paragraph (4) of subdivision (d), or whether any existing order should be modified in the interests of justice. Upon a showing of good cause, the hearing shall be held within two days of the service of the request for hearing upon the prosecuting agency.

(3) In determining whether to issue a preliminary injunction or temporary restraining order in a proceeding brought by a prosecuting agency in conjunction with or subsequent to the filing of an allegation pursuant to this section, the court has the discretion to consider any matter that it deems reliable and appropriate, including hearsay statements, in order to reach a just and equitable

decision. The court shall weigh the relative degree of certainty of the outcome on the merits and the consequences to each of the parties of granting the interim relief. If the prosecution is likely to prevail on the merits and the risk of the dissipation of assets outweighs the potential harm to the defendants and the interested parties, the court shall grant injunctive relief. The court shall give significant weight to the following factors:

(A) The public interest in preserving the property or assets pendente lite.

(B) The difficulty of preserving the property or assets pendente lite where the underlying alleged crimes involve issues of fraud and moral turpitude.

(C) The fact that the requested relief is being sought by a public prosecutor on behalf of alleged victims of white collar crimes.

(D) The likelihood that substantial public harm has occurred where aggravated white collar crime is alleged to have been committed.

(E) The significant public interest involved in compensating the victims of white collar crime and paying court-imposed restitution and fines.

(4) The court, in making its orders, may consider a defendant's request for the release of a portion of the property affected by this section in order to pay reasonable legal fees in connection with the criminal proceeding, any necessary and appropriate living expenses pending trial and sentencing, and for the purpose of posting bail. The court shall weigh the needs of the public to retain the property against the needs of the defendant to a portion of the property. The court shall consider the factors listed in paragraph (3) prior to making any order releasing property for these purposes.

(5) The court, in making its orders, shall seek to protect the interests of any innocent third persons, including an innocent spouse, who were not involved in the commission of any criminal activity.

(6) Any petition filed pursuant to this section is part of the criminal proceedings for purposes of appointment of counsel and shall be assigned to the criminal division of the superior court of the county in which the accusatory pleading was filed.

(7) Based upon a noticed motion brought by the receiver appointed pursuant to paragraph (2) of subdivision (e), the court may order an interlocutory sale of property named in the petition

when the property is liable to perish, to waste, or to be significantly reduced in value, or when the expenses of maintaining the property are disproportionate to the value thereof. The proceeds of the interlocutory sale shall be deposited with the court or as directed by the court pending determination of the proceeding pursuant to this section.

(8) The court may make any orders that are necessary to preserve the continuing viability of any lawful business enterprise that is affected by the issuance of a temporary restraining order or preliminary injunction issued pursuant to this action.

(9) In making its orders, the court shall seek to prevent any asset subject to a temporary restraining order or preliminary injunction from perishing, spoiling, going to waste, or otherwise being significantly reduced in value. Where the potential for diminution in value exists, the court shall appoint a receiver to dispose of or otherwise protect the value of the property or asset.

(10) A preservation order shall not be issued against any assets of a business that are not likely to be dissipated and that may be subject to levy or attachment to meet the purposes of this section.

(g) If the allegation that the defendant is subject to the aggravated white collar crime enhancement or has committed a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000) is dismissed or found by the trier of fact to be untrue, any preliminary injunction or temporary restraining order issued pursuant to this section shall be dissolved. If a jury is the trier of fact, and the jury is unable to reach a unanimous verdict, the court shall have the discretion to continue or dissolve all or a portion of the preliminary injunction or temporary restraining order based upon the interests of justice. However, if the prosecuting agency elects not to retry the case, any preliminary injunction or temporary restraining order issued pursuant to this section shall be dissolved.

(h) (1) (A) If the defendant is convicted of two or more felonies, as specified in subdivision (a), and the existence of facts that would make the person subject to the aggravated white collar crime enhancement have been admitted or found to be true by the trier of fact, or the defendant is convicted of a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), and

an allegation as to the existence of those facts has been admitted or found to be true by the trier of fact, the trial judge shall continue the preliminary injunction or temporary restraining order until the date of the criminal sentencing and shall make a finding at that time as to what portion, if any, of the property or assets subject to the preliminary injunction or temporary restraining order shall be levied upon to pay fines and restitution to victims of the crime. The order imposing fines and restitution may exceed the total worth of the property or assets subjected to the preliminary injunction or temporary restraining order. The court may order the immediate transfer of the property or assets to satisfy any judgment and sentence made pursuant to this section. Additionally, upon motion of the prosecution, the court may enter an order as part of the judgment and sentence making the order imposing fines and restitution pursuant to this section enforceable pursuant to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure.

