
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 1637 **Hearing Date:** June 28, 2022
Author: Cooper
Version: June 2, 2022
Urgency: Yes **Fiscal:** Yes
Consultant: MK

Subject: *Criminal profiteering: asset forfeiture: unemployment and disability insurance
fraud*

HISTORY

Source: Author

Prior Legislation: None

Support: California District Attorneys Association; California State Sheriffs' Association;
Los Angeles County District Attorney's Office; Peace Officers Research
Association of California (PORAC)

Opposition: California Public Defenders Association

Assembly Floor Vote: 61 - 0

PURPOSE

The purpose of this bill is to specify that fraud offenses relating to COVID-19 pandemic-related insurance programs administered by the California Employment Development Department (EDD) are criminal profiteering activity for which a prosecutor can seek asset forfeiture pursuant to the California Control Profits of Organized Crime Act.

Existing law establishes the California Control of Profits of Organized Crime Act. (Penal Code § 186.)

Existing law finds and declares that an effective means of punishing and deterring criminal activities of organized crime is through the forfeiture of profits acquired and accumulated as a result of such criminal activities, and states the intent of the Legislature that the California Control of Profits of Organized Crime Act be used by prosecutors to punish and deter only such activities. (Penal Code § 186.1.)

Existing law defines “Criminal profiteering activity” as an act committed or attempted, or a threat, made for financial gain or advantage, which may be charged as a specified crime, including, among other offenses, “offenses relating to insurance fraud.” (Penal Code, § 186.2 (a).)

Existing law defines “Pattern of criminal profiteering activity” as engaging in at least two incidents of criminal profiteering, that:

- a) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics;
- b) Are not isolated events; and,
- c) Were committed as a criminal activity of organized crime. (Penal Code § 186.2 (b)(1)(A).)

Existing law defines “Organized crime” as:

- a) A crime that is of a conspiratorial nature and that is either of an organized nature and seeks to supply illegal goods or services, as specified;
- b) A crime that, through planning and coordination of individual efforts, seeks to conduct specified illegal activities including among others, insurance fraud, embezzlement, and forgery;
- c) A crime committed by a criminal street gang;
- d) False or fraudulent activities, schemes, or artifices relating to health care programs, as specified; or,
- e) Theft of personal identifying information. (Penal Code § 186.2 (d).)

Existing law provides that in any case in which a person is alleged to have been engaged in a pattern of criminal profiteering activity, upon a conviction of the underlying offense the following assets shall be subject to forfeiture:

- a) Any property interest whether tangible or intangible, acquired through a pattern of criminal profiteering activity; and,
- b) All proceeds of a pattern of criminal profiteering activity, including all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity. (Penal Code § 186.3.)

Existing law provides that acts that would constitute a “pattern of criminal profiteering activity” may not be used by a prosecuting agency to seek the forfeiture of property and proceeds unless the prior act occurred within 10 years, excluding any period of imprisonment, of the commission of the underlying offense. (Penal Code § 186.2 (b)(2).)

Existing law states that a prior act may not be used by a prosecuting agency to seek the forfeiture of property and proceeds if the act resulted in an acquittal. (Penal Code § 186.2 (b)(2).)

Existing law establishes the procedures for forfeiture proceedings and requires a forfeiture hearing to be set in the superior court in which the underlying criminal offense will be tried. (Penal Code §§ 186.4, 186.5.)

Existing law provides that a violation of the Unemployment Insurance Code (UIC), except as specified, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by a fine of not more than \$20,000, or by both. (Unemp. Ins. Code § 2122.)

Existing law provides that any fine imposed by the court for violations of the UIC shall be paid to the office of the prosecutor bringing the complaint, but if the case was referred to the prosecutor by the EDD, or some other governmental unit, one-half of the criminal fine shall be

paid to that governmental unit. (Unemp. Ins. Code § 2122.5.)

This bill includes in the enumerated offenses that can be charged under “criminal profiteering activity” offenses relating to insurance fraud involving COVID-19 pandemic-related insurance programs administered by the Employment Development Department.

This bill provides that if the proceeds for property is forfeited because of a pattern of criminal activity related to offenses relating to insurance fraud, then the proceeds shall be returned to the Employment Development Department.

COMMENTS

1. Need for This Bill

According to the author:

Dubbed by prosecutors and media outlets as the biggest criminal fraud in United States history, the California Employment Development Department (EDD) estimates that it paid \$20 billion in fraudulent COVID-19 related UI claims. For context, \$20 billion is enough to pay the yearly salary of more than 333,300 California schoolteachers (at an annual salary of \$60,000). \$20 billion is also enough to shelter the estimated 160,000 homeless individuals in California in a hotel room for more than three years.

