CHAPTER 708
OFFENSES AGAINST PROPERTY RIGHTS

Part I. General Provisions Relating to Offenses Against Property Rights

Part II. Burglary and Other Offenses of Intrusion

Part III. Criminal Damage to Property

Part IV. Theft and Related Offenses

Part V. Robbery

Part VI. Forgery and Related Offenses

708-8120, 8121 Repealed

Part XII. Cable Television and Telecommunication Service Offenses

Part XIII. Arson

Part XIV. Unlicensed Contracting Offenses

Note

L 2001, c 91, §4 purports to amend this chapter.

"PART I. GENERAL PROVISIONS RELATING TO OFFENSES AGAINST PROPERTY RIGHTS

§708-800 Definitions of terms in this chapter. In this chapter, unless a different meaning plainly is required, the following definitions apply.

"Agricultural equipment, supplies, or products" mean any agricultural equipment, supplies, or commercial agricultural products or commodities raised, grown, or maintained by a commercial agricultural enterprise or research agency while owned by the enterprise or agency.

"Apartment building" means any structure containing one or more dwelling units which is not a hotel or a single-family residence.

"Aquacultural equipment, supplies, or products" means any equipment, supplies, products, or commodities used, raised, grown, or maintained for the production of fish, shellfish, mollusk, crustacean, algae, or other aquatic plant or animal by an aquaculture enterprise or research agency while owned by the enterprise or agency.

"Building" includes any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

"Cable operator" means any person who provides cable television service by means of a set of closed transmission paths and associated signal generation, reception, and control equipment designed to deliver such programming to multiple subscribers.

"Cable television service" means one-way transmission of programming provided by, or generally considered comparable to programming provided by, a television broadcast station or other information made available by a cable operator to all subscribers generally.

"Cable television service device" means any mechanical or electronic instrument, apparatus, equipment or device which can be used to obtain cable television services without payment of applicable charges therefor. A "cable television service device" does not include any instrument, apparatus, equipment, device, facility or any component thereof furnished by a cable operator in the ordinary course of its business.

"Cardholder" means the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer.

"Confidential personal information" means information in which an individual has a significant privacy interest, including but not limited to a driver's license number, a social security number, an identifying number of a depository account, a bank account number, a password or other information that is used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of a person.

"Control over the property" means the exercise of dominion over the property and includes, but is not limited to, taking, carrying away, or possessing the property, or selling, conveying, or transferring title to or an interest in the property.

"Credit card" means any instrument or device, whether known as a credit card, credit plate, debit card, electronic benefits transfer card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value.

"Dealer" means a person in the business of buying and selling goods.

"Deception" occurs when a person knowingly:

(1) Creates or confirms another's impression which is false and which the defendant does not believe to be true;

(2) Fails to correct a false impression which the person previously has created or confirmed;

(3) Prevents another from acquiring information pertinent to the disposition of the property involved;

(4) Sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or

(5) Promises performance which the person does not intend to perform or knows will not be performed, but a person's intention not to perform a promise shall not be inferred from the fact alone that the person did not subsequently perform the promise.

The term "deception" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or services in communications addressed to the public or to a class or group.

"Deprive" means:

(1) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstance that a significant portion of its economic value, or of the use and benefit thereof, is lost to the person;

(2) To dispose of the property so as to make it unlikely that the owner will recover it;

(3) To retain the property with intent to restore it to the owner only if the owner purchases or leases it back, or pays a reward or other compensation for its return;

(4) To sell, give, pledge, or otherwise transfer any interest in the property; or

(5) To subject the property to the claim of a person other than the owner.

"Distributes" means to sell, transfer, give or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.

"Dwelling" means a building which is used or usually used by a person for lodging.

"Encoding" means making, changing, altering, erasing, adding, creating, or manipulating a credit card number electronically, or magnetically, or both.

"Enter or remain unlawfully" means to enter or remain in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of the person's intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

"Expired credit card" means a credit card which is no longer valid because the term shown on the credit card has elapsed.

"Financial institution" means a bank, trust company, insurance company, credit union, safety deposit company, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

"Government" means the United States, or any state, county, municipality, or other political unit within territory belonging to the United States, or any department, agency, or subdivision

of any of the foregoing, or any corporation or other association carrying out the functions of government, or any corporation or agency formed pursuant to interstate compact or international treaty. As used in this definition "state" includes any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

"Hotel" means a structure in which a majority of the tenants are roomers or boarders.

"Intent to defraud" means:

(1) An intent to use deception to injure another's interest which has value; or

(2) Knowledge by the defendant that the defendant is facilitating an injury to another's interest which has value.

"Issuer" means the business organization or financial institution which issues a credit card or its agent.

"Master key" means a key which will operate two or more locks to different apartments, offices, hotel rooms, or motel rooms in a common physical location.

"Obtain" means:

(1) When used in relation to property, to bring about a transfer of possession or other interest, whether to the obtainer or to another; and

(2) When used in relation to services, to secure the performance of services.

"Owner" means a person, other than the defendant, who has possession of or any other interest in, the property involved, even though that possession or interest is unlawful; however, a secured party is not an owner in relation to a defendant who is a debtor with respect to property in which the secured party has only a security interest.

"Personal information" means information associated with an actual person or a fictitious person that is a name, an address, a telephone number, an electronic mail address, a driver's license number, a social security number, an employer, a place of employment, information related to employment, an employee identification number, a mother's maiden name, an identifying number of a depository account, a bank account number, a password used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of an actual or a fictitious person.

"Premises" includes any building and any real property.

"Property" means any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind. Commodities of a public utility nature such as gas, electricity, steam, and water constitute

property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits, or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.

"Property of another" means property which any person, other than the defendant, has possession of or any other interest in, even though that possession or interest is unlawful; however, a security interest is not an interest in property, even if title is in the secured party pursuant to the security agreement.

"Receives" or "receiving" includes but is not limited to acquiring possession, control, or title, and taking a security interest in the property.

"Revoked credit card" means a credit card which is no longer valid because permission to use the credit card has been suspended or terminated by the issuer.

"Services" includes but is not limited to labor, professional services, transportation, telephone or other public services, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, and the supplying of equipment for use.

"Stolen" means obtained by theft or robbery.

"Telecommunication service" means the offering of transmission between or among points specified by a user, of information of the user's choosing, including voice, data, image, graphics, and video without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, or other similarly capable means of transmission, with or without benefit of any closed transmission medium, and does not include cable service as defined in section 440G-3.

"Telecommunication service device" means any mechanical or electronic instrument, apparatus, equipment, or device which can be used to obtain telecommunication services without payment of applicable charges therefor and shall include any such device that is capable of, or has been altered, modified, programmed, or reprogrammed alone or in conjunction with another device or other equipment so as to be capable of acquiring or facilitating the acquisition of any electronic serial number, mobile identification number, personal identification number, or any telecommunication service without payment of the applicable charges therefor. A "telecommunication service device" includes telecommunication devices altered to obtain service without the consent of the telecommunication service provider, tumbler phones, counterfeit or clone microchips, scanning receivers of wireless telecommunication service of a telecommunication service provider, and other instruments capable of disguising

their identity or location or of gaining access to a communications system operated by a telecommunication service provider. A "telecommunication service device" does not include any telephone or telegraph instrument, equipment, device, facility, or any component thereof furnished by a provider of telecommunication services in the ordinary course of its business nor any device operated by a law enforcement agency in the normal course of its activities.

"Telecommunication service provider" means any person that owns, operates, manages, or controls any facility used to furnish telecommunication services for profit to the public, or to classes of users as to be effectively available to the public, engaged in the provision of services, such as voice, data, image, graphics, and video services, that make use of all or part of their transmission facilities, switches, broadcast equipment, signalling, or control devices.

"Unauthorized control over property" means control over property of another which is not authorized by the owner.

"Widely dangerous means" includes explosion, flood, avalanche, collapse of building, poison gas, radioactive material, or any other material, substance, force, or means capable of causing potential widespread injury or damage. [L 1972, c 9, pt of §1; am L 1973, c 136, §7(a); am L 1974, c 55, §2 and c 200, §1; am L 1978, c 221, §1; am L 1979, c 106, §4; am L 1986, c 314, §60; am L 1987, c 268, §1; am L 1992, c 54, §1; am L 1993, c 218, §2 and c 287, §1; gen ch 1993; am L 1996, c 222, §2; am L 1997, c 198, §3; am L 2002, c 45, §1 and c 224, §4; am L 2005, c 182, §2; am L 2006, c 139, §3, c 156, §2, and c 181, §2; am L 2011, c 208, §1]

Revision Note

In paragraphs (1), (2), and (3) of the definition of "deprive", "or" deleted pursuant to §23G-15.

COMMENTARY ON §708-800

Section 708-800 provides definitions of terms used repeatedly throughout this chapter; it does not specify any penal offense.

As with other statutory definitions provided by this Code, a discussion of the definitions when needed or appropriate is found in the commentary on the sections employing the terms defined.

SUPPLEMENTAL COMMENTARY ON §708-800

Act 136, Session Laws 1973, modified the definition of "building" and Act 200, Session Laws 1974, further clarified it. As amended in 1974, "building" includes any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein.

In explaining the change in 1974, the Senate Judiciary Committee in Standing Committee Report No. 1065-74 stated that it was clear the phrase, "used for lodging of persons therein" was added by Act 136, Session Laws 1973, "to modify the terms 'vehicle, railway car, aircraft, or watercraft' and not the word 'structure.' However, it is possible to interpret the present definition as including 'structures' only when 'used for lodging of persons therein.' Such an interpretation means that stores, warehouses, and other commercial buildings not primarily used for the lodging of persons will not be included in the definition of 'building.' As a further result, persons breaking into such places cannot be charged with burglary because the commission of that crime involves breaking into a 'building' as defined in §708-800(1)."

Act 54, Session Laws 1992, amended this section by adding the definition of "aquaculture product" for the purpose of protecting Hawaii's aquaculture industry by deterring theft from aquaculture farms, which could cause devastating losses to research facilities and businesses. House Standing Committee Report No. 1184-92, Senate Standing Committee Report No. 1671.

Act 218, Session Laws 1993, amended this section by adding a definition for "agricultural equipment, supplies, or products." The legislature sought to prevent the theft of agricultural equipment, supplies, or products by subjecting violators to a class C felony in §708-831. Conference Committee Report No. 52.

Act 287, Session Laws 1993, amended this section by adding a definition for "encoding." The legislature intended to provide criminal sanctions for the fraudulent encoding of a credit card in §708-8100.5. Conference Committee Report No. 102.

Act 222, Session Laws 1996, amended this section by adding the definition of "telecommunication service provider" and by amending the definitions of "telecommunication service" and "telecommunication service device." The Act was intended to expand the scope of the law establishing the offense of telecommunication service fraud, to include fraud involving cellular telephone devices and services. The legislature recognized that cellular telephone fraud had become a major problem in the country, increasing consumer costs, and contributing to increased drug-related criminal activity, and that current state law did not provide comprehensive protection for telecommunication services theft. House Standing Committee Report No. 1521-96, Senate Standing Committee Report No. 2017.

Act 198, Session Laws 1997, expanded the definition of "credit card" to include electronic benefit transfer cards and debit cards, in order to criminalize the fraudulent use of debit and electronic benefit transfer cards under part X of chapter 708. Senate Standing Committee Report No. 1547.

Act 45, Session Laws 2002, amended the definition of "hotel" to clarify that the definition in relation to offenses against property rights means a structure in which a majority of the tenants are roomers or boarders. The current definition required all tenants to be roomers or boarders. However, hotel structures will rarely be totally occupied by roomers or boarders at the exclusion of commercial tenants such as shops and restaurants. The amended definition would more accurately reflect the current state of hotel operations. House Standing Committee Report No. 176-02, Senate Standing Committee Report No. 2461.

Act 224, Session Laws 2002, amended this section by adding the definition of "personal information." The legislature found that misappropriation of personal identification information was on the rise. Act 224 addresses the criminal conduct associated with intentional identity theft. Conference Committee Report No. 25-02.

Act 182, Session Laws 2005, amended the definition of "agricultural equipment, supplies, or products" by adding agricultural "commodities" in the definition. Act 182 addressed the problem of agricultural theft in Hawaii by amending various provisions of Hawaii's theft laws relating to agricultural livestock and products. Conference Committee Report No. 77, Senate Standing Committee Report No. 1359.

Act 139, Session Laws 2006, amended this section by adding the definition of "confidential personal information." Act 139 made it a crime to intentionally or knowingly possess the confidential information of another without that person's authorization. Hawaii law enforcement has found it difficult to curb the rise in identity theft-related crimes when identity thieves in possession of personal information who have not yet caused a monetary loss to the victim cannot be prosecuted for crimes other than petty misdemeanor thefts. The legislature found that amending the law to make intentionally or knowingly possessing the confidential information of another without authorization a class C felony would help to deter identity theft crimes. Senate Standing Committee Report No. 2636.

Act 156, Session Laws 2006, amended this section by adding the definition of "aquacultural equipment, supplies, or products." Act 156 established intentionally or knowingly damaging the agricultural or aquacultural equipment, supplies, or products of another as an offense of criminal property damage. The

legislature found that increasing the penalties for criminal property damage offenses was consistent with the great impact these crimes have on Hawaii's agricultural and aquacultural industries and the ability of individual farmers and ranchers to earn a living. Senate Standing Committee Report Nos. 3021 and 3310.

