

Introduced by Senator Alquist

February 8, 2011

An act to amend Section 1202.4 of the Penal Code, relating to identity theft, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 208, as introduced, Alquist. Identity theft: restitution.

Existing law establishes various offenses relating to identity theft. Existing law establishes a procedure for purposes of imposing restitution obligations on defendants, as specified.

This bill would authorize restitution for expenses to monitor an identity theft victim's credit report and for the costs to repair the victim's credit for a period of time reasonably necessary to make the victim whole, as specified.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

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

- 1 SECTION 1. Section 1202.4 of the Penal Code is amended to
- 2 read:
- 3 1202.4. (a) (1) It is the intent of the Legislature that a victim
- 4 of crime who incurs any economic loss as a result of the
- 5 commission of a crime shall receive restitution directly from any
- 6 defendant convicted of that crime.

1 (2) Upon a person being convicted of any crime in the State of
2 California, the court shall order the defendant to pay a fine in the
3 form of a penalty assessment in accordance with Section 1464.

4 (3) The court, in addition to any other penalty provided or
5 imposed under the law, shall order the defendant to pay both of
6 the following:

7 (A) A restitution fine in accordance with subdivision (b).

8 (B) Restitution to the victim or victims, if any, in accordance
9 with subdivision (f), which shall be enforceable as if the order
10 were a civil judgment.

11 (b) In every case where a person is convicted of a crime, the
12 court shall impose a separate and additional restitution fine, unless
13 it finds compelling and extraordinary reasons for not doing so, and
14 states those reasons on the record.

15 (1) The restitution fine shall be set at the discretion of the court
16 and commensurate with the seriousness of the offense, but shall
17 not be less than two hundred dollars (\$200), and not more than ten
18 thousand dollars (\$10,000), if the person is convicted of a felony,
19 and shall not be less than one hundred dollars (\$100), and not more
20 than one thousand dollars (\$1,000), if the person is convicted of
21 a misdemeanor.

22 (2) In setting a felony restitution fine, the court may determine
23 the amount of the fine as the product of two hundred dollars (\$200)
24 multiplied by the number of years of imprisonment the defendant
25 is ordered to serve, multiplied by the number of felony counts of
26 which the defendant is convicted.

27 (c) The court shall impose the restitution fine unless it finds
28 compelling and extraordinary reasons for not doing so, and states
29 those reasons on the record. A defendant's inability to pay shall
30 not be considered a compelling and extraordinary reason not to
31 impose a restitution fine. Inability to pay may be considered only
32 in increasing the amount of the restitution fine in excess of the two
33 hundred-dollar (\$200) or one hundred-dollar (\$100) minimum.
34 The court may specify that funds confiscated at the time of the
35 defendant's arrest, except for funds confiscated pursuant to Section
36 11469 of the Health and Safety Code, be applied to the restitution
37 fine if the funds are not exempt for spousal or child support or
38 subject to any other legal exemption.

39 (d) In setting the amount of the fine pursuant to subdivision (b)
40 in excess of the two hundred-dollar (\$200) or one hundred-dollar

1 (\$100) minimum, the court shall consider any relevant factors,
2 including, but not limited to, the defendant's inability to pay, the
3 seriousness and gravity of the offense and the circumstances of its
4 commission, any economic gain derived by the defendant as a
5 result of the crime, the extent to which any other person suffered
6 any losses as a result of the crime, and the number of victims
7 involved in the crime. Those losses may include pecuniary losses
8 to the victim or his or her dependents as well as intangible losses,
9 such as psychological harm caused by the crime. Consideration
10 of a defendant's inability to pay may include his or her future
11 earning capacity. A defendant shall bear the burden of
12 demonstrating his or her inability to pay. Express findings by the
13 court as to the factors bearing on the amount of the fine shall not
14 be required. A separate hearing for the fine shall not be required.

15 (e) The restitution fine shall not be subject to penalty
16 assessments authorized in Section 1464 or Chapter 12
17 (commencing with Section 76000) of Title 8 of the Government
18 Code, or the state surcharge authorized in Section 1465.7, and
19 shall be deposited in the Restitution Fund in the State Treasury.

