

ASSEMBLY BILL

No. 2221

Introduced by Assembly Members Cristina Garcia and Grove

February 18, 2016

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

LEGISLATIVE COUNSEL'S DIGEST

AB 2221, as introduced, Cristina Garcia. Crimes: 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.

This bill would make technical, nonsubstantive changes to that provision.

Vote: majority. 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 186.11 of the Penal Code is amended to
2 read:
3 186.11. (a) (1) Any person who commits two or more related
4 felonies, a material element of which is fraud or embezzlement,
5 which involve a pattern of related felony conduct, and the pattern
6 of related felony conduct involves the taking of, or results in the
7 loss by another person or entity of, more than one hundred thousand
8 dollars (\$100,000), shall be punished, upon conviction of two or

1 more felonies in a single criminal proceeding, in addition and
2 consecutive to the punishment prescribed for the felony offenses
3 of which he or she has been convicted, by an additional term of
4 imprisonment in the state prison as specified in paragraph (2) or
5 (3). This enhancement shall be known as the aggravated white
6 collar crime enhancement. The aggravated white collar crime
7 enhancement shall only be imposed once in a single criminal
8 proceeding. For purposes of this section, “pattern of related felony
9 conduct” means engaging in at least two felonies that have the
10 same or similar purpose, result, principals, victims, or methods of
11 commission, or are otherwise interrelated by distinguishing
12 characteristics, and that are not isolated events. For purposes of
13 this section, “two or more related felonies” means felonies
14 committed against two or more separate victims, or against the
15 same victim on two or more separate occasions.

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

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

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

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

34 (c) Any person convicted of two or more felonies, as specified
35 in subdivision (a), shall also be liable for a fine not to exceed five
36 hundred thousand dollars (\$500,000) or double the value of the
37 taking, whichever is greater, if the existence of facts that would
38 make the person subject to the aggravated white collar crime
39 enhancement have been admitted or found to be true by the trier
40 of fact. However, if the pattern of related felony conduct involves

1 the taking of more than one hundred thousand dollars (\$100,000),
2 but not more than five hundred thousand dollars (\$500,000), the
3 fine shall not exceed one hundred thousand dollars (\$100,000) or
4 double the value of the taking, whichever is greater.

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

29 (2) To prevent dissipation or secreting of assets or property, the
30 prosecuting agency may, at the same time as or subsequent to the
31 filing of a complaint or indictment charging two or more felonies,
32 as specified in subdivision (a), and the enhancement specified in
33 subdivision (a), or a felony, a material element of which is fraud
34 or embezzlement, that involves the taking or loss of more than one
35 hundred thousand dollars (\$100,000), and an allegation as to the
36 existence of those facts, file a petition with the criminal division
37 of the superior court of the county in which the accusatory pleading
38 was filed, seeking a temporary restraining order, preliminary
39 injunction, the appointment of a receiver, or any other protective
40 relief necessary to preserve the property or assets. This petition

1 shall commence a proceeding that shall be pendent to the criminal
2 proceeding and maintained solely to affect the criminal remedies
3 provided for in this section. The proceeding shall not be subject
4 to or governed by the provisions of the Civil Discovery Act as set
5 forth in Title 4 (commencing with Section 2016.010) of Part 4 of
6 the Code of Civil Procedure. The petition shall allege that the
7 defendant has been charged with two or more felonies, as specified
8 in subdivision (a), and is subject to the aggravated white collar
9 crime enhancement specified in subdivision (a) or that the
10 defendant has been charged with a felony, a material element of
11 which is fraud or embezzlement, that involves the taking or loss
12 of more than one hundred thousand dollars (\$100,000), and an
13 allegation as to the existence of those facts. The petition shall
14 identify that criminal proceeding and the assets and property to be
15 affected by an order issued pursuant to this section.

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

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

32 (5) If the property to be preserved are assets under the control
33 of a banking or financial institution, the prosecuting agency, at the
34 time of the filing of the petition, may obtain an order from the
35 court directing the banking or financial institution to immediately
36 disclose the account numbers and value of the assets of the accused
37 held by the banking or financial institution. The prosecuting agency
38 shall file a supplemental petition, specifically identifying which
39 banking or financial institution accounts shall be subject to a

1 temporary restraining order, preliminary injunction, or other
2 protective remedy.

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

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

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

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

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

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

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

24 (2) The defendant, or a person who has filed a verified claim
25 as provided in paragraph (6) of subdivision (d), shall have the right
26 to have the court conduct an order to show cause hearing within
27 10 days of the service of the request for hearing upon the
28 prosecuting agency, in order to determine whether the temporary
29 restraining order should remain in effect, whether relief should be
30 granted from any lis pendens recorded pursuant to paragraph (4)
31 of subdivision (d), or whether any existing order should be
32 modified in the interests of justice. Upon a showing of good cause,
33 the hearing shall be held within two days of the service of the
34 request for hearing upon the prosecuting agency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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