Act 181, Session Laws 2006, amended the definition of "widely dangerous means" by excluding "fire" from the definition. Act 181 included arson as a new class of property damage and defined four degrees of the offense of arson with appropriate sanctions. The legislature found that fires that are intentionally set cause extensive damage to public and private properties and threaten lives. Conference Committee Report No. 50-06.

Act 208, Session Laws 2011, amended the definition of "enter or remain unlawfully" by deleting the provision that a person who enters or remains on unimproved and apparently unused land that is not fenced or otherwise enclosed in a manner designed to exclude intruders, unless notice against trespass has been given, is allowed to be on the land and is not trespassing. The legislature recognized that, in many cases, trespassers are armed and found many miles from the nearest town or police station, and that in these situations, personal notice is impractical and even dangerous. Senate Standing Committee Report No. 1254, Conference Committee Report No. 59.

Case Notes

Defendant did not intend to permanently deprive car dealership of vehicle where evidence indicated defendant wanted to have new vehicle to drive for weekend then return it when defendant's deception was discovered. 86 H. 207, 948 P.2d 1048 (1997).

Where defendant returned new vehicle after 72 hour possession and prosecution was unable to prove any economic loss to car dealership, no intent to deprive dealership of significant portion of vehicle's economic value, use, or benefit. 86 H. 207, 948 P.2d 1048 (1997).

Inasmuch as the "intent to defraud" component of second degree theft by shoplifting, as defined by this section, prescribes two alternative means of establishing the state of mind requisite to the offense of second degree theft by shoplifting, trial court plainly erred in failing to instruct jury as to the alternative states of mind requisite to the charged offense. 101 H. 389, 69 P.3d 517 (2003).

The alternative states of mind potentially requisite to the charged offense of second degree theft by shoplifting, as prescribed by the definition of "intent to defraud" set forth in this section, does not implicate a defendant's constitutional

right to a unanimous jury verdict, as guaranteed by article I, §§5 and 14 of the Hawaii constitution; a proper elements instruction, which sets forth the alternative states of mind prescribed by the "intent to defraud" component of second degree theft by shoplifting, does not violate defendant's constitutional right. 101 H. 389, 69 P.3d 517 (2003).

Where petitioner was charged with theft by deception in a situation involving a contract, the intent element of the crime was not met where evidence showed that petitioner performed or intended to perform petitioner's part of the contract; intent element would have only been satisfied if the petitioner intended not to perform petitioner's contractual obligations; further, subsequent breach of the contract may give rise to potential civil remedies grounded in contract law, but unless accompanied by the intent to deprive a complainant's property, the breach does not create criminal liability for theft. 129 H. 414, 301 P.3d 1255 (2013).

Shambles and temporary absence not abandonment sufficient to deprive structure of use as a dwelling; a structure, although unoccupied does not become abandoned unless it is "wholly forsaken or deserted"; unoccupied house does not cease to be a "dwelling" because of the temporary absence of the owner. 2 H. App. 581, 637 P.2d 782 (1981).

Nightclub owner's bedroom and bath in separately secured area of club constituted a "building" within the meaning of this section. 9 H. App. 307, 837 P.2d 1308 (1992).

Once erected, a tent is a structure, and thus, a building. 9 H. App. 368, 842 P.2d 267 (1992).

In prosecution for first degree burglary under §708-810, prosecution satisfied its burden of proving that storage shed was in a garage that was part of a building that was a dwelling. 86 H. 143 (App.), 948 P.2d 564 (1997).

" **§708-801 Valuation of property or services.** Whenever the value of property or services is determinative of the class or grade of an offense, or otherwise relevant to a prosecution, the following shall apply:

(1) Except as otherwise specified in this section, value means the market value of the property or services at the time and place of the offense, or the replacement cost if the market value of the property or services cannot be determined.

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertained market value, shall be evaluated as follows:

(a) The value of an instrument constituting an evidence of debt, such as a check, traveler's check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof that has been satisfied;

(b) The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the greatest amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(3) When property or services have value but that value cannot be ascertained pursuant to the standards set forth above, the value shall be deemed to be an amount not exceeding $100.

(4) When acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense, the value of property or services shall be prima facie evidence that the defendant believed or knew the property or services to be of that value. When acting recklessly with respect to the value of property or services is sufficient to establish an element of an offense, the value of the property or services shall be prima facie evidence that the defendant acted in reckless disregard of the value.

(5) When acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense, it is a defense, which reduces the class or grade of the offense to a class or grade of offense consistent with the defendant's state of mind, that the defendant believed the valuation of the property or services to be less. When acting recklessly with respect to the value of property or services is required to establish an element of an offense, it is a defense that the defendant did not recklessly disregard a risk that the property was of the specified value.

(6) Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether the property taken be of one person or several persons, may be aggregated in determining the class or grade of the offense. Amounts involved in offenses of criminal property damage committed pursuant to one scheme or

course of conduct, whether the property damaged be of one person or several persons, may be aggregated in determining the class or grade of the offense. [L 1972, c 9, pt of §1; am L 1987, c 175, §1; am L 1998, c 49, §1; am L 2006, c 230, §34]

COMMENTARY ON §708-801

Section 708-801 provides rules for determining the value of property and the actor's state of mind with respect to the value of the property when these factors are required to be determined by the definitions of substantive offenses. As in the case of statutory definitions, a discussion of the provisions relating to value is found in the commentary on subsequent sections in this chapter.

SUPPLEMENTAL COMMENTARY ON §708-801

Act 175, Session Laws 1987, provided for the valuation of property or services under this section to be the replacement cost only if the property cannot be found, or where the value of the property or services cannot be ascertained. Senate Conference Committee Report No. 72, House Conference Committee Report No. 54.

Act 49, Session Laws 1998, clarified that the valuation of property taken in the commission of a theft should be determined by the value of the property "taken" rather than the value of the property "damaged." The legislature found that under this section, the law provided that valuation amounts were to be determined by the property "damaged" whereas it should logically be determined by the value of the property "taken." The legislature further found that the law needed to be changed to assure that a victim's losses were fairly assessed and adequately compensated. Senate Standing Committee Report No. 3230.

Act 230, Session Laws 2006, amended this section by making technical nonsubstantive amendments.

Case Notes

Where defendant testified that defendant harbored no belief at all regarding the value of the stolen property, paragraph (5) could not afford defendant a mitigating defense to second degree theft under §708-831(1)(b). 90 H. 359, 978 P.2d 797 (1999).

Valuation of property as applied to violation of §708-831(1)(b). 1 H. App. 644, 623 P.2d 898 (1981).

Due process right violated where circuit court's instruction to jury regarding the statutory presumption created by paragraph (4) failed to further instruct jury pursuant to HRE rule 306(a) that the presumption is merely a permissible inference of fact and that in order to apply the presumption, the jury must find that the presumed fact exists beyond a reasonable doubt. 88 H. 216 (App.), 965 P.2d 149 (1998).

Under §702-206, the term "intentional", as applied to the value-attendant-circumstance element of the insurance fraud offense under §431:10C-307.7, means "believes"; also, paragraph (4) indicates that either a defendant's "belief" or "knowledge" is sufficient to establish an intentional or knowing state of mind as to the value element; thus, pursuant to §702-204, as a "reckless" state of mind was applicable to the value element of the insurance fraud offense, defendant was not exposed to a conviction based on a state of mind lower than what was required. 117 H. 26 (App.), 175 P.3d 136 (2007).

" **§708-802 Property recovered in offenses against property rights.** Identification of an item of property recovered for violation of chapter 708, may be made by photographing the item and authentication of the content of the photograph. Such photograph shall be deemed competent evidence of the item photographed and admissible in any proceeding, hearing, or trial for violation of the chapter.

Provided, however, that nothing in this section shall be construed to limit or to restrict the application of rule 901 of the Hawaii rules of evidence. [L 1981, c 124, §1; am L 1990, c 194, §1]

COMMENTARY ON §708-802

Act 124, Session Laws 1981, added this section to enable victims of burglary, theft, and related offenses to obtain the quick return of their property recovered by the police and at the same time to insure the availability of competent evidence at trial.

Act 194, Session Laws 1990, amended this section to expand the type of property which may be photographed for evidence in a court proceeding. The legislature felt this amendment would allow victims of property crimes, not previously covered, to obtain their property quickly from the police. House Standing Committee Report No. 1186-90.

" **§708-803 Habitual property crime.** (1) A person commits the offense of habitual property crime if the person is a

habitual property crime perpetrator and commits a property crime.

(2) For the purposes of this section, "habitual property crime perpetrator" means a person who, within ten years of the instant offense, has convictions for offenses within this chapter for:

(a) Any combination of two felonies or misdemeanors; or

(b) Any combination of either one felony or one misdemeanor and one petty misdemeanor; or

(c) Three petty misdemeanors.

The convictions shall be for separate incidents on separate dates. The prosecution is not required to prove any state of mind with respect to the person's status as a habitual property crime perpetrator. Proof that the person has the requisite minimum prior convictions shall be sufficient to establish this element.

(3) A person commits a property crime if the person engages in conduct that constitutes an offense under this chapter. It can be established that the person has committed a property crime by either the prosecution proving that the person is guilty of or by the person pleading guilty or no contest to committing any offense under this chapter.

(4) Habitual property crime is a class C felony.

(5) For a conviction under this section, the sentence shall be either:

(a) An indeterminate term of imprisonment of five years; provided that the minimum term of imprisonment shall be not less than one year; or

(b) A term of probation of five years, with conditions to include but not be limited to one year of imprisonment; provided that probation shall only be available for a first conviction under this section. [L 2004, c 49, §1; am L 2014, c 118, §1; am L 2016, c 231, §36]

COMMENTARY ON §708-803

Act 49, Session Laws 2004, added this section, establishing the offense of habitual property crime, a class C felony. The legislature found that in 2002, Hawaii ranked first in the nation for property crime rates and second in larceny theft rates, and that a large portion of the crimes are committed by habitual offenders. The legislature also found that Act 49 would punish repeat offenders of property crime. House Standing Committee Report No. 902-4, Senate Standing Committee Report No. 2616.

Act 118, Session Laws 2014, amended subsection (4) by clarifying that the sentence for a person convicted of habitual property crime will be: (1) an indeterminate term of imprisonment of five years, with a minimum term of one year; or (2) for a first conviction only, a term of probation of five years, with conditions to include but not be limited to one year of imprisonment. The legislature found that property crimes have been a continual problem in Hawaii. The Federal Bureau of Investigation reported in 2012 that Hawaii ranked thirty-one out of fifty-two jurisdictions when it came to the amount of property crimes at a rate per one hundred thousand inhabitants. The legislature strongly supported the services offered through the Judiciary's Hawaii's Opportunity Probation with Enforcement (HOPE) Probation program, drug court, mental health court, and veterans treatment court, and suggested, without the intent of limiting the court's discretion, that when sentencing a defendant to a term of probation for conviction of a habitual property crime, the court consider sentencing the defendant to the programs, if appropriate. Senate Standing Committee Report No. 3258, Conference Committee Report No. 42-14.

Act 231, Session Laws 2016, amended this section by reducing by one the number of qualifying convictions required to meet the habitual property crime perpetrator status and allowing any offense committed under chapter 708 to qualify. Act 231 also doubled the length of time from five years to ten years that a conviction can qualify a person for habitual theft status, based on the recommendation of the penal code review committee, which was convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015). The legislature concluded that it was necessary to further strengthen this section, the habitual property crime statute. While it is not desirable to incarcerate an individual for stealing items worth $300, the current felony theft threshold, especially when reminded of the fact that each day of incarceration costs Hawaii taxpayers $137 per incarcerated individual, it is important to properly penalize those individuals who have made a career of thievery. Conference Committee Report No. 138-16.

"PART II. BURGLARY AND OTHER OFFENSES OF INTRUSION

§708-810 Burglary in the first degree. (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

(a) The person is armed with a dangerous instrument in the course of committing the offense;

(b) The person intentionally, knowingly, or recklessly inflicts or attempts to inflict bodily injury on anyone in the course of committing the offense; or

(c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

(2) An act occurs "in the course of committing the offense" if it occurs in effecting entry or while in the building or in immediate flight therefrom.

(3) Burglary in the first degree is a class B felony. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

Case Notes

No merit to defendant's arguments regarding defendant's sentence, where defendant contended, inter alia, that repeat offender statute did not apply to defendant's offense, where defendant was convicted of burglary in first degree of a dwelling in violation of subsection (1)(c). 105 F.3d 463 (1997).

Accomplice. 58 H. 404, 570 P.2d 844 (1977).

Although there was no direct evidence that appellant did not have permission to enter residence, a reasonable mind could infer that appellant did not have permission. 78 H. 383, 894 P.2d 80 (1995).

First degree burglary not an included offense of first degree robbery. 81 H. 309, 916 P.2d 1210 (1996).

A perpetrator "remains unlawfully" for the purposes of a burglary prosecution only in situations where the individual makes an initial lawful entry, that subsequently becomes unlawful. 89 H. 284, 972 P.2d 287 (1998).

Because the broad language of this section does not evidence an intent to confine crimes "against a person" to those enumerated in chapter 707, and harassment under §711-1106 is a crime against a person, burglary conviction under this section may be predicated on offense of harassment. 89 H. 284, 972 P.2d 287 (1998).