In a 2021 EDD conference call, Julie Su, former secretary for the California Labor and Workforce Development Agency said, "There is no sugar coating the reality, California did not have sufficient security measures in place to prevent this level of fraud".

While previous estimates put the level of fraud payments between \$11 and \$20 billion, that number is now expected to grow to \$30 billion.

In Beverly Hills, merchants alerted authorities that a large number of shoppers paid with EDD debit cards for high-end merchandise such as Gucci bags and \$125 slippers imported from Paris.

In southern California, detective’s tracked individuals repeatedly feeding Bank of America issued EDD debit cards after debit cards into ATM machines withdrawing large amounts of cash. Two individuals produced and posted a rap video on YouTube bragging about getting rich from committing UI benefits fraud. The rapping duo is alleged to have obtained at least 92 debit cards that had been pre-loaded with more than \$1.2 million in fraudulently obtained benefits.

An EDD task force formed by district attorneys across the state uncovered that incarcerated individuals in nearly every prison and jail in California were collecting unemployment benefits including at least 133 death row inmates. Fraudsters submitted UI claims for convicted killers Scott Peterson and Cary Stayner and in one case “Minnie Mouse”.

The statewide EDD task force continues to investigate, root out and prosecute fraud in California's unemployment system and needs every tool available to help recover the estimated \$20 billion in fraudulently obtained taxpayer dollars. AB 1637 provides investigators an important tool to recover cash and goods obtained through UI fraud and return as much of the \$20 billion back to the state.

2. California Control of Profits of Organized Crime Act

The California Control of Profits of Organized Crime Act sets forth the asset forfeiture procedure for property and proceeds acquired through a pattern of criminal profiteering activity. (Penal Code § 186, *et seq.*) Under the Act, the prosecuting agency can seek forfeiture of any property interest whether tangible (such as buildings, real property, and vehicles) or intangible (such as life insurance policies and shares of a company) acquired directly or indirectly through a pattern of criminal profiteering activity and all of the proceeds of a pattern of criminal profiteering activity, including all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity. (Penal Code § 186.3(b) & (c).) For example, items purchased using money obtained by insurance fraud would be eligible for forfeiture. The forfeited assets are distributed to the State's General Fund, and/or the local governmental entity, whichever prosecutes, with no direction for use. (Penal Code §§ 186.8 (c); 186.7(a).)

In any case in which a person is alleged to have been engaged in a pattern of criminal profiteering activity, assets are subject to forfeiture upon a conviction of at least two violations of one of more than thirty offenses. (Penal Code § 186.2)

Criminal profiteering asset forfeiture requires a court hearing to be held in conjunction with the trial of the underlying criminal offense. (Penal Code §§ 186.4 (a); 186.5 (c)(1).) The court shall decide whether same jury who heard the criminal charges or a new jury, shall determine whether the defendant's assets were the ill-gotten gains of criminal profiteering. The prosecutor bears the burden to demonstrate, beyond a reasonable doubt that (1) the defendant was engaged in a pattern of criminal profiteering activity and (2) that the property to be forfeited was acquired through a pattern of criminal profiteering activity. (Penal Code §186.5(c))

A "pattern of criminal profiteering activity" means that the defendant engaged in at least two incidents of criminal profiteering that have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics; are not isolated events; and were committed as a criminal activity of organized crime. "Organized crime" includes insurance fraud, grand theft, forgery and money laundering. (Penal Code, § 186.2 (d).)

The Act includes several unemployment insurance fraud acts that come within the definition of "criminal profiteering", including embezzlement (Penal Code § 503), forgery (Penal Code § 470), presentation of a false claim, (Penal Code § 550). (Penal Code, § 186.2 (a).)

The Act also lists specified insurance fraud offenses such as failing to make unemployment insurance contributions, failing to withhold worker deductions, and supplying false or fraudulent information, that come within the definition of "criminal profiteering" under the California Control of Profits of Organized Crime Act. (Unemp. Ins. Code §§ 2106, 2108, 2109, 2110, 2110.3, 2110.5, 2110.7 & 2117). (Penal Code, § 186.2 (a).)

This bill clarifies that the insurance fraud offenses listed in the offenses relating to insurance fraud involving COVID-19 pandemic-related insurance programs administered by the Employment Development Department.