20 (f) Except as provided in subdivisions (q) and (r), in every case
21 in which a victim has suffered economic loss as a result of the
22 defendant's conduct, the court shall require that the defendant
23 make restitution to the victim or victims in an amount established
24 by court order, based on the amount of loss claimed by the victim
25 or victims or any other showing to the court. If the amount of loss
26 cannot be ascertained at the time of sentencing, the restitution
27 order shall include a provision that the amount shall be determined
28 at the direction of the court. The court shall order full restitution
29 unless it finds compelling and extraordinary reasons for not doing
30 so, and states them on the record. The court may specify that funds
31 confiscated at the time of the defendant's arrest, except for funds
32 confiscated pursuant to Section 11469 of the Health and Safety
33 Code, be applied to the restitution order if the funds are not exempt
34 for spousal or child support or subject to any other legal exemption.

35 (1) The defendant has the right to a hearing before a judge to
36 dispute the determination of the amount of restitution. The court
37 may modify the amount, on its own motion or on the motion of
38 the district attorney, the victim or victims, or the defendant. If a
39 motion is made for modification of a restitution order, the victim

1 shall be notified of that motion at least 10 days prior to the
2 proceeding held to decide the motion.

3 (2) Determination of the amount of restitution ordered pursuant
4 to this subdivision shall not be affected by the indemnification or
5 subrogation rights of any third party. Restitution ordered pursuant
6 to this subdivision shall be ordered to be deposited to the
7 Restitution Fund to the extent that the victim, as defined in
8 subdivision (k), has received assistance from the Victim
9 Compensation Program pursuant to Chapter 5 (commencing with
10 Section 13950) of Part 4 of Division 3 of Title 2 of the Government
11 Code.

12 (3) To the extent possible, the restitution order shall be prepared
13 by the sentencing court, shall identify each victim and each loss
14 to which it pertains, and shall be of a dollar amount that is sufficient
15 to fully reimburse the victim or victims for every determined
16 economic loss incurred as the result of the defendant's criminal
17 conduct, including, but not limited to, all of the following:

18 (A) Full or partial payment for the value of stolen or damaged
19 property. The value of stolen or damaged property shall be the
20 replacement cost of like property, or the actual cost of repairing
21 the property when repair is possible.

22 (B) Medical expenses.

23 (C) Mental health counseling expenses.

24 (D) Wages or profits lost due to injury incurred by the victim,
25 and if the victim is a minor, wages or profits lost by the minor's
26 parent, parents, guardian, or guardians, while caring for the injured
27 minor. Lost wages shall include any commission income as well
28 as any base wages. Commission income shall be established by
29 evidence of commission income during the 12-month period prior
30 to the date of the crime for which restitution is being ordered,
31 unless good cause for a shorter time period is shown.

32 (E) Wages or profits lost by the victim, and if the victim is a
33 minor, wages or profits lost by the minor's parent, parents,
34 guardian, or guardians, due to time spent as a witness or in assisting
35 the police or prosecution. Lost wages shall include any commission
36 income as well as any base wages. Commission income shall be
37 established by evidence of commission income during the
38 12-month period prior to the date of the crime for which restitution
39 is being ordered, unless good cause for a shorter time period is
40 shown.

1 (F) Noneconomic losses, including, but not limited to,
2 psychological harm, for felony violations of Section 288.

3 (G) Interest, at the rate of 10 percent per annum, that accrues
4 as of the date of sentencing or loss, as determined by the court.

5 (H) Actual and reasonable attorney’s fees and other costs of
6 collection accrued by a private entity on behalf of the victim.

7 (I) Expenses incurred by an adult victim in relocating away
8 from the defendant, including, but not limited to, deposits for
9 utilities and telephone service, deposits for rental housing,
10 temporary lodging and food expenses, clothing, and personal items.
11 Expenses incurred pursuant to this section shall be verified by law
12 enforcement to be necessary for the personal safety of the victim
13 or by a mental health treatment provider to be necessary for the
14 emotional well-being of the victim.

15 (J) Expenses to install or increase residential security incurred
16 related to a crime, as defined in subdivision (c) of Section 667.5,
17 including, but not limited to, a home security device or system, or
18 replacing or increasing the number of locks.

19 (K) Expenses to retrofit a residence or vehicle, or both, to make
20 the residence accessible to or the vehicle operational by the victim,
21 if the victim is permanently disabled, whether the disability is
22 partial or total, as a direct result of the crime.