In order to sustain a burglary conviction under this section, the evidence must show that the unlawful entry was effected for the purpose of committing an offense against a person or property rights; the intent to commit the offense must have existed at the time the unlawful entry was made. 89 H. 284, 972 P.2d 287 (1998).

Where trial court failed to correct prosecution's erroneous interpretation of "remains unlawfully" under this section, defendant's constitutional rights to due process and a unanimous jury verdict violated. 89 H. 284, 972 P.2d 287 (1998).

Theft in the second degree is not a lesser included offense of burglary in the first degree. 2 H. App. 579, 637 P.2d 780 (1981).

Conviction of first degree burglary affirmed where defendant intentionally entered a separately secured bedroom and bath area of nightclub. 9 H. App. 307, 837 P.2d 1308 (1992).

Conviction affirmed, where defendant argued that court erred in denying defendant's motion for judgment of acquittal on burglary in first degree count on ground that, since tent defendant was charged with having entered was not a building, it was not a dwelling within definition of this section. 9 H. App. 368, 842 P.2d 267 (1992).

Prosecution satisfied its burden of proving that storage shed was in a garage that was part of a building that was a dwelling. 86 H. 143 (App.), 948 P.2d 564 (1997).

As robbery in the first degree under §708-840(1)(b)(ii) does not include the element required under subsection (1)(c) for burglary in the first degree of intentionally entering or remaining unlawfully in a building, it was possible for defendant to commit robbery in the first degree without committing burglary in the first degree; thus the crimes are not included in each other and do not merge. 109 H. 327 (App.), 126 P.3d 370 (2005).

" **§708-811 Burglary in the second degree.** (1) A person commits the offense of burglary in the second degree if the person intentionally enters or remains unlawfully in a building with intent to commit therein a crime against a person or against property rights.

(2) Burglary in the second degree is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993]

Case Notes

Evidence adequate to support conviction. 64 H. 226, 638 P.2d 330 (1981).

COMMENTARY ON §§708-810 AND 708-811

It has been said that the essence of the offense of burglary is "invasion of premises under circumstances specially likely to terrorize occupants."[1] Alternatively, it has been proposed that the primary function of burglary statutes is to crystallize

the doctrine of attempt in situations of criminal trespass.[2] The former view implies that the offense is conceived of, in part, although not necessarily defined in terms of a harm to personal dignity and sense of safety. With respect to the second view, the need to crystallize the doctrine of attempt in cases involving criminal trespass is largely obviated by this Code's clear treatment of the doctrine of attempt.[3] However, despite the absence of clearly articulated substantive reasons for making burglary a separate offense, the Code defers to the overwhelming body of decisional and statutory law recognizing this crime.[4] In the words of the Model Penal Code commentary,

> If we were writing on a clean slate, the best solution might be to eliminate burglary as a distinct offense. ... But we are not writing on a clean slate. Centuries of history and a deeply embedded Anglo-American conception like burglary cannot easily be discarded. The needed reform must therefore take the direction of narrowing the offense to something like the distinctive situation for which it was originally devised: invasion of premises under circumstances specially likely to terrorize occupants.[5]

The Code rejects the division of burglary into three degrees of offense,[6] and follows the Model Penal Code approach of dividing the offense into two degrees and treating the generally recognized aggravating circumstances as of roughly equal significance.[7] Thus, either (a) possessing a dangerous instrument, or (b) inflicting or attempting to inflict bodily injury, or (c) recklessly disregarding the risk that the building is a dwelling is sufficient to aggravate the class C offense and make it a class B offense.

Previously, Hawaii law defined burglary as the entry of a building or other structure of various descriptions, with intent to commit larceny of the first or second degree or to commit any felony.[8] If the conduct occurred at night, with the possession of a deadly weapon, or in a legally-occupied building or structure, the offense was burglary in the first degree.[9] All other burglary was burglary in the second degree.[10]

The previous Hawaii definitions were similar to those adopted by this Code. The Code covers both "entering and remaining unlawfully" upon premises; and the definition of this phrase is provided by §708-800. The Code alters the circumstances that aggravate the offense and make it burglary in the first degree. Committing the offense while armed with a dangerous instrument remains an aggravating circumstance. The Code, however, gives no significance to the time of the occurrence of the event. Unlike prior law, the Code makes it an aggravating circumstance to inflict or attempt to inflict bodily injury during the course of the offense. Rather than have the degree of the offense turn

on the fortuitous circumstance of whether the structure happened to be occupied, the Code makes it an aggravating circumstance if the structure is a dwelling and the defendant is culpable in this regard.

Another substantive change is the reduction of penalty. It is felt that this reduction reflects the desire to treat different offenses separately. To the extent that actual harm or theft do occur, they may be dealt with under appropriate sections of the Code: where they are absent, it is felt that the prior law's provisions for a possible twenty-year sentence[11] was too severe for an offense which may involve no major injury other than unpermitted entry.

§§708-810 And 708-811 Commentary:

1. M.P.C., Tentative Draft No. 11, comments at 57 (1960).

2. Prop. Mich. Rev. Cr. Code, comments at 200; cf. commentary on §§708-813 and 814, this Code.

3. Cf. §§705-500 through 502, and commentary thereon. However, it must be noted that simultaneous convictions for criminal trespass and attempt of another offense would yield concurrent rather than consecutive sentences, and, in most cases, not the kind of penalty commensurate with the view of burglary as a crystallization of the doctrine of attempt in aggravated cases. Still, one might argue that whatever special aggravation arises out of the conjunction of criminal trespass and criminal attempt (and it is difficult to find a rational articulation of this aggravation) ought to be dealt with individually, according to the actual and potential harms involved in each instance, rather than on a wholesale basis which ignores individual differences.

4. Both the Model Penal Code and the Proposed Michigan Revised Criminal Code adopt this approach; see M.P.C., Tentative Draft No. 11, comments at 57-58 (1960), and Prop. Mich. Rev. Cr. Code, comments at 200.

5. M.P.C., Tentative Draft No. 11, comments at 57 (1960).

6. See Prop. Mich. Rev. Cr. Code §§210 to 212.

7. See M.P.C. §221.1.

8. H.R.S. §726-1.

9. Id. §726-3.

10. Id.

11. Id. §726-4.

" **§708-812 Possession of burglar's tools.** (1) A person commits the offense of possession of burglar's tools if:

(a) The person knowingly possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking, and the person intends to use the explosive, tool, instrument, or article, or knows some person intends ultimately to use it, in the commission of the offense of the nature described aforesaid; or

(b) The person knowingly possesses any master key, unless authorized, and the person intends to use the master key or knows some person intends ultimately to use it, in the commission of an offense involving entry into premises or theft by a physical taking.

(2) Possession of burglar's tools is a misdemeanor.

(3) A master key taken in evidence shall be impounded by the court and returned to the owner of the locks or premises which the key operates. [L 1972, c 9, pt of §1; am L 1978, c 221, §2; gen ch 1993]

COMMENTARY ON §708-812

This offense is largely inchoate in nature and as such it might have been rationally grouped with other anticipatory offenses in chapter 705. However, because it is closely related to burglary, we have placed it here for related treatment in matters such as language and sentence.

This section provides a vehicle for punishing those who possess or traffic in devices adapted, designed or commonly used in the commission of offenses involving forcible entry or theft by physical taking. The person who possesses the designated type of device with intent to use the same in the proscribed manner is covered--and so is the manufacturer, distributor, and transporter who deals in such devices if he possesses the same with knowledge "that some person intends ultimately to use it" in the commission of one or more of the offenses for which it is adapted, designed, or commonly used.

Previous Hawaii law did not have an independent offense dealing with possession of burglar's tools; this section, therefore, represents an addition to our law.

SUPPLEMENTAL COMMENTARY ON §708-812

Act 221, Session Laws 1978, inserted the provisions relating to master keys to help curb burglaries involving the use of such keys, which activities the legislature found to be a significant problem particularly in hotels and apartment buildings.

Case Notes

Subsection (1)(a) not unconstitutionally overbroad where defendant's challenge to subsection (1)(a) was grounded in hypothetical conduct in which defendant was not involved. 104 H. 462, 92 P.3d 471 (2004).

Subsection (1)(a) not unconstitutionally vague as it describes the proscribed conduct in ordinary and understandable terms specifying the type of items to be possessed and limiting and defining the offenses to which this section applies to those involving forcible entry into premises or theft by physical taking; it also adequately informs a person on how to avoid committing the offense by not employing the items with the culpable intent set forth in this section. 104 H. 462, 92 P.3d 471 (2004).

Conviction under subsection (1)(a) cannot be sustained unless the State establishes beyond a reasonable doubt that the defendant knowingly possessed an explosive, tool, instrument, or other article; had knowledge that the tools could be used to commit a burglary; and had the intent to use the tools, or knew that some other person intended to use the tools to commit a burglary. 97 H. 323 (App.), 37 P.3d 572 (2001).

" **[§708-812.5] Burglary offenses; intent to commit therein a crime against a person or against property rights.** A person engages in conduct "with intent to commit therein a crime against a person or against property rights" if the person formed the intent to commit within the building a crime against a person or property rights before, during, or after unlawful entry into the building. [L 2006, c 230, pt of §2]

COMMENTARY ON §708-812.5

Act 230, Session Laws 2006, added this section, defining the phrase "with intent to commit therein a crime against a person or against property rights."

" **[§708-812.55] Unauthorized entry in a dwelling in the first degree.** (1) A person commits the offense of unauthorized entry in a dwelling in the first degree if the person intentionally or knowingly enters unlawfully into a dwelling and another person was, at the time of the entry, lawfully present in the dwelling who:

(a) Was sixty-two years of age or older;

(b) Was an incapacitated person; or

(c) Had a developmental disability.

(2) For the purposes of this section:

"Developmental disability" shall have the same meaning as in section 333E-2.

"Incapacitated person" shall have the same meaning as in section 560:5-102.

(3) Unauthorized entry in a dwelling in the first degree is a class B felony.

(4) It shall be an affirmative defense that reduces this offense to a misdemeanor that, at the time of the unlawful entry:

(a) There was a social gathering of invited guests at the dwelling the defendant entered;

(b) The defendant intended to join the social gathering as an invited guest; and

(c) The defendant had no intent to commit any unlawful act other than the entry. [L 2011, c 187, §2]

COMMENTARY ON §708-812.55

Act 187, Session Laws 2011, established the offense of unauthorized entry in a dwelling in the first degree, a class B felony, for the unauthorized entry in a dwelling if another person, at the time of entry, was lawfully present in the dwelling and the person was sixty-two years of age or older, was an incapacitated person, or had a developmental disability. The legislature found that home invasions are traumatic experiences for the victims and may be especially frightening for vulnerable elderly and disabled individuals present during the intrusion. The legislature intended that the presence of a person lawfully in the dwelling shall be a strict liability element and that it shall not be necessary to prove that a defendant knew or had any reason to know that the person lawfully in the dwelling was sixty-two years of age or older, incapacitated, or disabled. Conference Committee Report No. 32.

" **§708-812.6 Unauthorized entry in a dwelling in the second degree.** (1) A person commits the offense of unauthorized entry

in a dwelling in the second degree if the person intentionally or knowingly enters unlawfully into a dwelling and another person was lawfully present in the dwelling.

(2) Unauthorized entry in a dwelling in the second degree is a class C felony.

(3) It shall be an affirmative defense that reduces this offense to a misdemeanor that, at the time of the unlawful entry:

(a) There was a social gathering of invited guests at the dwelling the defendant entered;

(b) The defendant intended to join the social gathering; and

(c) The defendant had no intent to commit any unlawful act other than the entry. [L 2006, c 230, pt of §2; am L 2011, c 187, §3]

COMMENTARY ON §708-812.6

Act 230, Session Laws 2006, added this section, creating the offense of unauthorized entry in a dwelling. The offense is a class C felony, which may be reduced to a misdemeanor.

Act 187, Session Laws 2011, redesignated the offense of unauthorized entry in a dwelling as a second degree offense. The legislature also repealed the element of reckless disregard of the risk that another person was lawfully present in the dwelling, with the intent that the presence of a person lawfully present in the dwelling shall be a strict liability element, and for purposes of prosecuting the offense, it shall not be necessary to prove that a defendant knew or had any reason to know that someone else was lawfully in the dwelling. Conference Committee Report No. 32.

" **§708-813 Criminal trespass in the first degree.** (1) A person commits the offense of criminal trespass in the first degree if:

(a) That person knowingly enters or remains unlawfully:

(i) In a dwelling; or

(ii) In or upon the premises of a hotel or apartment building;

(b) That person:

(i) Knowingly enters or remains unlawfully in or upon premises that are fenced or enclosed in a manner designed to exclude intruders; and

(ii) Is in possession of a firearm, as defined in section 134-1, at the time of the intrusion; or

(c) That person enters or remains unlawfully in or upon the premises of any public school as defined in

section 302A-101, or any private school, after reasonable warning or request to leave by school authorities or a police officer; provided however, such warning or request to leave shall be unnecessary between 10:00 p.m. and 5:00 a.m.

(2) Subsection (1) shall not apply to a process server who enters or remains in or upon the land or premises of another, unless the land or premises are secured with a fence and locked gate, for the purpose of making a good faith attempt to perform their legal duties and to serve process upon any of the following:

(a) An owner or occupant of the land or premises;

(b) An agent of the owner or occupant of the land or premises; or

(c) A lessee of the land or premises.

