

AMENDED IN SENATE AUGUST 17, 2016

AMENDED IN SENATE AUGUST 15, 2016

AMENDED IN SENATE AUGUST 2, 2016

AMENDED IN SENATE JUNE 16, 2016

AMENDED IN ASSEMBLY MAY 27, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 2759

Introduced by Assembly Member Levine

February 19, 2016

An act to amend Sections 2281, 2282, 2282.1, 2286, 2288, 2289, 2290, 2293.1, and 2294 of the Corporations Code, relating to fraud, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 2759, as amended, Levine. Corporations: agents: victims of corporate fraud compensation fund.

Existing law establishes the Victims of Corporate Fraud Compensation Fund, a continuously appropriated fund, within the State Treasury administered by the Secretary of State, the sole purpose of which is to provide restitution to victims of corporate fraud. Existing law provides that an aggrieved person who obtains a final judgment, as specified, against a corporation based upon the corporation's fraud, misrepresentation, or deceit, made with intent to defraud, may file an application with the Secretary of State for payment from the fund for the amount unpaid on the judgment that represents the awarded actual and direct loss to the claimant in the final judgment.

This bill would additionally apply those provisions if an aggrieved person obtains a criminal restitution order against an agent, as defined, of a corporation based upon those same circumstances. The bill would also make conforming changes. By allowing for additional payments to be made from the Victims of Corporate Fraud Compensation Fund, this bill would make an appropriation.

Existing law requires the application filed with the Secretary of State to include specified information and documentation, and imposes criminal penalties for the filing of any documents that are false or untrue or contain any willful, material misstatements of fact.

This bill would require, if the final judgment is a criminal restitution order, the claimant to provide the charging document and the restitution order, and if the defendant is an agent, documentation showing the defendant named in the restitution order is an agent as defined in this bill. By expanding the scope of a crime, this bill would impose a state-mandated local program.

Existing law requires, if, at any time, the money deposited in the Victims of Corporate Fraud Compensation Fund is insufficient to satisfy any duly authorized award or offer of settlement, the Secretary of State to, when sufficient money has been deposited in the fund, satisfy the unpaid award or offer of settlement, plus specified accumulated interest.

This bill would eliminate the requirement to pay that specified accumulated interest.

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.

Vote: majority. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

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

- 1 SECTION 1. Section 2281 of the Corporations Code is
- 2 amended to read:
- 3 2281. As used in this chapter:
- 4 (a) "Agent" means a person who was an officer or director of
- 5 a corporation, as defined in subdivision (e), at the time the
- 6 fraudulent acts occurred, was named in a final criminal restitution
- 7 order in connection with the fraudulent acts, and was acting in the

1 person's capacity as the corporation's officer or director when
2 committing the fraudulent acts.

3 (b) "Application" means a request for payment from the fund
4 submitted to the Secretary of State pursuant to this chapter.

5 (c) "Claimant" means an aggrieved person who resides in the
6 state at the time of the fraud and who submits an application
7 pursuant to this chapter.

8 (d) "Complaint," for the purpose of an application based on a
9 criminal restitution order, means the facts of the underlying
10 transaction or transactions upon which the criminal restitution
11 order is based.

12 (e) "Corporation" means a domestic corporation as defined by
13 Section 162 or 2509 or a foreign corporation that is qualified to
14 transact business in California pursuant to Section 2105.

15 (f) "Court of competent jurisdiction" means a state or federal
16 court situated in California.

17 (g) "Final judgment" means a judgment, arbitration award, or
18 criminal restitution order for which appeals have been exhausted
19 or for which the period for appeal has expired, enforcement of
20 which is not barred by the order of any court or by any statutory
21 provision, which has not been nullified or rendered void by any
22 court order or statutory provision, and for which the claimant has
23 not otherwise been fully reimbursed. The following are examples
24 of final judgments:

25 (1) A civil judgment that has been entered against a corporation
26 for fraud, misrepresentation, or deceit, with the intent to defraud,
27 and includes findings of facts and conclusions of law.

28 (2) If the matter was submitted to arbitration, a copy of the
29 arbitration decision and any other documentation supporting the
30 arbitration award. An arbitration award against a corporation for
31 conduct constituting fraud, misrepresentation, or deceit, with the
32 intent to defraud, that includes findings of fact and conclusions of
33 law rendered in accordance with the rules established by the
34 American Arbitration Association or another recognized arbitration
35 body, and in accordance with Sections 1280 to 1294.2, inclusive,
36 of the Code of Civil Procedure where applicable, and where the
37 arbitration award has been confirmed and reduced to judgment
38 pursuant to Section 1287.4 of the Code of Civil Procedure.