(B) Additionally, the court shall order the defendant to make full restitution to the victim or to make restitution to the victim based on his or her ability to pay, as defined in subdivision (b) of Section 1203.1b. The payment of the restitution ordered by the court pursuant to this section shall be made a condition of any probation granted by the court if the existence of facts that would make the defendant subject to the aggravated white collar crime enhancement or of facts demonstrating the person committed a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000) have been admitted or found to be true by the trier of fact. Notwithstanding any other provision of law, the court may order that the period of probation continue for up to 10 years or until full restitution is made to the victim, whichever is earlier.

(C) The sentencing court shall retain jurisdiction to enforce the order to pay additional fines and restitution and, in appropriate cases, may initiate probation violation proceedings or contempt of court proceedings against a defendant who is found to have willfully failed to comply with any lawful order of the court.

(D) If the execution of judgment is stayed pending an appeal of an order of the superior court pursuant to this section, the preliminary injunction or temporary restraining order shall be

maintained in full force and effect during the pendency of the appellate period.

(2) The order imposing fines and restitution shall not affect the interest in real property of any third party that was acquired prior to the recording of the *lis pendens*, unless the property was obtained from the defendant other than as a bona fide purchaser for value. If any assets or property affected by this section are subject to a valid lien, mortgage, security interest, or interest under a conditional sales contract and the amount due to the holder of the lien, mortgage, interest, or contract is less than the appraised value of the property, that person may pay to the state or the local government that initiated the proceeding the amount of the difference between the appraised value of the property and the amount of the lien, mortgage, security interest, or interest under a conditional sales contract. Upon that payment, the state or local entity shall relinquish all claims to the property. If the holder of the interest elects not to make that payment to the state or local governmental entity, the interest in the property shall be deemed transferred to the state or local governmental entity and any indicia of ownership of the property shall be confirmed in the state or local governmental entity. The appraised value shall be determined as of the date judgment is entered either by agreement between the holder of the lien, mortgage, security interest, or interest under a conditional sales contract and the governmental entity involved, or if they cannot agree, then by a court-appointed appraiser for the county in which the action is brought. A person holding a valid lien, mortgage, security interest, or interest under a conditional sales contract shall be paid the appraised value of his or her interest.

(3) In making its final order, the court shall seek to protect the legitimately acquired interests of any innocent third persons, including an innocent spouse, who were not involved in the commission of any criminal activity.

(i) In all cases where property is to be levied upon pursuant to this section, a receiver appointed by the court shall be empowered to liquidate all property or assets which shall be distributed in the following order of priority:

(1) To the receiver, or court-appointed appraiser, for all reasonable expenditures made or incurred by him or her in connection with the sale of the property or liquidation of assets, including all reasonable expenditures for any necessary repairs,

storage, or transportation of any property levied upon under this section.

(2) To any holder of a valid lien, mortgage, or security interest up to the amount of his or her interest in the property or proceeds.

(3) To any victim as restitution for any fraudulent or unlawful acts alleged in the accusatory pleading that were proven by the prosecuting agency as part of the pattern of fraudulent or unlawful acts.

(4) For payment of any fine imposed pursuant to this section. The proceeds obtained in payment of a fine shall be paid to the treasurer of the county in which the judgment was entered, or if the action was undertaken by the Attorney General, to the Treasurer. If the payment of any fine imposed pursuant to this section involved losses resulting from violation of Section 550 of this code or Section 1871.4 of the Insurance Code, one-half of the fine collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half of the fine collected shall be paid to the Department of Insurance for deposit in the appropriate account in the Insurance Fund. The proceeds from the fine first shall be used by a county to reimburse local prosecutors and enforcement agencies for the reasonable costs of investigation and prosecution of cases brought pursuant to this section.

(5) To the Restitution Fund, or in cases involving convictions relating to insurance fraud, to the Insurance Fund as restitution for crimes not specifically pleaded and proven in the accusatory pleading.

(j) If, after distribution pursuant to paragraphs (1) and (2) of subdivision (i), the value of the property to be levied upon pursuant to this section is insufficient to pay for restitution and fines, the court shall order an equitable sharing of the proceeds of the liquidation of the property, and any other recoveries, which shall specify the percentage of recoveries to be devoted to each purpose. At least 70 percent of the proceeds remaining after distribution pursuant to paragraphs (1) and (2) of subdivision (i) shall be devoted to restitution.

(k) Unless otherwise expressly provided, the remedies or penalties provided by this section are cumulative to each other and to the remedies or penalties available under all other laws of this state, except that two separate actions against the same defendant and pertaining to the same fraudulent or unlawful acts may not be

brought by a district attorney or the Attorney General pursuant to this section and Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code. If a fine is imposed under this section, it shall be in lieu of all other fines that may be imposed pursuant to any other provision of law for the crimes for which the defendant has been convicted in the action.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Approved _____, 2011

Governor