(3) As used in this section, "process server" means any person authorized under the Hawaii rules of civil procedure, district court rules of civil procedure, Hawaii family court rules, or section 353C-10 to serve process.

(4) Criminal trespass in the first degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1974, c 55, §1; am L 1975, c 32, §1; am L 1981, c 177, §1; am L 1996, c 89, §18; am L 2000, c 200, §1; am L 2015, c 101, §2]

SUPPLEMENTAL COMMENTARY ON §§708-813 TO 708-815

Act 101, Session Laws 2015, amended §§708-813 and 708-814 to shield process servers performing their duties from prosecution under criminal trespass statutes when they enter premises that are not secured by a fence or a locked gate. The legislature found that process servers are an important part of the judicial process. Act 101 allowed process servers to enter or remain in or upon the premises of another for the purpose of making a good faith attempt to serve process upon certain individuals. Senate Standing Committee Report No. 1363, Conference Committee Report No. 22.

" **§708-814 Criminal trespass in the second degree.** (1) A person commits the offense of criminal trespass in the second degree if:

(a) The person knowingly enters or remains unlawfully in or upon premises that are enclosed in a manner designed to exclude intruders or are fenced;

(b) The person enters or remains unlawfully in or upon commercial premises after a reasonable warning or request to leave by the owner or lessee of the commercial premises, the owner's or lessee's

authorized agent, or a police officer; provided that this paragraph shall not apply to any conduct or activity subject to regulation by the National Labor Relations Act.

For the purposes of this paragraph, "reasonable warning or request" means a warning or request communicated in writing at any time within a one-year period inclusive of the date the incident occurred, which may contain but is not limited to the following information:

(i) A warning statement advising the person that the person's presence is no longer desired on the property for a period of one year from the date of the notice, that a violation of the warning will subject the person to arrest and prosecution for trespassing pursuant to section 708-814(1)(b), and that criminal trespass in the second degree is a petty misdemeanor;

(ii) The legal name, any aliases, and a photograph, if practicable, or a physical description, including but not limited to sex, racial extraction, age, height, weight, hair color, eye color, or any other distinguishing characteristics of the person warned;

(iii) The name of the person giving the warning along with the date and time the warning was given; and

(iv) The signature of the person giving the warning, the signature of a witness or police officer who was present when the warning was given and, if possible, the signature of the violator;

(c) The person enters or remains unlawfully on agricultural lands without the permission of the owner of the land, the owner's agent, or the person in lawful possession of the land, and the agricultural lands:

(i) Are fenced, enclosed, or secured in a manner designed to exclude intruders;

(ii) Have a sign or signs displayed on the unenclosed cultivated or uncultivated agricultural land sufficient to give notice and reading as follows: "Private Property". The sign or signs, containing letters not less than two inches in height, shall be placed along the boundary line of the land and at roads and trails entering the land in a manner and position as to be clearly noticeable from outside the boundary line; or

(iii) At the time of entry, are fallow or have a visible presence of livestock or a crop:
(A) Under cultivation;
(B) In the process of being harvested; or
(C) That has been harvested;

(d) The person enters or remains unlawfully on unimproved or unused lands without the permission of the owner of the land, the owner's agent, or the person in lawful possession of the land, and the lands:
(i) Are fenced, enclosed, or secured in a manner designed to exclude the general public; or
(ii) Have a sign or signs displayed on the unenclosed, unimproved, or unused land sufficient to give reasonable notice and reads as follows: "Private Property – No Trespassing", "Government Property – No Trespassing", or a substantially similar message; provided that the sign or signs shall contain letters not less than two inches in height and shall be placed at reasonable intervals along the boundary line of the land and at roads and trails entering the land in a manner and position as to be clearly noticeable from outside the boundary line.

For the purposes of this paragraph, "unimproved or unused lands" means any land upon which there is no improvement; construction of any structure, building, or facility; or alteration of the land by grading, dredging, or mining that would cause a permanent change in the land or that would change the basic natural condition of the land. Land remains "unimproved or unused land" under this paragraph notwithstanding minor improvements, including the installation or maintenance of utility poles, signage, and irrigation facilities or systems; minor alterations undertaken for the preservation or prudent management of the unimproved or unused land, including the installation or maintenance of fences, trails, or pathways; maintenance activities, including forest plantings and the removal of weeds, brush, rocks, boulders, or trees; and the removal or securing of rocks or boulders undertaken to reduce risk to downslope properties; or

(e) The person enters or remains unlawfully in or upon the premises of any public housing project or state low-income housing project, as defined in section 356D-1, 356D-51, or 356D-91, after a reasonable warning or request to leave by housing authorities or a police

officer, based upon an alleged violation of law or administrative rule; provided that a warning or request to leave shall not be necessary between 10:00 p.m. and 5:00 a.m. at any public housing project or state low-income housing project that is closed to the public during those hours and has signs, containing letters not less than two inches in height, placed along the boundary of the project property, at all entrances to the property, in a manner and position to be clearly noticeable from outside the boundary of the project property and to give sufficient notice that the public housing project or state low-income housing project is closed to the public during those hours.

(2) Subsection (1) shall not apply to a process server who enters or remains in or upon the land or premises of another, unless the land or premises are secured with a fence and locked gate, for the purpose of making a good faith attempt to perform their legal duties and to serve process upon any of the following:

(a) An owner or occupant of the land or premises;

(b) An agent of the owner or occupant of the land or premises; or

(c) A lessee of the land or premises.

(3) As used in this section:

"Housing authorities" means resident managers or managers, tenant monitors, security guards, or others officially designated by the Hawaii public housing authority.

"Process server" means any person authorized under the Hawaii rules of civil procedure, district court rules of civil procedure, Hawaii family court rules, or section 353C-10 to serve process.

(4) Criminal trespass in the second degree is a petty misdemeanor. [L 1972, c 9, pt of §1; am L 1974, c 49, §1; am L 1979, c 201, §1; am L 1980, c 232, §40; am L 1981, c 177, §2; gen ch 1993; am L 1998, c 146, §1; am L 2004, c 50, §2; am L 2005, c 181, §2 and c 212, §3; am L 2011, c 208, §2; am L 2013, c 145, §1; am L 2015, c 101, §3]

Case Notes

Where defendant failed to adduce sufficient evidence to support claim of the exercise of a constitutionally protected native Hawaiian right and knowingly entered landowner's property which was fenced in a manner to exclude others, trial court properly concluded that defendant was unlawfully on property in violation of subsection (1). 89 H. 177, 970 P.2d 485 (1998).

Where persons were allowed on hotel premises if invited by hotel guests, State had burden to prove that defendants were not so invited. 2 H. App. 264, 630 P.2d 129 (1981).

As criminal liability in section (1993) based only on contemporaneous refusal to obey warning or request to leave premises, no conviction where defendant returned to bar more than a month after being given warning not to return to premises for a year. 80 H. 372 (App.), 910 P.2d 143 (1996).

Finding by court that property was "commercial premises" protected by this section not clearly erroneous. 80 H. 460 (App.), 911 P.2d 95 (1996).

" **[§708-814.5] Criminal trespass onto public parks and recreational grounds.** (1) A person commits the offense of criminal trespass onto public parks and recreational grounds if the person remains unlawfully in or upon a public park or recreational ground after a request to leave is made by any law enforcement officer, when the request is based upon violation by the person of any term of use specified on a sign or notice posted on the property, or based on violation of any term of use contained in, or the expiration of, any permit relating to the person's presence on the property.

(2) For the purposes of this section, unless the context requires otherwise:

"Law enforcement officer" has the same meaning as in section 710-1000.

"Public park or recreational ground" means any park, park roadway, playground, athletic field, beach, shore, beach or shore right-of-way, tennis court, golf course, swimming pool, or other recreational area or facility under control, maintenance, and management of the State or any of the counties.

(3) Criminal trespass onto public parks and recreational grounds is a petty misdemeanor. [L 2005, c 212, §2]

" **§708-815 Simple trespass.** (1) A person commits the offense of simple trespass if the person knowingly enters or remains unlawfully in or upon premises.

(2) Simple trespass is a violation. [L 1972, c 9, pt of §1; gen ch 1993]

Case Notes

Where defendant requested court to instruct jury on time-barred lesser included offense of simple trespass under this section, defendant waived statute of limitations under §701-114(1)(e). 87 H. 108, 952 P.2d 865 (1997).

Where police had probable cause to arrest defendant without a warrant for fourth degree theft, a petty misdemeanor under §708-833, and simple trespass, a violation under this section, and §803-6 authorized them to cite, rather than arrest, defendant for those offenses if defendant did not have any outstanding arrest warrants, outstanding warrant check on defendant by police not unconstitutional. 91 H. 111 (App.), 979 P.2d 1137 (1999).

COMMENTARY ON §§708-813 TO 708-815

The essence of the offense of criminal trespass is "entering and remaining unlawfully," as defined by §708-800. It is basic to the offense that the actor have some knowledge that the actor's presence on the premises is not licensed, invited, or privileged.

> Under that definition, a person does not transgress when he enters or stays in a place open at the time to the public, unless he is specifically warned not to enter or remain. The fact that some portions of the premises were open to the public, including the defendant, does not mean that he has a privilege with reference to closed-off portions.[1]

The simple offense (i.e., §708-815) is defined in terms of entering or remaining on premises with knowledge of this fact ("...the person knowingly enters or remains unlawfully in or upon premises"). Simple trespass is a violation.

Two degrees of aggravated trespass are provided by the Code. The most serious aggravation occurs when the trespass is to a dwelling as defined by §708-800. Section 708-813 (criminal trespass in the first degree), makes this offense a misdemeanor. "The alarm caused to inhabitants by the entry, and the likelihood of violence which may injure someone, including the intruder, are sufficient to warrant increased penalties."[2] A second, less serious aggravation, occurs when the premises are enclosed or fenced. Under §708-814 (criminal trespass in the second degree), this kind of trespass is made a petty misdemeanor.

Act 55, Session Laws 1974, amended §708-813(1), relating to criminal trespass in the first degree, by making it an offense for a person to knowingly enter or remain unlawfully in or upon the premises of a hotel or apartment building in addition to a dwelling. The law was changed primarily to deal with the problem of prostitution in hotels and apartments. Senate Standing Committee Report No. 699-74. Section 708-813 was also amended by Act 32, Session Laws 1975, which added subsection (2). The purpose of the new language was to aid ranchers in proceeding against rustlers. The legislature found that it was

difficult to catch rustlers in the act. Under the new subsection, one apprehended in an enclosed area in possession of a firearm could be punished as a misdemeanant.

Act 49, Session Laws 1974, amended §708-814, criminal trespass in the second degree, to include the situation where a person is unlawfully on school premises and refuses to leave after reasonable warning or request to leave. In explaining the change, the House Committee on Judiciary and Corrections in Standing Committee Report No. 727-74 stated:

> Your Committee understands that there are some schools without fences and under present statutes, persons trespassing on such premises commit the offense of simple trespass. Simple trespass is a violation and is enforceable only by means of a penal summons. Your Committee finds that persons trespassing on school premises, whether fenced or unfenced, should be subject to the offense of criminal trespass in the second degree, a petty misdemeanor.

Where adverse circumstances, e.g., flood, storm, etc., require one to take refuge upon the premises of another, such action is not penal because it comes within the choice of evils justification set forth in §703-302.

Any trespass statute which is applied in situations involving political or religious solicitation becomes subject to constitutional scrutiny. As the drafters of the Proposed Michigan Revised Criminal Code, one of the sources from which this chapter of the Code is derived, noted:

> This activity does not fall within §[708-815] because (a) in most instances the entry is privileged by custom and therefore is not unlawful within the definition of 'enter or remain unlawfully' in §[708-800], if the owner does not post his premises or give specific notice to the religious or campaign worker to stay off or leave the premises there is no change in the customary law, and (b) even if the owner does not desire the person to enter, the latter does not 'know' within the meaning of §[702-206(2)(b)] that he is entering or remaining unlawfully unless the notice is communicated to him. If he forces his way into an enclosure that is posted or into a dwelling, with the knowledge that his presence is not wanted he fits the language of §§[708-813 to 815], but can still contend that the statute as to him under the circumstances infringes on his freedoms of speech or religion. Even if he prevails with regard to the prosecution against him, however, this does not void the statute as far as cases not involving these freedoms are concerned, under well-established constitutional case law.[3]

Previous Hawaii law imposed a single low-grade misdemeanor sanction for trespass.[4] The offense was not differentiated, as in the Code, and did not account adequately for the varying circumstances in which trespass may arise.

SUPPLEMENTAL COMMENTARY ON §§708-813 TO 708-815

Act 201, Session Laws 1979, added §708-814(c) to upgrade the penalty for the acts referred to from a violation to a petty misdemeanor. The legislature found that the police would not place persons charged with simple trespass under physical arrest without a penal summons being first obtained. In upgrading the offense, the legislature sought to give retailers a more effective means of removing persons who harass or inconvenience customers or cause a loss of sales. House Standing Committee Report No. 984.

Act 177, Session Laws 1981, rearranged the former text and added subsection (1)(c) to §708-813, formerly §708-814(1)(b), thereby upgrading trespass upon school premises from a petty misdemeanor to a misdemeanor. The increase in penalty was designed to curb vandalism and violence on school campuses, much of which appeared to be caused by person unlawfully there. Senate Standing Committee Report No. 720, House Standing Committee Report No. 627.