23 *(L) Expenses for a period of time reasonably necessary to make*
24 *the victim whole, for the costs to monitor the credit report of, and*
25 *for the costs to repair the credit of, a victim of identity theft, as*
26 *defined in Section 530.5.*

27 (4) (A) If, as a result of the defendant’s conduct, the Restitution
28 Fund has provided assistance to or on behalf of a victim or
29 derivative victim pursuant to Chapter 5 (commencing with Section
30 13950) of Part 4 of Division 3 of Title 2 of the Government Code,
31 the amount of assistance provided shall be presumed to be a direct
32 result of the defendant’s criminal conduct and shall be included
33 in the amount of the restitution ordered.

34 (B) The amount of assistance provided by the Restitution Fund
35 shall be established by copies of bills submitted to the California
36 Victim Compensation and Government Claims Board reflecting
37 the amount paid by the board and whether the services for which
38 payment was made were for medical or dental expenses, funeral
39 or burial expenses, mental health counseling, wage or support
40 losses, or rehabilitation. Certified copies of these bills provided

1 by the board and redacted to protect the privacy and safety of the
2 victim or any legal privilege, together with a statement made under
3 penalty of perjury by the custodian of records that those bills were
4 submitted to and were paid by the board, shall be sufficient to meet
5 this requirement.

6 (C) If the defendant offers evidence to rebut the presumption
7 established by this paragraph, the court may release additional
8 information contained in the records of the board to the defendant
9 only after reviewing that information in camera and finding that
10 the information is necessary for the defendant to dispute the amount
11 of the restitution order.

12 (5) Except as provided in paragraph (6), in any case in which
13 an order may be entered pursuant to this subdivision, the defendant
14 shall prepare and file a disclosure identifying all assets, income,
15 and liabilities in which the defendant held or controlled a present
16 or future interest as of the date of the defendant's arrest for the
17 crime for which restitution may be ordered. The financial disclosure
18 statements shall be made available to the victim and the board
19 pursuant to Section 1214. The disclosure shall be signed by the
20 defendant upon a form approved or adopted by the Judicial Council
21 for the purpose of facilitating the disclosure. Any defendant who
22 willfully states as true any material matter that he or she knows to
23 be false on the disclosure required by this subdivision is guilty of
24 a misdemeanor, unless this conduct is punishable as perjury or
25 another provision of law provides for a greater penalty.

26 (6) A defendant who fails to file the financial disclosure required
27 in paragraph (5), but who has filed a financial affidavit or financial
28 information pursuant to subdivision (c) of Section 987, shall be
29 deemed to have waived the confidentiality of that affidavit or
30 financial information as to a victim in whose favor the order of
31 restitution is entered pursuant to subdivision (f). The affidavit or
32 information shall serve in lieu of the financial disclosure required
33 in paragraph (5), and paragraphs (7) to (10), inclusive, shall not
34 apply.

35 (7) Except as provided in paragraph (6), the defendant shall file
36 the disclosure with the clerk of the court no later than the date set
37 for the defendant's sentencing, unless otherwise directed by the
38 court. The disclosure may be inspected or copied as provided by
39 subdivision (b), (c), or (d) of Section 1203.05.

1 (8) In its discretion, the court may relieve the defendant of the
2 duty under paragraph (7) of filing with the clerk by requiring that
3 the defendant’s disclosure be submitted as an attachment to, and
4 be available to, those authorized to receive the following:

5 (A) Any report submitted pursuant to subparagraph (C) of
6 paragraph (2) of subdivision (b) of Section 1203 or subdivision
7 (g) of Section 1203.

8 (B) Any stipulation submitted pursuant to paragraph (4) of
9 subdivision (b) of Section 1203.

10 (C) Any report by the probation officer, or any information
11 submitted by the defendant applying for a conditional sentence
12 pursuant to subdivision (d) of Section 1203.

13 (9) The court may consider a defendant’s unreasonable failure
14 to make a complete disclosure pursuant to paragraph (5) as any of
15 the following:

16 (A) A circumstance in aggravation of the crime in imposing a
17 term under subdivision (b) of Section 1170.

18 (B) A factor indicating that the interests of justice would not be
19 served by admitting the defendant to probation under Section 1203.

20 (C) A factor indicating that the interests of justice would not be
21 served by conditionally sentencing the defendant under Section
22 1203.

23 (D) A factor indicating that the interests of justice would not
24 be served by imposing less than the maximum fine and sentence
25 fixed by law for the case.