39 (3) A criminal restitution order issued by a court of competent
40 jurisdiction against a corporation, or an agent of the corporation,

1 for fraud, misrepresentation, or deceit, with the intent to defraud,
 2 pursuant to subdivision (f) of Section 1202.4 of the Penal Code or
 3 Section 3663 of Title 18 of the United States Code. An application
 4 for payment from the fund that is based on a criminal restitution
 5 order shall comply with all of the requirements of this chapter.

6 (h) "Fund" means the Victims of Corporate Fraud Compensation
 7 Fund created by Section 2280.

8 (i) "Judgment debtor" means a corporation or agent against
 9 which a judgment, arbitration award, or criminal restitution order
 10 has been entered for conduct constituting intentional fraud.

11 SEC. 2. Section 2282 of the Corporations Code is amended to
 12 read:

13 2282. (a) ~~(1)~~—When an aggrieved person obtains a final
 14 judgment in a court of competent jurisdiction against a corporation
 15 based upon the corporation's fraud, misrepresentation, or deceit,
 16 made with intent to defraud, or obtains a criminal restitution order
 17 against an agent based upon the agent's fraud, misrepresentation,
 18 or deceit, made with intent to defraud while acting in the agent's
 19 capacity as the corporation's officer or director, the aggrieved
 20 person may, upon the judgment becoming final and after diligent
 21 collection efforts are made, file an application with the Secretary
 22 of State for payment from the fund, within the limitations specified
 23 in Section 2289, for the amount unpaid on the judgment that
 24 represents the awarded actual and direct loss, any awarded
 25 compensatory damages, and awarded costs to the claimant in the
 26 final judgment, excluding punitive damages.

27 ~~(2) Nothing in this subdivision shall be interpreted to authorize~~
 28 ~~the collection of attorney's fees, unless they are ordered by a court~~
 29 ~~in the final judgment against a corporation or a criminal restitution~~
 30 ~~order against an agent.~~

31 (b) The application shall be delivered in person or by certified
 32 mail to the Secretary of State not later than 18 months after the
 33 judgment has become final.

34 (c) The application shall be made on a form prescribed by the
 35 Secretary of State and shall include each of the following:

- 36 (1) The name and address of the claimant.
- 37 (2) If the claimant is represented by an attorney for the
 38 application, the name, business address, and telephone number of
 39 the attorney. If the claimant is not represented by an attorney for

1 the application, a telephone number where the claimant can be
2 reached during regular business hours shall be included.

3 (3) The name and address of the corporation and the agent, if
4 any.

5 (4) The identification of the final judgment, the amount of the
6 claim that remains unreimbursed from any source, and an
7 explanation of the claim's computation.

8 (5) A copy of a final judgment and a copy of the civil complaint
9 and any amendments thereto upon which the judgment finding
10 fraud, misrepresentation, or deceit, made with the intent to defraud,
11 was made shall be deemed to satisfy compliance with the
12 requirements prescribed in this paragraph. The claimant may also
13 provide any additional documentation that he or she believes may
14 help the Secretary of State in evaluating the application, including,
15 but not limited to, evidence submitted to the court in the underlying
16 judgment or a detailed narrative statement of facts in explanation
17 of the allegations of the complaint upon which the underlying
18 judgment is based.

19 (6) If the final judgment is a criminal restitution order, the
20 claimant shall provide the charging document and the restitution
21 order, and if the defendant is an agent, documentation showing
22 the defendant named in the restitution order is an agent as defined
23 in this chapter.

24 (7) A description of searches and inquiries conducted by or on
25 behalf of the claimant with respect to the judgment debtor's assets
26 liable to be sold or applied to satisfaction of the judgment. A
27 court's determination or finding of the judgment debtor's
28 insolvency or lack of assets to pay the claimant shall be deemed
29 to satisfy the requirements prescribed in this paragraph.

30 (8) Each of the following representations by the claimant:

31 (A) That the claimant is not a spouse, registered domestic
32 partner, or an immediate family member of an employee, officer,
33 director, managing agent, or other principal of the corporation nor
34 a personal representative of the spouse or an immediate family
35 member of an employee, officer, director, managing agent, or other
36 principal of the corporation.

37 (B) That the claimant has complied with all of the requirements
38 of this section.

1 (C) That the judgment underlying the claim meets the
2 requirements of subdivisions (a) and (b) of Section 2282, including
3 all of the following:

4 (i) That the judgment was for fraud, misrepresentation, or deceit
5 by the corporation or the agent of the corporation, with the intent
6 to defraud.

7 (ii) That the judgment is unpaid in part or in whole.

8 (iii) That the underlying judgment and debt have not been
9 discharged in bankruptcy, or the underlying judgment is statutorily
10 nondischargeable, or, in the case of a bankruptcy proceeding that
11 is open at or after the time of the filing of the application, that the
12 judgment and debt have been declared to be nondischargeable by
13 the judge or stipulated as nondischargeable by the parties in the
14 proceeding and that the claimant has been granted permission by
15 the bankruptcy court to proceed with collection or otherwise
16 proceed with the claimant’s claims against the judgment debtor or
17 debtors.