Act 89, Session Laws 1996, amended §708-813(1) by clarifying that the provisions of the subsection pertain to both public and private schools. Conference Committee Report No. 64.

Act 146, Session Laws 1998, addressed the problem of trespassing and amended §708-814 by requiring that written warnings [to leave] be given by the owner or lessee of the premises or their agent, or by a police officer. In State v. Sadler, 80 H. 372, 375 (1996), the Hawaii intermediate court of appeals held that the offense of criminal trespass in the second degree under §708-814(1)(b) "contemplates a warning or request contemporaneous with a person entering or remaining unlawfully on the premises." Therefore, in order to convict a person for criminal trespass in the second degree, the person must refuse a warning or request to leave that is made contemporaneously with the person's entering or remaining on the premises. The legislature found that under the court's interpretation of the current law, as long as a trespasser left the premises immediately upon being ordered to do so, the trespasser could return that same day with no fear of arrest. The interpretation was burdensome on commercial establishments because owners and operators were unable to meaningfully evict trespassers who may interfere with business and commit property crimes. Conference

Committee Report No. 81, House Standing Committee Report No. 711-98.

Act 200, Session Laws 2000, among other things, amended §708-813(1) by qualifying that the pre-arrest warning requirement is excepted between the hours of 10:00 p.m. and 5:00 a.m., when most persons have no legitimate purpose on campus. House Standing Committee Report No. 1283-00.

Act 50, Session Laws 2004, amended §708-814(1) to protect public property from trespassers by applying the offense of criminal trespass in the second degree, a petty misdemeanor, to persons who enter or remain unlawfully on any public property after a reasonable warning or request to leave has been given by the owner or lessee of the property. House Standing Committee Report No. 901-04.

Act 181, Session Laws 2005, amended §708-814 by specifying that a person commits criminal trespass in the second degree if the person enters or remains on agricultural lands without the permission of the owner of the land, the owner's agent, or the person in lawful possession of the land. Agricultural theft is a critical problem for Hawaii's farmers, who are especially vulnerable to theft since farms are usually located on large plots of land in sparsely populated areas, isolated from law enforcement. Although many farms have fences and other simple barriers surrounding their property, the obstacles are easily overcome by thieves and do little to deter trespassing. Conference Committee Report No. 78, Senate Standing Committee Report No. 1164.

Act 212, Session Laws 2005, established the petty misdemeanor offense of criminal trespass onto public parks and recreational grounds (§708-814.5). Act 212 also repealed the amendments made to the offense of criminal trespass in the second degree (§708-814) by Act 50, Session Laws 2004. Act 50 was intended to address the problem of squatters in public parks or campgrounds, but the law was being broadly used in circumstances not related to squatting. Conference Committee Report No. 82.

Act 208, Session Laws 2011, amended §708-814(1) by prohibiting a person from entering or remaining unlawfully on unimproved or unused lands that are fenced, enclosed, or clearly marked by signage. Act 208 also added entering or remaining on agricultural lands that are fallow or have evidence of livestock at the time of entry to the offense of trespass in the second degree. The legislature found that trespassing is a major problem for owners of unimproved or unused land. Trespassers often damage property and crops and increase the liability of the owners of the land. Trespassers also use unimproved and unused lands as illegal dump sites and places to conduct illicit

activities. Senate Standing Committee Report No. 830, House Standing Committee Report No. 934.

Act 145, Session Laws 2013, amended §708-814 to: (1) broaden the offense of criminal trespass in the second degree to include a person who enters or remains unlawfully in or upon the premises of any public housing project after a reasonable warning or request to leave by housing authorities or a police officer; (2) clarify that the warning or request to leave would not be necessary between 10:00 p.m. and 5:00 a.m. at any public housing project that is closed to the public during those hours and has signs of a certain size and placement to provide sufficient notice of the closure; and (3) define "housing authorities." The legislature found that the Hawaii public housing authority continues to make improvements to security measures at many of the high risk housing projects, including the addition of fences, security fences, and photo identification cards for tenants. The legislature further found that Act 145 would significantly improve the ability of the authority to ensure a secure, livable community for residents. Conference Committee Report No. 32, Senate Standing Committee Report No. 1333.

§§708-813 To 708-815 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 196.

2. Id.

3. Prop. Mich. Rev. Cr. Code, comments at 197.

4. H.R.S. §771-1.

" **§708-816 Defense to trespass.** It is a defense to prosecution for trespass as a violation of sections 708-814 and 708-815 that the defendant entered upon and passed along or over established and well-defined roadways, pathways, or trails leading to public beaches over government lands, whether or not under lease to private persons. [L 1972, c 9, pt of §1]

COMMENTARY ON §708-816

This is a new section inserted by the legislature in 1972. It was not contained in the Proposed Draft. This addition provides that traveling to or from the beach over government land does not constitute trespass and is a defense to §§708-814 and 815. Conference Committee Report No. 2 (1972).

" **[§708-816.5] Entry upon the premises of a facility utilized as a sex, child, or spouse abuse shelter; penalty.** [(1)] No person shall knowingly enter or remain unlawfully upon the premises of a facility utilized as a sex abuse, child abuse, or spouse abuse shelter after reasonable warning or request to leave by a member of the facility's staff.

[(2)] Violation of this section is a misdemeanor. [L 1993, c 12, §1]

COMMENTARY ON §708-816.5

Act 12, Session Laws 1993, added this section to establish the offense of unlawful entry upon the premises of a facility used as a sex, child, or spouse abuse shelter, by making it a misdemeanor for any person to knowingly enter or unlawfully remain upon the premises after reasonable warning or request to leave by a facility staff member. Since the locations of these shelters are often known, individuals seeking shelter and shelter staff are at potential risk from abusers. This section affords a higher level of legal protection for staff and persons who seek refuge from abuse. House Standing Committee Report No. 692, Senate Standing Committee Report No. 1049.

Law Journals and Reviews

Empowering Battered Women: Changes in Domestic Violence Laws in Hawai‘i. 17 UH L. Rev. 575 (1995).

" **§708-817 Burglary of a dwelling during an emergency period.** (1) A person commits the offense of burglary of a dwelling if, during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A and within the area covered by the emergency period, the person:

(a) Intentionally enters or remains unlawfully in a dwelling with intent to commit therein a crime against a person or against property rights; and

(b) Recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling at the time.

(2) Burglary of a dwelling during an emergency period is a class A felony. [L 2006, c 116, pt of §3, am L 2014, c 111, §17]

" **§708-818 Burglary of a building during an emergency period.** (1) A person commits the offense of burglary of a building if, during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A and within the area

covered by the emergency period, the person intentionally enters or remains unlawfully in a building other than a dwelling with intent to commit therein a crime against a person or against property rights.

(2) Burglary of a building during an emergency period is a class B felony. [L 2006, c 116, pt of §3; am L 2014, c 111, §18]

COMMENTARY ON §§708-817 AND 708-818

Act 116, Session Laws 2006, added these sections, classifying burglary of a dwelling during a civil defense emergency or during a period of disaster relief, as a class A felony and of a building during a civil defense emergency or during a period of disaster relief, as a class B felony. Act 116 penalized the commission of certain crimes during a time of a civil defense emergency proclaimed by the governor or during a period of disaster relief. The legislature found that Hurricanes Katrina and Rita created situations that highlighted the prevalence of opportunistic crimes that can occur during these times. When resources are needed to restore law and order, emergency response aid to victims may be hampered or delayed, leaving victims at an increased risk of bodily injury or death. Stronger measures to control law and order may deter looting and other crimes. House Standing Committee Report No. 757-06, Senate Standing Committee Report No. 3302, Conference Committee Report No. 64-06.

Act 111, Session Laws 2014, amended §§708-817 and 708-818. Act 111 updated and recodified Hawaii's emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

"PART III. CRIMINAL DAMAGE TO PROPERTY

Cross References

Arson, see pt XIII.

Special sentencing considerations for arson; other actions not prohibited, see §706-606.2.

§708-820 Criminal property damage in the first degree. (1) A person commits the offense of criminal property damage in the first degree if by means other than fire:

(a) The person intentionally or knowingly damages property and thereby recklessly places another person in danger of death or bodily injury;

(b) The person intentionally or knowingly damages the property of another, without the other's consent, in an amount exceeding $20,000;

(c) The person intentionally or knowingly damages the property of another during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster; or

(d) The person intentionally or knowingly damages the agricultural equipment, supplies, or products or aquacultural equipment, supplies, or products of another, including trees, bushes, or any other plant and livestock of another, without the other's consent, in an amount exceeding $1,500. In calculating the amount of damages to agricultural products, the amount of damages includes future losses and the loss of future production.

(2) Criminal property damage in the first degree is a class B felony. [L 1972, c 9, pt of §1; gen ch 1993; am L 1996, c 170, §1; am L 2003, c 19, §1; am L 2006, c 116, §5, c 156, §3, and c 181, §3; am L 2007, c 98, §1; am L 2014, c 111, §19]

Case Notes

The risks involved in criminal property damage in the first degree present a serious potential risk of physical injury to another and that risk is similar to the risks involved in arson and burglary in the ordinary case; thus, defendant's prior conviction under subsection (1)(a) (1996) was a crime of violence as defined in §4B1.2(a)(2) of the federal Sentencing Guidelines. 724 F.3d 1133 (2013).

" **§708-821 Criminal property damage in the second degree.** (1) A person commits the offense of criminal property damage in the second degree if by means other than fire:

(a) The person intentionally or knowingly damages the property of another, without the other's consent, by the use of widely dangerous means;

(b) The person intentionally or knowingly damages the property of another, without the other's consent, in an amount exceeding $1,500; or

(c) The person intentionally or knowingly damages the agricultural equipment, supplies, or products or aquacultural equipment, supplies, or products of another, including trees, bushes, or any other plant and livestock of another, without the other's consent, in an amount exceeding $500. In calculating the amount of damages to agricultural products, the amount of damages includes future losses and the loss of future production.

(2) Criminal property damage in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1973, c 136, §7(b); gen ch 1993; am L 1996, c 170, §2; am L 2003, c 19, §2; am L 2006, c 156, §4 and c 181, §4; am L 2007, c 98, §2]

" **§708-822 Criminal property damage in the third degree.** (1) A person commits the offense of criminal property damage in the third degree if by means other than fire:

(a) The person recklessly damages the property of another, without the other's consent, by the use of widely dangerous means;

(b) The person intentionally or knowingly damages the property of another, without the other's consent, in an amount exceeding $500; or

(c) The person intentionally damages the agricultural equipment, supplies, or products or aquacultural equipment, supplies, or products of another, including trees, bushes, or any other plant and livestock of another, without the other's consent, in an amount exceeding $100. In calculating the amount of damages to agricultural products, the amount of damages includes future losses and the loss of future production.

(2) Criminal property damage in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1973, c 136, §7(c); am L 1986, c 314, §62; gen ch 1993; am L 1996, c 170, §3; am L 2006, c 156, §5, c 181, §5, and c 230, §35; am L 2007, c 98, §3]

Case Notes

Offense is graded according to amount of damage done, not the value of the property damaged. 86 H. 165 (App.), 948 P.2d 586 (1997).

" **§708-823 Criminal property damage in the fourth degree.** (1) A person commits the offense of criminal property damage in the fourth degree if by means other than fire, the person intentionally or knowingly damages the property of another without the other's consent.

(2) Criminal property damage in the fourth degree is a petty misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2006, c 181, §6 and c 230, §36]

Case Notes

Appellate court erred in its characterization of "presumption" of nonconsent; trial judge did not err in denying motion for judgment of acquittal or in finding appellant guilty. 78 H. 262, 892 P.2d 455 (1995).

COMMENTARY ON §§708-820 TO 708-823

These sections of the Code provide a unified treatment of offenses relating to property damage. Dispensed with are archaic labels such as "arson" and "criminal mischief." The offense of criminal property damage is divided into four degrees which represent gradations of penalty depending on: (1) the culpability of the actor (i.e., whether the actor acts intentionally or merely recklessly), (2) the means used (i.e., whether the means present potential danger of widespread damage to persons or property), and (3) the value of the property damaged.

Section 708-800 provides some relevant statutory definitions. "Property" is defined, in §708-800, basically, as "any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind." "Property of another" is defined, in §708-800, to mean "property which any person, other than the defendant, has possession of or any other interest in, even though that possession is unlawful." A security interest in property, however, does not make the holder thereof any "owner" of an interest for purposes of this chapter. [See §708-800.]

The determination of value is governed by §708-801. When value cannot be determined according to the rules provided by subsections (1) and (2) of §708-801, subsection (3) provides that the value shall be deemed to be not more than $50, therefore limiting conviction to the lowest degree of the

offense when the value of property constitutes an element. Section 708-801(4) provides that the value of property is prima facie evidence that the defendant possessed the requisite culpability with respect thereto. Section 708-801(5) affords the defendant a defense, which reduces the degree of the offense, based on the lack of the requisite culpability with respect to the value of the property involved in the offense--when the factor is an element of the offense. Section 708-801(6) provides that amounts involved in separate offenses committed pursuant to the same scheme or course of conduct may be aggregated in determining value.