26 (10) A defendant’s failure or refusal to make the required
27 disclosure pursuant to paragraph (5) shall not delay entry of an
28 order of restitution or pronouncement of sentence. In appropriate
29 cases, the court may do any of the following:

30 (A) Require the defendant to be examined by the district attorney
31 pursuant to subdivision (h).

32 (B) If sentencing the defendant under Section 1170, provide
33 that the victim shall receive a copy of the portion of the probation
34 report filed pursuant to Section 1203.10 concerning the defendant’s
35 employment, occupation, finances, and liabilities.

36 (C) If sentencing the defendant under Section 1203, set a date
37 and place for submission of the disclosure required by paragraph
38 (5) as a condition of probation or suspended sentence.

39 (11) If a defendant has any remaining unpaid balance on a
40 restitution order or fine 120 days prior to his or her scheduled

1 release from probation or 120 days prior to his or her completion
2 of a conditional sentence, the defendant shall prepare and file a
3 new and updated financial disclosure identifying all assets, income,
4 and liabilities in which the defendant holds or controls or has held
5 or controlled a present or future interest during the defendant's
6 period of probation or conditional sentence. The financial
7 disclosure shall be made available to the victim and the board
8 pursuant to Section 1214. The disclosure shall be signed and
9 prepared by the defendant on the same form as described in
10 paragraph (5). Any defendant who willfully states as true any
11 material matter that he or she knows to be false on the disclosure
12 required by this subdivision is guilty of a misdemeanor, unless
13 this conduct is punishable as perjury or another provision of law
14 provides for a greater penalty. The financial disclosure required
15 by this paragraph shall be filed with the clerk of the court no later
16 than 90 days prior to the defendant's scheduled release from
17 probation or completion of the defendant's conditional sentence.

18 (g) The court shall order full restitution unless it finds
19 compelling and extraordinary reasons for not doing so, and states
20 those reasons on the record. A defendant's inability to pay shall
21 not be considered a compelling and extraordinary reason not to
22 impose a restitution order, nor shall inability to pay be a
23 consideration in determining the amount of a restitution order.

24 (h) The district attorney may request an order of examination
25 pursuant to the procedures specified in Article 2 (commencing
26 with Section 708.110) of Chapter 6 of Division 2 of Title 9 of Part
27 2 of the Code of Civil Procedure, in order to determine the
28 defendant's financial assets for purposes of collecting on the
29 restitution order.

30 (i) A restitution order imposed pursuant to subdivision (f) shall
31 be enforceable as if the order were a civil judgment.

32 (j) The making of a restitution order pursuant to subdivision (f)
33 shall not affect the right of a victim to recovery from the Restitution
34 Fund as otherwise provided by law, except to the extent that
35 restitution is actually collected pursuant to the order. Restitution
36 collected pursuant to this subdivision shall be credited to any other
37 judgments for the same losses obtained against the defendant
38 arising out of the crime for which the defendant was convicted.

39 (k) For purposes of this section, "victim" shall include all of
40 the following:

- 1 (1) The immediate surviving family of the actual victim.
- 2 (2) Any corporation, business trust, estate, trust, partnership,
3 association, joint venture, government, governmental subdivision,
4 agency, or instrumentality, or any other legal or commercial entity
5 when that entity is a direct victim of a crime.
- 6 (3) Any person who has sustained economic loss as the result
7 of a crime and who satisfies any of the following conditions:
 - 8 (A) At the time of the crime was the parent, grandparent, sibling,
9 spouse, child, or grandchild of the victim.
 - 10 (B) At the time of the crime was living in the household of the
11 victim.
 - 12 (C) At the time of the crime was a person who had previously
13 lived in the household of the victim for a period of not less than
14 two years in a relationship substantially similar to a relationship
15 listed in subparagraph (A).
 - 16 (D) Is another family member of the victim, including, but not
17 limited to, the victim's fiancé or fiancée, and who witnessed the
18 crime.
 - 19 (E) Is the primary caretaker of a minor victim.
- 20 (4) Any person who is eligible to receive assistance from the
21 Restitution Fund pursuant to Chapter 5 (commencing with Section
22 13950) of Part 4 of Division 3 of Title 2 of the Government Code.
- 23 (5) Any governmental entity that is responsible for repairing,
24 replacing, or restoring public or privately owned property that has
25 been defaced with graffiti or other inscribed material, as defined
26 in subdivision (e) of Section 594, and that has sustained an
27 economic loss as the result of a violation of Section 594, 594.3,
28 594.4, 640.5, 640.6, or 640.7 of the Penal Code.
 - 29 (l) At its discretion, the board of supervisors of any county may
30 impose a fee to cover the actual administrative cost of collecting
31 the restitution fine, not to exceed 10 percent of the amount ordered
32 to be paid, to be added to the restitution fine and included in the
33 order of the court, the proceeds of which shall be deposited in the
34 general fund of the county.
 - 35 (m) In every case in which the defendant is granted probation,
36 the court shall make the payment of restitution fines and orders
37 imposed pursuant to this section a condition of probation. Any
38 portion of a restitution order that remains unsatisfied after a
39 defendant is no longer on probation shall continue to be enforceable