18 (D) That the claimant does not have a pending claim and has
19 not collected on the final judgment from any other restitution fund.
20 If the claimant has a pending claim or has collected from another
21 fund, a description of the nature of the pending claim and the
22 recovery amounts from any restitution fund.

23 (d) (1) Except as provided in paragraphs (2), (3), and (4) the
24 Secretary of State shall not condition an award of payment from
25 the fund upon a claimant providing any additional information or
26 documents other than those prescribed in subdivision (c).

27 (2) If the final judgment in favor of the claimant was by default,
28 stipulated, a consent judgment, or pursuant to Section 594 of the
29 Code of Civil Procedure or if the action against the corporation or
30 its agent was defended by a trustee in bankruptcy, the Secretary
31 of State may request additional documents and information from
32 the claimant to determine whether the claim is valid.

33 (3) If the final judgment does not expressly set forth the amount
34 of damages that were awarded for actual loss and compensatory
35 damages that are payable from the fund pursuant to Section 2289,
36 the Secretary of State may ask the claimant to provide copies of
37 documentation pertaining to the amount of the actual and direct
38 loss and the awarded compensatory damages or both of those
39 findings. For purposes of this section, “sufficient proof of money
40 damages” may include any of the following: copies of bank account

1 statements showing or confirming particular transactions, copies
2 of the front and back of checks made payable to the corporation
3 that have been negotiated, credit card statements showing or
4 confirming particular transactions, or similar documentation
5 demonstrating financial loss directly resulting from the fraudulent
6 acts by the corporation or its agent and the amount of compensatory
7 damages awarded by the court.

8 (4) If there is no court determination or finding of the insolvency
9 of the judgment debtor or lack of assets to pay the claimant, the
10 Secretary of State may request additional information and
11 documentation from the claimant to determine what assets, if any,
12 are available to satisfy the final judgment.

13 (e) The Secretary of State shall include with the application
14 form a notice to the claimant of his or her obligation to protect the
15 underlying judgment from discharge in bankruptcy, to be appended
16 to the application.

17 (f) If a claimant is a spouse, registered domestic partner, or an
18 immediate family member of an employee, officer, director,
19 managing agent, or other principal of the corporation, or is a
20 personal representative of the spouse, registered domestic partner,
21 or an immediate family member of an employee, officer, director,
22 managing agent, or other principal of the corporation, the claimant
23 shall not be precluded for that reason alone from receiving an
24 award where the claimant can otherwise meet the requirements of
25 this section.

26 SEC. 3. Section 2282.1 of the Corporations Code is amended
27 to read:

28 2282.1. (a) The Secretary of State shall provide notice to the
29 corporation and all agents named in the application that a claimant
30 has submitted an application for payment from the fund and shall
31 also provide within that notice, as prescribed by the Secretary of
32 State, the method to contest the payment from the fund.

33 (b) The notice to the corporation shall be provided by certified
34 mail addressed to the corporation's last designated agent for service
35 of process of record with the Secretary of State and notice shall
36 be deemed complete five calendar days after the notice is mailed.

37 (c) If the corporation or its agent wishes to contest payment of
38 an application by the Secretary of State, the corporation or agent
39 shall mail or deliver a written response addressed to the Secretary
40 of State within 30 calendar days of the notice of the application,

1 and shall mail or deliver a copy of the response to the claimant.
2 The written response of the corporation or agent shall not be
3 directed to issues and facts conclusively established by the
4 underlying judgment. If the corporation fails to mail or deliver a
5 timely response, the corporation shall have waived the
6 corporation's right to present objections to payment of the
7 application, and shall not thereafter be entitled to notice of any
8 action taken or proposed to be taken by the Secretary of State with
9 respect to the application.

10 SEC. 4. Section 2286 of the Corporations Code is amended to
11 read:

12 2286. The Secretary of State shall give notice, as prescribed
13 by the Secretary of State, to the corporation and all agents named
14 in the application that the Secretary of State has made a decision
15 to award funds to the claimant and shall provide a copy of the
16 decision to the corporation and all agents named in the application.

17 SEC. 5. Section 2288 of the Corporations Code is amended to
18 read:

19 2288. (a) Whenever the court proceeds upon a petition under
20 Section 2287, it shall order payment out of the fund only upon a
21 determination that the aggrieved party has a valid cause of action
22 within the purview of Section 2282, and has complied with Section
23 2287.

24 (b) (1) The Secretary of State may defend any action on behalf
25 of the fund and shall have recourse to all appropriate means of
26 defense and review, including examination of witnesses and the
27 right to relitigate any issues that are material and relevant in the
28 proceeding against the fund. The claimant's judgment shall create
29 a rebuttable presumption of the fraud, misrepresentation, or deceit
30 by the corporation, which presumption shall affect the burden of
31 producing evidence.