Criminal property damage in the first degree, §708-820, presents the most aggravated form of property damage: damage which carries with it an incidental risk of danger to the person. Under former formulations of property offenses, arson, which is sometimes regarded as an offense against the person, was regarded as the most serious property offense deserving the most severe sanction. Yet actual risk of danger to another was not required for conviction of arson, and it is possible to think of many cases in which, although fire is not the method used in causing the damage, actual risk to the safety of another would result from property damage. The conjunction of property damage and risk to the person is made a separate offense which, because of the cumulative dangers involved, is punished more severely than the offense of reckless endangering.[1] If the conduct places another in danger, it is not required for conviction under §708-820 that the property damaged be that of another; any property damage will suffice.

Section 708-821, criminal property damage in the second degree, covers damage aggravated by three factors: intentional behavior on the part of the actor, and either a potential of widespread damage or a high value of the property. Subsection (1)(a) incorporates the traditional offense of arson and, in addition, would cover other property damage by "means capable of causing potential widespread injury or damage." The Code employs the phrase "widely dangerous means," defined in §708-800, to cover, in addition to fire, such methods of damage as floods, avalanche, and radioactive material. It is the potential for indiscriminate destruction that is the gravamen of this offense. It seems clear that separate, but substantially similar, methods of property damage should not constitute separately defined offenses merely for the sake of preserving old labels and phrases. It should be pointed out that under §708-821(1)(a), unlike §708-820, another person need not actually be placed in danger of death or bodily injury by the actor's conduct. Subsection (1)(b) seeks to differentiate the degree of the offense on the basis of the value of property

damaged. As one of the factors differentiating the seriousness of similar offenses, the value of the property involved has traditionally been considered in theft offenses. It seems here no less applicable. Accordingly, theft and property damage offenses are correlated to the extent the value of the property involved is a governing factor.

Section 708-822, criminal property damage in the third degree, reduces the grade of the offense to a misdemeanor if the actor recklessly damages the property of another, without the other's consent, by the use of widely dangerous means, or if the actor intentionally damages such property, the value of which exceeds $50. At common law arson was an intentional offense. Subsection (1)(a) in part extends the arson offense, but subsection (2) provides a reduced penalty, reflecting a lesser degree of culpability. Subsection (1)(b) imposes misdemeanor liability for intentional property damage based in part on the value of the property involved. It is part of the differentiation referred to above and must be compared with §§708-821(1)(b) and 823.

Section 708-823 provides a residual property damage offense and is graded a petty misdemeanor. The damage must be intentional; however, the property damaged may be of any value.

Previous Hawaii law was rather typical of the confused state of decisional and statutory law regarding offenses of property damage.[2] The Hawaii Revised Statutes recognized no less than six offenses predicated on damage by fire: two degrees of arson, three degrees of malicious burning, and a separate offense of wilful burning with intent to injure an insurer.[3] Such fine distinctions were required as to whether the act was done by day or night, the value of the property damaged, and the nature of the property damaged (e.g., which range from the inhabited dwelling house of another to any wood, field, grass or standing product of the soil). A separate offense, in a different chapter, resulting in a less severe sentence, was provided if the defendant chose to use explosives.[4] Property damage not involving what the Code has called "widely dangerous means" was labeled malicious injury and was made a misdemeanor under previous law; the offense was not differentiated on the basis of the value of the property involved. This Code attempts to greatly simplify, clarify, and rationalize the wide range of property damage offenses in the prior law.

SUPPLEMENTAL COMMENTARY ON §§708-820 TO 708-823

Act 314, Session Laws 1986, amended §708-822 by increasing the dollar amount of the property involved in the offense of criminal property damage. The previous figure ($50) was

designated in 1972 when the Code was first codified. With the increase, the dollar amount will more accurately reflect current property values and consequently the offense will warrant the level of culpability intended when it was originally drafted. Senate Standing Committee Report No. 820-86.

Act 170, Session Laws 1996, amended §708-820 by making damage to property in an amount exceeding $20,000 criminal property damage in the first degree. Prosecution is permitted for damage to property in the stated amount as a class B felony, consistent with other class B felony threshold amounts found in other crimes in the penal code. Senate Standing Committee Report No. 2599.

Act 170, Session Laws 1996, amended §§708-821 and 708-822 by raising the property damage thresholds from $500 to $1,500 for criminal property damage in the second degree (§708-821), a class C felony, and from $100 to $500 for criminal property damage in the third degree (§708-822), a misdemeanor. The legislature found that with the inflation of prices and services over the years, the amounts used to repair damages did not properly reflect the seriousness of the cases involved, as many cases involved damages to vehicles that may cost up to $1,000 for repairs. The legislature also found that the present threshold amounts did not accurately reflect the proper values for class C felony and misdemeanor property damage. Senate Standing Committee Report No. 2599, House Standing Committee Report No. 196-96.

Act 19, Session Laws 2003, amended §§708-820 and 708-821 to include "knowingly" as a state of mind alternative for the crimes of criminal property damage in the first or second degree. The legislature found that there are cases where the defendant is aware that property damage will occur as a result of the defendant's action but intentional property damage is not the motivating factor for the action. The legislature believed that in these cases, defendants should be held accountable for their actions and found that including the word "knowingly" as a state of mind alternative would accomplish this goal. Senate Standing Committee Report No. 591, House Standing Committee Report No. 1257.

Act 116, Session Laws 2006, amended §708-820, expanding the offense of criminal property damage in the first degree to include intentionally or knowingly damaging the property of another during a civil defense emergency or during a period of disaster relief. Act 116 penalized the commission of certain crimes during a time of a civil defense emergency proclaimed by the governor or during a period of disaster relief. The legislature found that Hurricanes Katrina and Rita created situations that highlighted the prevalence of opportunistic

crimes that can occur during these times. When resources are needed to restore law and order, emergency response aid to victims may be hampered or delayed, leaving victims at an increased risk of bodily injury or death. Stronger measures to control law and order may deter looting and other crimes. Senate Standing Committee Report Nos. 2938 and 3302, Conference Committee Report No. 64-06.

Act 156, Session Laws 2006, amended §§708-820, 708-821, and 708-822 to protect Hawaii's agricultural and aquacultural industries by establishing that a person commits the offense of criminal property damage: (1) in the first degree, if the person intentionally or knowingly damages the agricultural or aquacultural equipment, supplies, or products of another without the other's consent, in an amount exceeding $1,500, provided that the value of future crops that were damaged is included in calculating the damage; (2) in the second degree, if the person intentionally or knowingly damages the agricultural or aquacultural equipment, supplies, or products of another without the other's consent, in an amount exceeding $500, provided that the value of future crops that were damaged is included in calculating the damage; and (3) in the third degree, if the person intentionally damages the agricultural or aquacultural equipment, supplies, or products of another without the other's consent, in an amount exceeding $100, provided that the value of future crops that were damaged is included in calculating the damage. The legislature found that increasing the penalties for criminal property damage offenses was consistent with the great impact the crimes have on Hawaii's agricultural and aquacultural industries and the ability of individual farmers and ranchers to earn a living. Conference Committee Report No. 74-06, Senate Standing Committee Report No. 3310.

Act 181, Session Laws 2006, amended §§708-820, 708-821, 708-822, and 708-823 by excluding property damage caused by means of fire from the offenses of criminal property damage in the first, second, third, and fourth degrees. Act 181 included arson as a new class of property damage and defined four degrees of the offense of arson with appropriate sanctions. The legislature found that fires that are intentionally set cause extensive damage to public and private properties and threaten lives. Conference Committee Report No. 50-06.

Act 230, Session Laws 2006, amended §708-822(1), by making it an offense of criminal property damage in the third degree, to knowingly damage the property of another without consent and in an amount exceeding $500. House Standing Committee Report No. 665-06.

Act 230, Session Laws 2006, amended §708-823(1), by making it an offense of criminal property damage in the fourth degree, to knowingly damage the property of another without consent.

Act 98, Session Laws 2007, amended §§708-820(1), 708-821(1), and 708-822(1) by clarifying the calculation of the value of damage to agricultural products to include future losses and the loss of future production. The legislature found that vandalism, theft, and arson are critical problems with a significant impact upon Hawaii's agricultural industry. Act 98 would strengthen the present law in calculating damages. Senate Standing Committee Report No. 1606, House Standing Committee Report No. 459.

Act 111, Session Laws 2014, which amended §708-820(1), updated and recodified Hawaii's emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

---

§§708-820 To 708-823 Commentary:

1. Cf. §§707-713 and 714.

2. See generally, in relation to arson, M.P.C., Tentative Draft No. 11, comments at 34-37 (1960).

3. H.R.S. §§723-2 through 723-10.

4. Id. §753-8.

" **§708-823.5 Aggravated criminal property damage.** (1) A person commits the offense of aggravated criminal property damage if the person by means other than fire:

(a) Intentionally damages the property of another without the other's consent; and

(b) Has been convicted two or more times of an offense under section 708-822 or 708-823.

(2) For purposes of this section, "convicted two or more times" means that, at the time of the instant offense, the person had previously entered a plea of guilty or no contest or a judge or jury had previously returned a verdict of guilty against the person for two or more offenses committed on separate occasions.

(3) Aggravated criminal property damage is a misdemeanor. [L 2005, c 187, §1; am L 2006, c 181, §7; am L 2007, c 196, §2]

COMMENTARY ON §708-823.5

Act 187, Session Laws 2005, established the misdemeanor offense of aggravated criminal property damage which applies to a person who intentionally damages the property of another without the other's consent and has two or more convictions for criminal property damage in the third or fourth degree in the preceding five years. Act 187 was designed to address the problem of graffiti in the community. Conference Committee Report No. 67, Senate Standing Committee Report No. 1362.

Act 181, Session Laws 2006, amended this section by excluding property damage caused by means of fire. Act 181 included arson as a new class of property damage and defined four degrees of the offense of arson with appropriate sanctions. The legislature found that fires that are intentionally set cause extensive damage to public and private properties and threaten lives. Conference Committee Report No. 50-06.

Act 196, Session Laws 2007, amended subsection (1) by deleting the five-year look-back period. Conference Committee Report No. 34.

" **§708-823.6 Graffiti; sentencing.** (1) Whenever a person is sentenced under section 708-821, 708-822, 708-823, or 708-823.5 for an offense in which the damage is caused by graffiti, in addition to any penalty prescribed by those sections, the person shall be required to:

(a) Remove the graffiti from the damaged property within thirty days of sentencing, if it has not already been removed and where consent from the respective property owner or owners has been obtained; and

(b) For a period of time not to exceed two years from the date of sentencing, along with any other person or persons who may be sentenced under this section for the same property, perform community service removing, within fourteen days, any graffiti applied to other property within two hundred fifty yards of the site of

the offense for which the person was sentenced, where consent from the respective property owner or owners has been obtained, even if the property was damaged by another person;

provided that removal of graffiti shall not place the person or others in physical danger nor inconvenience the public.

(2) In lieu of performing graffiti removal pursuant to subsection (1), the court may require a person to perform one hundred hours of community service if the government agency that is responsible for supervising the graffiti removal lacks the necessary resources to ensure the person's compliance with subsection (1).

(3) For purposes of this section, "graffiti" means any unauthorized drawing, inscription, figure, or mark of any type intentionally created by paint, ink, chalk, dye, or similar substances. [L 2010, c 99, §1; am L 2011, c 156, §1]

COMMENTARY ON §708-823.6

Act 99, Session Laws 2010, added this section, requiring a person sentenced for criminal property damage, where the damage is caused by graffiti, to, among other things, remove the graffiti from the damaged property and to perform community service removing graffiti on other property within one hundred yards of the site of the offense for which the person was sentenced. The legislature found that graffiti was a community-wide problem. Act 99 was intended to impose appropriate penalties to deter the property crime. Senate Standing Committee Report No. 2974, House Standing Committee Report No. 495-10.

Act 156, Session Laws 2011, amended this section by extending the area applicable to graffiti removal requirements to two hundred fifty yards of the site of the offense; limiting graffiti removal requirements to cases where the removal would not endanger the convicted person or others or inconvenience the public; and allowing the court to impose a sentence of one hundred hours of community service instead of graffiti removal, where the government agency responsible for supervising the graffiti removal lacks the necessary resources to ensure the person's compliance with the graffiti removal. When a defendant who is convicted of property damage by graffiti is sentenced to remove graffiti within the same area where the defendant defaced the property of others, a defendant performs a valuable community service while gaining a direct understanding of the time and effort required by property owners and community members to restore what may take only minutes to vandalize.

Conference Committee Report No. 53, Senate Standing Committee Report No. 1112.

" **§708-824 Failure to control widely dangerous means.** (1) A person commits the offense of failure to control widely dangerous means if, knowing that widely dangerous means are endangering life or property, the person negligently fails to take measures to prevent or mitigate the danger and:

(a) The person knows that the person is under an official, contractual, or other legal duty to take measures to prevent, control, or mitigate the danger; or

(b) The means were employed by the person or with the person's assent, or on premises in the person's custody or control.

(2) Failure to control widely dangerous means is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §708-824

This section imposes misdemeanor liability upon a person for the negligent failure to prevent or mitigate danger resulting from the use of widely dangerous means where either (a) the actor is under some legal duty to do so, or (b) the actor is actually or constructively responsible for employing such means. This offense combines the Model Penal Code's offenses of "Failure to Control or Report a Dangerous Fire" and "Failure to Prevent Catastrophe."[1] The underlying premise is that a citizen's criminal liability for potential widespread destruction arises from the citizen's tortious or contractual liability with regard to the potential harm.

