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AB-2759 Corporations: agents: victims of corporate fraud compensation fund. (2015-2016)

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Assembly Bill No. 2759

CHAPTER 390

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.

[Approved by Governor September 16, 2016. Filed with Secretary of State September 16, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2759, 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.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2281 of the Corporations Code is amended to read:

2281. As used in this chapter:

(a) "Agent" means a person who was an officer or director of a corporation, as defined in subdivision (e), at the time the fraudulent acts occurred, was named in a final criminal restitution order in connection with the fraudulent acts, and was acting in the person's capacity as the corporation's officer or director when committing the fraudulent acts.

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

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

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

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

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

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

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

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

(3) A criminal restitution order issued by a court of competent jurisdiction against a corporation, or an agent of the corporation, for fraud, misrepresentation, or deceit, with the intent to defraud, pursuant to subdivision (f) of Section 1202.4 of the Penal Code or Section 3663 of Title 18 of the United States Code. An application for payment from the fund that is based on a criminal restitution order shall comply with all of the requirements of this chapter.

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

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

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

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

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

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

(1) The name and address of the claimant.

(2) If the claimant is represented by an attorney for the application, the name, business address, and telephone number of the attorney. If the claimant is not represented by an attorney for the application, a telephone number where the claimant can be reached during regular business hours shall be included.

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

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

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

(6) If the final judgment is a criminal restitution order, the claimant shall 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 chapter.

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

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

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

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

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

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

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

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

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

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

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

(3) If the final judgment does not expressly set forth the amount of damages that were awarded for actual loss and compensatory damages that are payable from the fund pursuant to Section 2289, the Secretary of State may ask the claimant to provide copies of documentation pertaining to the amount of the actual and direct loss and the awarded compensatory damages or both of those findings. For purposes of this section, "sufficient proof of money damages" may include any of the following: copies of bank account statements showing or confirming particular transactions, copies of the front and back of checks made payable to the corporation that have been negotiated, credit card statements showing or confirming particular

transactions, or similar documentation demonstrating financial loss directly resulting from the fraudulent acts by the corporation or its agent and the amount of compensatory damages awarded by the court.

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

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

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

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

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

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

(c) If the corporation or its agent wishes to contest payment of an application by the Secretary of State, the corporation or agent shall mail or deliver a written response addressed to the Secretary of State within 30 calendar days of the notice of the application, and shall mail or deliver a copy of the response to the claimant. The written response of the corporation or agent shall not be directed to issues and facts conclusively established by the underlying judgment. If the corporation fails to mail or deliver a timely response, the corporation shall have waived the corporation's right to present objections to payment of the application, and shall not thereafter be entitled to notice of any action taken or proposed to be taken by the Secretary of State with respect to the application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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