3. Amendments in Committee

The bill will be amended in Committee to delete the references to Sections 2101 and 2114 of the Unemployment Insurance Code which was an amendment taken in Assembly Public Safety and mistakenly put back in. The sections were removed because of concerns by the Committee and opposition from the California Public Defenders Association and the ACLU and the removal of their opposition. The concerns in part were because these section already have significant penalties without asset forfeiture. Asset forfeiture would be *in addition to* existing financial penalties: A violation of § 2101 and § 2114 is punishable by imprisonment or by a fine of not more than \$20,000, or by both. (Unemp. Ins. Code, § 2122; see also *People v. Booker* (1994) 21 Cal.App.4th 1517.) In comparison, violation of § 2117, already included in the statute, is only punishable by a fine of \$1,000. In addition a person charged with UIC must pay investigation costs and loses the right to benefits for a year and they can already be ordered to pay restitution.

4. Argument in Support

The Los Angeles District Attorney's Office supports this bill stating:

AB 1637 specifies that fraud offenses relating to COVID-19 pandemic-related insurance programs administered by the California Employment Development Department (EDD) are criminal profiteering activities from which a prosecutor can seek asset forfeiture pursuant to the California Control Profits of Organized Crime Act (The Act).

Under the Act, the prosecuting agency can seek forfeiture of any property interest whether tangible (such as buildings, real property, and vehicles) or intangible (such as life insurance policies and shares of a company) acquired directly or indirectly through a pattern of criminal profiteering activity and all of the proceeds of a pattern of criminal profiteering activity, including all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.

The COVID-19 EDD fraud was the biggest criminal fraud in U.S. history. EDD estimates that the fraud conservatively exceeded \$20 billion (a more realistic estimate is between \$30-\$40 billion).

Clarifying that the COVID-19 EDD fraud specifically falls within the Act will help ensure that as many fraudulently obtained assets can be returned to help offset this massive fraud to the taxpayers.

5. Argument in Opposition

The California Public Defenders oppose this bill stating:

Penal Code section 186.2 includes “insurance fraud” among the list of crimes for which a prosecuting agency can seek to forfeit assets obtained through the fraudulent activity. (Pen. Code, § 186 et seq.) AB 1637 seeks to amend section 186.2 to specifically list COVID-related insurance fraud among the crimes for which a prosecuting agency can seek asset forfeiture.

While harming innocent individuals suffering from COVID, AB 1637 would be duplicative of existing law and would be ineffectual in prosecuting federal crimes due to lack of jurisdiction.

Specifically, the amendment at issue, which deleted Unemployment Insurance Code section 2101 in Assembly Public Safety and then was amended back into the bill on June 2, 2022, has the potential to lead to the forfeiture of the assets of innocent individuals because of the broad sweep of its language which includes making a false statement or omitting a material fact. The author agreed to its deletion when he accepted the Assembly Public Safety Committee’s amendments. In reliance on that agreement, we withdrew our opposition.

AB 1637, as newly amended, would have a chilling effect on those infected individuals who most need assistance, such as impoverished or low-income folks trying to bridge the gap while they recover from this serious illness. (E.g., Bedayn, *EDD wants its jobless money back. But some people can’t pay*, CalMatters < <https://calmatters.org/california-divide/2022/01/edd-california-unemployment-fraud/>> [as of March 21, 2022].)

Family members with long COVID are known to be overwhelmed and struggling and rely on insurance coverage to provide a safety net. AB 1637 might additionally burden these infected individuals to prove their illness beyond their physicians having already provided a diagnosis and further burden overwhelmed physicians with additional paperwork. Penal Code section 186.2 already includes insurance fraud. Thus, insurance fraud, whether related to COVID or otherwise, is already illegal and subject to asset forfeiture. AB 1637 does not explain why section 186.2 needs to particularly specify COVID (where no other illnesses are already specified). Neither does the bill provide any data about the prevalence of COVID-related insurance fraud.

Further, the federal government can and is prosecuting COVID-related insurance fraud: The U.S. Department of Justice has already indicted several individuals in connection with such fraud. (See press release here: [Superseding Indictment Adds Defendants to \\$25 Million, Prison-Based Unemployment Insurance Fraud Scheme | USAO-EDCA | Department of Justice.](#)) President Biden also recently announced that he would appoint a special prosecutor for pandemic fraud. (Joe Biden’s plan to help investigate California unemployment scams | [The Sacramento Bee \(sacbee.com\).](#)) Moreover, California has no jurisdiction over multinational gangs or crime syndicates.