Hawaii previously had no statute dealing generally with the problems of catastrophe and the mitigation of the risk thereof but rather dealt separately with various substantive acts which represented a general public danger. The only general heading under which such offenses were grouped is "common nuisance," which included such widely dangerous aspects as spreading disease, making and storing gunpowder, blasting with explosives, and keeping dangerous animals.[2] In a similar vein, however, Hawaii provided a misdemeanor sanction for the failure of any able-bodied person to help combat a fire.[3] In simplifying and combining the above-mentioned sections of the Model Penal Code, this Code fills an apparently neglected area of Hawaii law.

§708-824 Commentary:

1. M.P.C. §§220.1(3) and 220.2(3), respectively.

2. H.R.S. §727-1.

3. Id. §185-8.

" **§708-825 Criminal tampering; definitions of terms.** In sections 708-826 and 708-827:

To "tamper with" means to interfere improperly with something, meddle with it, or make unwarranted alterations in its existing condition.

"Utility" means an enterprise which provides gas, electric, steam, water or communications services, and any common carrier; it may be either publicly or privately owned or operated. [L 1972, c 9, pt of §1]

Revision Note

Numeric designations deleted and punctuation changed pursuant to §23G-15.

" **§708-826 Criminal tampering in the first degree.** (1) A person commits the offense of criminal tampering in the first degree if, and with intent to cause a substantial interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection, the person damages or tampers with, without the consent of the utility or institution, its property or facilities and thereby causes substantial interruption or impairment of service.

(2) Criminal tampering in the first degree is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

" **§708-827 Criminal tampering in the second degree.** (1) A person commits the offense of criminal tampering in the second degree if the person intentionally tampers with property of another person, without the other person's consent, with intent to cause substantial inconvenience to that person or to another.

(2) Criminal tampering in the second degree is a petty misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 1996, c 256, §3]

COMMENTARY ON §§708-825 TO 708-827

The offenses of criminal tampering are addressed to two significant problems. (1) Harm may result from meddling with, but not damaging, property which provides a service, thus altering the availability of the service. For example an electrical switch could be turned and the flow of electrical

power curtailed. (2) Slight damage to property which provides a service would not, in many cases, if handled solely as an offense of criminal property damage under §§708-820 through 823, reflect the magnitude of social harm involved.

Section 708-826 provides misdemeanor liability for the most aggravated form of tampering: intentional interference with a public utility defined in §708-825(2) to include a common carrier or an institution providing health or safety services for the purpose and with the result of causing substantial interruption or impairment of service furnished by the utility or institution.

A petty misdemeanor offense is provided by §708-827 where the circumstances are less aggravated. Under subsection (1)(a) the definition requires that the actor intend to cause substantial inconvenience; however, the offense is inchoate in the sense that the actor need not be successful. Moreover, the inconvenience need not be aimed at more than one person, and the property tampered with need not be that of a utility or institution providing protected services. Under subsection (1)(b) liability is imposed for tampering with a public utility without its consent. Actual interference with the operation of the utility need not be shown.

Previous Hawaii law contained no specific prohibitions of the sort contemplated by the present section.

" **§708-828 Criminal use of a noxious substance.** (1) A person commits the offense of criminal use of a noxious substance if the person knowingly deposits on the premises or in the vehicle of another, without the other's consent, any stink bomb or device, irritant, or offensive-smelling substance, with the intent to interfere with another's use of the premises or vehicle.

(2) Criminal use of a noxious substance is a petty misdemeanor. [L 1972, c 9, pt of §1]

COMMENTARY ON §708-828

This section recognizes that the use value of a person's property may be impaired by the use of noxious substances without the involvement of tampering (§§708-826 to 827) or actual damage (§§708-820 to 823). This form of interference with the use of property can be significantly grave to warrant the low grade of criminal sanction provided by this section.

Under previous Hawaii law, the conduct described in this section would fall within the ambit of the indiscriminately-defined offense of common nuisance.[1] The Code sharpens the

focus and definition of the offense, as it relates to noxious substances, and reduces slightly the possible penalty.

§708-828 Commentary:

1. H.R.S. §727-1.

" **§708-829 Criminal littering.** (1) A person commits the offense of criminal littering if that person knowingly places, throws, or drops litter on any public or private property or in any public or private waters, except:

(a) In a place designated by the department of health or the county for the disposal of garbage and refuse;

(b) Into a litter receptacle;

(c) Into a litter bag; provided that the bag is disposed of properly into a litter receptacle or in a place designated by the department of health or the county for the disposal of garbage and refuse.

(2) "Litter" means rubbish, refuse, waste material, garbage, trash, offal, or debris of whatever kind or description, and whether or not it is of value, and includes improperly discarded paper, metal, plastic, glass, or solid waste.

(3) Criminal littering is a petty misdemeanor.

(4) The court shall sentence any person convicted of committing the offense of criminal littering as follows:

(a) For the first offense, the person shall spend four hours of either picking up litter on public property or performing community service;

(b) For any subsequent offense, the person shall spend eight hours of either picking up litter on public property or performing community service; and

(c) The court shall fine the person convicted of committing the offense of criminal littering at least $500, but not more than $1,000.

(5) It shall be an affirmative defense that the defendant had consent of the owner in control of the property. [L 1972, c 9, pt of §1; am L 1975, c 154, §1; am L 1979, c 60, §5; am L 1985, c 97, §1; am L 1992, c 116, §3; am L 2006, c 158, §4]

Cross References

Highways, see §§291C-131 and 291C-132.
Litter control, see §§339-1 to 339-11.

COMMENTARY ON §708-829

Subsection (1) makes it an offense to knowingly place, throw, or drop litter on property or in water without the consent of the owner thereof. Litter is broadly defined in subsection (2). The offense constitutes a diminishment of the aesthetic value and enjoyment of property. Although water, e.g., a lake, pond, or stream, constitutes property, it is included separately in the definition of the offense on the theory that the greater clarity achieved is worth the minor redundancy.

The previous law only covered criminal littering insofar as it related to highways.[1] This section of the Code extends the offense to areas other than public highways. In so doing, it represents an addition. However, even as it relates to highways, the Code greatly simplifies and clarifies prior law.

SUPPLEMENTAL COMMENTARY ON §708-829

Subsection (4) was added by Act 154, Session Laws 1975. The Legislature found that the punishment for littering was often not a sufficient deterrent and concluded that requiring an offender to actually pick up litter would be more effective. Senate Standing Committee Report No. 501.

Act 60, Session Laws 1979, amended the definition of litter to conform to the definition in chapter 339.

Act 97, Session Laws 1985, amended this section to: (1) except certain conduct from the criminal littering definition; and (2) allow anyone littering property to avoid conviction by affirmatively proving that the littering is consented to by the property owner. Senate Standing Committee Report No. 609, House Standing Committee Report No. 878.

Act 116, Session Laws 1992, amended this section by establishing a minimum fine of $25 for litter violations and a penalty of four hours of litter pickup work or community service for the first offense and eight hours for any subsequent offense. The legislature felt that the setting of a minimum fine and penalty serve as a more effective deterrent than having no minimum fine and penalty. House Standing Committee Report No. 1179-92, Senate Standing Committee Report No. 461.

Act 158, Session Laws 2006, amended this section by increasing the mandatory minimum criminal fine from $25 to $500 and the mandatory maximum criminal fine from $500 to $1,000. The legislature found that many Hawaii communities suffer from serious littering problems. The problem is exacerbated by a lack of enforcement and fines for littering that are insufficient to deter violators. Act 158 added "teeth" to the littering laws and provided a substantial deterrent to litter

violators, by increasing the fines for littering. Conference Committee Report No. 61-06.

§708-829 Commentary:

1. H.R.S. §§727-4 through 727-6.

"PART IV. THEFT AND RELATED OFFENSES

§708-830 Theft. A person commits theft if the person does any of the following:

(1) Obtains or exerts unauthorized control over property. A person obtains or exerts unauthorized control over the property of another with intent to deprive the other of the property.

(2) Property obtained or control exerted through deception. A person obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property.

(3) Appropriation of property. A person obtains, or exerts control over, the property of another that the person knows to have been lost or mislaid or to have been delivered under a mistake as to the nature or amount of the property, the identity of the recipient, or other facts, and, with the intent to deprive the owner of the property, the person fails to take reasonable measures to discover and notify the owner.

(4) Obtaining services by deception. A person intentionally obtains services, known by the person to be available only for compensation, by deception, false token, or other means to avoid payment for the services. When compensation for services is ordinarily paid immediately upon the rendering of them, absconding without payment or offer to pay is prima facie evidence that the services were obtained by deception.

(5) Diversion of services. Having control over the disposition of services of another to which a person is not entitled, the person intentionally diverts those services to the person's own benefit or to the benefit of a person not entitled thereto.

(6) Failure to make required disposition of funds.

(a) A person intentionally obtains property from anyone upon an agreement, or subject to a known legal obligation, to make specified payment or other disposition, whether from the property or

its proceeds or from the person's own property reserved in equivalent amount, and deals with the property as the person's own and fails to make the required payment or disposition. It does not matter that it is impossible to identify particular property as belonging to the victim at the time of the defendant's failure to make the required payment or disposition. A person's status as an officer or employee of the government or a financial institution is prima facie evidence that the person knows the person's legal obligations with respect to making payments and other dispositions. If the officer or employee fails to pay or account upon lawful demand, or if an audit reveals a falsification of accounts, it shall be prima facie evidence that the officer or employee has intentionally dealt with the property as the officer's or employee's own.

(b) A person obtains personal services from an employee upon agreement or subject to a known legal obligation to make a payment or other disposition of funds to a third person on account of the employment, and the person intentionally fails to make the payment or disposition at the proper time.

(7) Receiving stolen property. A person intentionally receives, retains, or disposes of the property of another, knowing that it has been stolen, with intent to deprive the owner of the property. It is prima facie evidence that a person knows the property to have been stolen if, being a dealer in property of the sort received, the person acquires the property for a consideration that the person knows is far below its reasonable value.

(8) Shoplifting.

(a) A person conceals or takes possession of the goods or merchandise of any store or retail establishment, with intent to defraud.

(b) A person alters the price tag or other price marking on goods or merchandise of any store or retail establishment, with intent to defraud.

(c) A person transfers the goods or merchandise of any store or retail establishment from one container to another, with intent to defraud.

The unaltered price or name tag or other marking on goods or merchandise, duly identified photographs or

photocopies thereof, or printed register receipts shall be prima facie evidence of value and ownership of such goods or merchandise. Photographs of the goods or merchandise involved, duly identified in writing by the arresting police officer as accurately representing such goods or merchandise, shall be deemed competent evidence of the goods or merchandise involved and shall be admissible in any proceedings, hearings, and trials for shoplifting to the same extent as the goods or merchandise themselves. [L 1972, c 9, pt of §1 and c 102, §2; am L 1974, c 39, §1; am L 1979, c 106, §5; gen ch 1993; am L 2001, c 87, §1; am L 2006, c 230, §37]

Cross References

Civil liability for shoplifting, see §663A-2.

Case Notes

There was material difference between this section and theft indictment. 796 F.2d 261 (1986).

Evidence of recent and exclusive possession of stolen property if unexplained will sustain finding of guilt. 62 H. 83, 611 P.2d 595 (1980).

Particular ownership of property in question not essential element in proving crime. 65 H. 217, 649 P.2d 1138 (1982).

Receiving stolen property is a continuing offense. 65 H. 261, 650 P.2d 1358 (1982).

Section merely provides an alternate but not exclusive method establishing sufficient foundation for admissibility of photographs of stolen goods in shoplifting cases. 66 H. 97, 657 P.2d 1023 (1983).

Paragraph (6)(a) is not unconstitutionally vague or overbroad. 78 H. 127, 890 P.2d 1167 (1995).

In order to convict a defendant of theft in the second degree, in violation of §708-831(1)(b) and paragraph (8)(a), the prosecution must prove beyond a reasonable doubt that the accused intended to steal property or services valued in excess of $300. 90 H. 359, 978 P.2d 797 (1999).

For purposes of paragraph (8)(a), "any store or retail establishment" constitutes a circumstance attendant to the charged conduct, and as such, the prosecution has the burden of proving that the defendant acted with the requisite state of mind as to that element. 101 H. 389, 69 P.3d 517 (2003).

Inasmuch as the "intent to defraud" component of second degree theft by shoplifting, as defined by §708-800, prescribes two

alternative means of establishing the state of mind requisite to the offense of second degree theft by shoplifting, trial court plainly erred in failing to instruct jury as to the alternative states of mind requisite to the charged offense. 101 H. 389, 69 P.3d 517 (2003).

The alternative states of mind potentially requisite to the charged offense of second degree theft by shoplifting, as prescribed by the definition of "intent to defraud" set forth in §708-800, does not implicate a defendant's constitutional right to a unanimous jury verdict, as guaranteed by article I, §§5 and 14 of the Hawaii constitution; a proper elements instruction, which sets forth the alternative states of mind prescribed by the "intent to defraud" component of second degree theft by shoplifting, does not violate defendant's constitutional right. 101 H. 389, 69 P.3d 517 (2003).

For purposes of the tolling provisions of §701-108(3)(a), the fraudulent component of subsection (2) is the use of deception in the taking of property. 111 H. 17, 137 P.3d 331 (2006).