1 by a victim pursuant to Section 1214 until the obligation is
2 satisfied.

3 (n) If the court finds and states on the record compelling and
4 extraordinary reasons why a restitution fine or full restitution order
5 should not be required, the court shall order, as a condition of
6 probation, that the defendant perform specified community service,
7 unless it finds and states on the record compelling and
8 extraordinary reasons not to require community service in addition
9 to the finding that restitution should not be required. Upon
10 revocation of probation, the court shall impose restitution pursuant
11 to this section.

12 (o) The provisions of Section 13963 of the Government Code
13 shall apply to restitution imposed pursuant to this section.

14 (p) The court clerk shall notify the California Victim
15 Compensation and Government Claims Board within 90 days of
16 an order of restitution being imposed if the defendant is ordered
17 to pay restitution to the board due to the victim receiving
18 compensation from the Restitution Fund. Notification shall be
19 accomplished by mailing a copy of the court order to the board,
20 which may be done periodically by bulk mail or electronic mail.

21 (q) Upon conviction for a violation of Section 236.1, the court
22 shall, in addition to any other penalty or restitution, order the
23 defendant to pay restitution to the victim in any case in which a
24 victim has suffered economic loss as a result of the defendant's
25 conduct. The court shall require that the defendant make restitution
26 to the victim or victims in an amount established by court order,
27 based on the amount of loss claimed by the victim or victims or
28 any other showing to the court. In determining restitution pursuant
29 to this section, the court shall base its order upon the greater of the
30 following: the gross value of the victim's labor or services based
31 upon the comparable value of similar services in the labor market
32 in which the offense occurred, or the value of the victim's labor
33 as guaranteed under California law, or the actual income derived
34 by the defendant from the victim's labor or services or any other
35 appropriate means to provide reparations to the victim.

36 (r) (1) In addition to any other penalty or fine, the court shall
37 order any person who has been convicted of any violation of
38 Section 350, 653h, 653s, 653u, 653w, or 653aa that involves a
39 recording or audiovisual work to make restitution to any owner or
40 lawful producer, or trade association acting on behalf of the owner

1 or lawful producer, of a phonograph record, disc, wire, tape, film,
2 or other device or article from which sounds or visual images are
3 derived that suffered economic loss resulting from the violation.
4 For the purpose of calculating restitution, the value of each
5 nonconforming article or device shall be based on the aggregate
6 wholesale value of lawfully manufactured and authorized devices
7 or articles from which sounds or visual images are devised, unless
8 a higher value can be proved in the case of (A) an unreleased audio
9 work, or (B) an audiovisual work that, at the time of unauthorized
10 distribution, has not been made available in copies for sale to the
11 general public in the United States on a digital versatile disc. The
12 order of restitution shall also include reasonable costs incurred as
13 a result of any investigation of the violation undertaken by the
14 owner, lawful producer, or trade association acting on behalf of
15 the owner or lawful producer. "Aggregate wholesale value" means
16 the average wholesale value of lawfully manufactured and
17 authorized sound or audiovisual recordings. Proof of the specific
18 wholesale value of each nonconforming device or article is not
19 required.

20 (2) As used in this subdivision, "audiovisual work" and
21 "recording" shall have the same meaning as in Section 653w.

22 SEC. 2. This act is an urgency statute necessary for the
23 immediate preservation of the public peace, health, or safety within
24 the meaning of Article IV of the Constitution and shall go into
25 immediate effect. The facts constituting the necessity are:

26 In order to protect public safety by ensuring an identity theft
27 victim can monitor their credit report and repair his or her credit
28 at no cost to him or her, it is necessary that this act take effect
29 immediately.