32 (2) If the civil judgment, arbitration award, or criminal
33 restitution order in the underlying action on which the final
34 judgment in favor of the petitioner was by default, stipulation,
35 consent, or pursuant to Section 594 of the Code of Civil Procedure,
36 or if the action against the corporation or its agent was defended
37 by a trustee in bankruptcy, the petitioner shall have the burden of
38 proving that the cause of action against the corporation or its agent
39 was for fraud, misrepresentation, or deceit.

1 (c) If the final judgment is a criminal restitution order against
2 an agent, the petitioner shall have the burden of proving that the
3 defendant named in the criminal restitution order qualifies as an
4 agent as defined in this chapter. An active corporation, that has
5 submitted a response to the application pursuant to Section 2282.2,
6 may be permitted by the court to appear in the action regarding
7 the sole issue of whether the defendant named in the criminal
8 restitution order qualifies as its agent as defined in this chapter.

9 (d) The Secretary of State may move the court at any time to
10 dismiss the petition when it appears there are no triable issues and
11 the petition is without merit. The motion may be supported by
12 affidavit of any person or persons having knowledge of the facts,
13 and may be made on the basis that the petition, and the judgment
14 referred to therein, does not form the basis for a meritorious
15 recovery claim within the purview of Section 2282; provided,
16 however, the Secretary of State shall give written notice at least
17 10 calendar days before hearing on the motion to the claimant.

18 SEC. 6. Section 2289 of the Corporations Code is amended to
19 read:

20 2289. (a) Notwithstanding any other provision of this chapter
21 and regardless of the number of persons aggrieved in an instance
22 of corporate fraud, or misrepresentation or deceit resulting in a
23 judgment meeting the requirements of Section 2282, or the number
24 of judgments against a corporation or its agent, the liability of the
25 fund shall not exceed fifty thousand dollars (\$50,000) for any one
26 claimant per single judgment finding fraud, misrepresentation, or
27 deceit, made with the intent to defraud.

28 (b) When multiple corporations or their agents are involved in
29 the same event or series of events that are the basis of the
30 claimant's final judgment and the conduct of two or more of the
31 corporations or their agents results in a judgment meeting the
32 requirements of Section 2282, the claimant may seek recovery
33 from the fund based on the judgment against any one of the
34 corporations or their agents, subject to the limitations of subdivision
35 (a).

36 (c) When multiple claimants are involved in a corporate fraud,
37 or in misrepresentation or deceit by a corporation or its agents,
38 resulting in a judgment meeting the requirements of Section 2282,
39 each claimant may seek recovery from the fund individually,
40 subject to the limitations of subdivision (a).

1 (d) Claimants who are spouses, registered domestic partners,
2 or persons other than natural persons, that have obtained an eligible
3 final judgment shall be considered one claimant.

4 SEC. 7. Section 2290 of the Corporations Code is amended to
5 read:

6 2290. If, at any time, the money deposited in the fund is
7 insufficient to satisfy any duly authorized award or offer of
8 settlement, the Secretary of State shall, when sufficient money has
9 been deposited in the fund, satisfy the unpaid awards or offer of
10 settlement, in the order that the awards or offers of settlement were
11 originally filed.

12 SEC. 8. Section 2293.1 of the Corporations Code is amended
13 to read:

14 2293.1. If the Secretary of State pays from the fund any amount
15 in settlement of a claim or toward satisfaction of a final judgment
16 against a corporation or its agent, the corporation or its agent shall
17 be required to pay to the fund the amount paid plus interest at the
18 prevailing legal rate applicable to a judgment rendered in any court
19 of this state, within 30 calendar days of the date that the Secretary
20 of State provided notice of the payment of the award or
21 compromise. If the corporation or its agent fails to make the
22 required payment to the fund within the required time, the
23 corporation shall be suspended until the payment is made. A
24 discharge in bankruptcy shall not relieve a corporation or its agent
25 from the penalties and disabilities provided in this chapter.

26 SEC. 9. Section 2294 of the Corporations Code is amended to
27 read:

28 2294. The Secretary of State shall not make any award to a
29 claimant from the fund if the claimant has received payment from
30 any other restitution funds or for the portions of the judgment that
31 the claimant has collected from the corporation or its agent or any
32 other defendant in the underlying judgment.

33 SEC. 10. No reimbursement is required by this act pursuant to
34 Section 6 of Article XIII B of the California Constitution because
35 the only costs that may be incurred by a local agency or school
36 district will be incurred because this act creates a new crime or
37 infraction, eliminates a crime or infraction, or changes the penalty
38 for a crime or infraction, within the meaning of Section 17556 of
39 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California
2 Constitution.

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