When the charged offense is theft by deception, as defined by paragraph (2), and the prosecution is relying on the tolling provision of §701-108(3)(a), relating to "any offense an element of which is fraud", the prosecution must not only allege the timely date or dates of commission of the offense in the indictment, but also the earliest date of the "discovery of the offense by an aggrieved party or a person who has a legal duty to represent the aggrieved party"; where indictment failed to aver the date of the earliest discovery of the alleged offenses, trial court order dismissing the indictment with prejudice affirmed. 111 H. 17, 137 P.3d 331 (2006).

Appeals court did not err in concluding that theft of state property by deception under paragraph (2) constituted a continuing offense where petitioner acted "under one general impulse" and had "but one intention and plan" to unlawfully procure public assistance from the government through a "series of acts" all directed towards the same overarching goal; thus, a specific unanimity instruction for the jury under the Hawaii constitution, article I, §§5 and 14, was unnecessary. 122 H. 271, 226 P.3d 441 (2010).

Where appeals court correctly held that defendant's theft offense under subsection (1) and §708-830.5(1)(a) required proof of a value element which defendant's federal conspiracy offense did not, and was designed to prevent a substantially different harm--the deprivation of property rights versus the threat posed by agreements to commit criminal conduct, defendant's prosecution in state court was not barred under §701-112 and the circuit court did not err in denying defendant's motion to dismiss in this respect. 126 H. 205, 269 P.3d 740 (2011).

Where State presented evidence that "a person of ordinary caution or prudence" could "believe and conscientiously entertain a strong suspicion" that the artifacts were the property of "another", including that the evidence was worth at least $800,000 and that the artifacts had been purposely secreted in the cave and not simply discarded, there was sufficient evidence to support defendant's indictment, and the circuit court did not err in denying defendant's motion to dismiss. 126 H. 205, 269 P.3d 740 (2011).

Where petitioner was charged with theft by deception in a situation involving a contract, the intent element of the crime was not met where evidence showed that petitioner performed or intended to perform petitioner's part of the contract; intent element would have only been satisfied if the petitioner intended not to perform petitioner's contractual obligations; further, subsequent breach of the contract may give rise to potential civil remedies grounded in contract law, but unless accompanied by the intent to deprive a complainant's property, the breach does not create criminal liability for theft. 129 H. 414, 301 P.3d 1255 (2013).

Phrase "whether from the property or its proceeds or from [the person's] own property reserved in equivalent amount" in paragraph (6)(a) limits application of paragraph to one of three situations specified in paragraph. 86 H. 183 (App.), 948 P.2d 604 (1997).

The law does not permit the conviction of a defendant of two counts of theft for, first, having obtained or taken an item of property and, second, for having disposed of or sold the same item of property; the taking and/or selling of one item of property is only one theft. 93 H. 22 (App.), 995 P.2d 323 (2000).

Where store security manager's testimony regarding the price/value of items, based on a universal price code with the price on the item that the manager verified through the store register system, was inadmissible hearsay, State failed to introduce substantial evidence of the value of the items necessary to support the charged offense of second or third degree theft; however, evidence was sufficient to support conviction of lesser included offense of fourth degree theft. 95 H. 169 (App.), 19 P.3d 752 (2001).

Trial court erred harmfully in excluding, pursuant to HRE rules 401 and 403, defendant's exhibit with respect to defendant's theft-by-deception charges under paragraph (2), on the grounds that defendant's analysis of the tax laws was irrelevant and that evidence of defendant's legal theories would confuse the jury, where evidence that defendant, based on defendant's understanding of the tax laws, had a good faith

belief that defendant did not owe taxes on defendant's wages was relevant to whether defendant acted by deception and whether defendant had a defense under §708-834(1). 119 H. 60 (App.), 193 P.3d 1260 (2008).

" **§708-830.5 Theft in the first degree.** (1) A person commits the offense of theft in the first degree if the person commits theft:

(a) Of property or services, the value of which exceeds $20,000;

(b) Of a firearm;

(c) Of dynamite or other explosive; or

(d) Of property or services during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster under chapter 127A, the value of which exceeds $300.

(2) Theft in the first degree is a class B felony. [L 1986, c 314, §63; am L 1992, c 289, §1; am L 1993, c 14, §1; am L 2006, c 116, §6; am L 2014, c 111, §20]

Case Notes

Where defendant returned new vehicle after 72 hour possession and prosecution was unable to prove any economic loss to car dealership, no intent to deprive dealership of significant portion of vehicle's economic value, use, or benefit. 86 H. 207, 948 P.2d 1048 (1997).

Where appeals court correctly held that defendant's theft offense under §708-830(1) and subsection (1)(a) required proof of a value element which defendant's federal conspiracy offense did not, and was designed to prevent a substantially different harm--the deprivation of property rights versus the threat posed by agreements to commit criminal conduct, defendant's prosecution in state court was not barred under §701-112 and the circuit court did not err in denying defendant's motion to dismiss in this respect. 126 H. 205, 269 P.3d 740 (2011).

Based on petitioner's performance of petitioner's part of the contract between homeowner and petitioner and the failure of the respondent State to produce evidence of the value of the work completed by petitioner, the State failed to establish that petitioner deprived homeowner of property exceeding $20,000 in value, the threshold for first degree theft. 129 H. 414, 301 P.3d 1255 (2013).

" **§708-831 Theft in the second degree.** (1) A person commits the offense of theft in the second degree if the person commits theft:

(a) Of property from the person of another;

(b) Of property or services the value of which exceeds $750;

(c) Of an aquacultural product or part thereof from premises that are fenced or enclosed in a manner designed to exclude intruders or there is prominently displayed on the premises a sign or signs sufficient to give notice and reading as follows: "Private Property", "No Trespassing", or a substantially similar message;

(d) Of agricultural equipment, supplies, or products, or part thereof, the value of which exceeds $100 but does not exceed $20,000, or of agricultural products that exceed twenty-five pounds, from premises that are fenced, enclosed, or secured in a manner designed to exclude intruders or there is prominently displayed on the premises a sign or signs sufficient to give notice and reading as follows: "Private Property", "No Trespassing", or a substantially similar message; or if at the point of entry of the premise, a crop is visible. The sign or signs, containing letters not less than two inches in height, shall be placed along the boundary line of the land in a manner and in such a position as to be clearly noticeable from outside the boundary line. Possession of agricultural products without ownership and movement certificates, when a certificate is required pursuant to chapter 145, is prima facie evidence that the products are or have been stolen; or

(e) Of agricultural commodities that are generally known to be marketed for commercial purposes. Possession of agricultural commodities without ownership and movement certificates, when a certificate is required pursuant to section 145-22, is prima facie evidence that the products are or have been stolen; provided that "agriculture commodities" has the same meaning as in section 145-21.

(2) Theft in the second degree is a class C felony. A person convicted of committing the offense of theft in the second degree under [subsection (1)](c) and (d) shall be sentenced in accordance with chapter 706, except that for the first offense, the court may impose a minimum sentence of a fine of at least $1,000 or two-fold damages sustained by the victim, whichever is greater. [L 1972, c 9, pt of §1 and c 102, §1; am L

1974, c 201, §1; am L 1975, c 158, §1; am L 1979, c 106, §6; am L 1981, c 68, §1; am L 1986, c 314, §64; am L 1987, c 176, §2; am L 1990, c 28, §3; am L 1992, c 54, §2 and c 289, §2; am L 1993, c 218, §3; am L 1998, c 228, §1; am L 2005, c 182, §3; am L 2006, c 156, §6; am L 2012, c 125, §6; am L 2016, c 231, §37]

Case Notes

Welfare fraud cases may be prosecuted under this section despite existence of §346-34. 61 H. 79, 595 P.2d 291 (1979).

History of this section and §346-34 reveals no legislative intent to limit welfare fraud prosecutions to §346-34. 62 H. 364, 616 P.2d 193 (1980).

Where there is a single intention, general impulse, and plan, there is only one offense even though there is a series of transactions. 62 H. 364, 616 P.2d 193 (1980).

Substantial direct and circumstantial evidence existed from which jury could have convicted defendant of theft in the first degree by extortion. 64 H. 65, 637 P.2d 407 (1981).

No irreconcilable conflict with unemployment fraud statute; State may proceed under either. 67 H. 406, 689 P.2d 753 (1984).

Not a lesser included offense of fraudulent use of a credit card. 70 H. 434, 774 P.2d 888 (1989).

In order to convict a defendant of theft in the second degree, in violation of §708-830(8)(a) and subsection (1)(b), the prosecution must prove beyond a reasonable doubt that the accused intended to steal property or services valued in excess of $300. 90 H. 359, 978 P.2d 797 (1999).

Where defendant testified that defendant harbored no belief at all regarding the value of the stolen property, §708-801(5) could not afford defendant a mitigating defense to second degree theft under subsection (1)(b). 90 H. 359, 978 P.2d 797 (1999).

Inasmuch as the "intent to defraud" component of second degree theft by shoplifting, as defined by §708-800, prescribes two alternative means of establishing the state of mind requisite to the offense of second degree theft by shoplifting, trial court plainly erred in failing to instruct jury as to the alternative states of mind requisite to the charged offense. 101 H. 389, 69 P.3d 517 (2003).

The alternative states of mind potentially requisite to the charged offense of second degree theft by shoplifting, as prescribed by the definition of "intent to defraud" set forth in §708-800, does not implicate a defendant's constitutional right to a unanimous jury verdict, as guaranteed by article I, §§5 and 14 of the Hawaii constitution; a proper elements instruction, which sets forth the alternative states of mind prescribed by the "intent to defraud" component of second degree theft by

shoplifting, does not violate defendant's constitutional right. 101 H. 389, 69 P.3d 517 (2003).

Trial court erred in failing to give a unanimity instruction to the jury as to the lesser included offense of theft in the second degree under this section where the only way that the jury could conclude that the evidence adduced supported a conviction on the theft II charge but not the theft I charge, would have been by rejecting some quantum of the evidence presented by respondent, and absent a unanimity instruction, it would have been impossible to know which "series of acts" resulted in the theft II conviction. 122 H. 271, 226 P.3d 441 (2010).

Valuation of stolen goods; airline tickets. 1 H. App. 644, 623 P.2d 898 (1981).

Evidence of moneys wrongfully converted, constituting violation of subsection (1)(b). 1 H. App. 658, 624 P.2d 381 (1981).

Where store security manager's testimony regarding the price/value of items, based on a universal price code with the price on the item that the manager verified through the store register system, was inadmissible hearsay, State failed to introduce substantial evidence of the value of the items necessary to support the charged offense of second or third degree theft; however, evidence was sufficient to support conviction of lesser included offense of fourth degree theft. 95 H. 169 (App.), 19 P.3d 752 (2001).

" **§708-832 Theft in the third degree.** (1) A person commits the offense of theft in the third degree if the person commits theft:

(a) Of property or services the value of which exceeds $250; or

(b) Of gasoline, diesel fuel, or other related petroleum products used as propellants of any value not exceeding $750.

(2) Theft in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1974, c 201, §2 and c 242, §2; am L 1979, c 106, §7; am L 1986, c 314, §65; am L 2006, c 230, §38; am L 2016, c 231, §38]

Case Notes

Jury instructions on the lesser included offenses of theft in the third degree under this section and theft in the fourth degree under §708-833 should have been given where jury could have found that petitioner committed theft of not only less than $20,000, but less than $300 or less than $100, making the

offenses of theft III or theft IV applicable. 122 H. 271, 226 P.3d 441 (2010).

" **§708-833 Theft in the fourth degree.** (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of $250.

(2) Theft in the fourth degree is a petty misdemeanor. [L 1972, c 9, pt of §1; am L 1986, c 314, §66; am L 2016, c 231, §39]

SUPPLEMENTAL COMMENTARY ON §§708-830 TO 708-833

Act 231, Session Laws 2016, amended §§708-831(1), 708-832(1), and 708-833(1) by raising the monetary thresholds for the offenses. The amendments implemented recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Attempt to commit theft, sufficiency of charge. 61 H. 177, 599 P.2d 285 (1979).

Jury instructions on the lesser included offenses of theft in the third degree under §708-832 and theft in the fourth degree under this section should have been given where jury could have found that petitioner committed theft of not only less than $20,000, but less than $300 or less than $100, making the offenses of theft III or theft IV applicable. 122 H. 271, 226 P.3d 441 (2010).

Adequacy of evidence for conviction. 1 H. App. 14, 611 P.2d 997 (1980).

Judgment convicting defendant of theft in fourth degree affirmed, where evidence was sufficient to support a reasonable inference that defendant intended to promote or facilitate a crime. 10 H. App. 263, 865 P.2d 944 (1994).

Where police had probable cause to arrest defendant without a warrant for fourth degree theft, a petty misdemeanor under this section, and simple trespass, a violation under §708-815, and §803-6 authorized them to cite, rather than arrest, defendant for those offenses if defendant did not have any outstanding arrest warrants, outstanding warrant check on defendant by police not unconstitutional. 91 H. 111 (App.), 979 P.2d 1137 (1999).

Where store security manager's testimony regarding the price/value of items, based on a universal price code with the price on the item that the manager verified through the store

register system, was inadmissible hearsay, State failed to introduce substantial evidence of the value of the items necessary to support the charged offense of second or third degree theft; however, evidence was sufficient to support conviction of lesser included offense of fourth degree theft. 95 H. 169 (App.), 19 P.3d 752 (2001).

Where jury convicted defendant of robbery in the first degree under §708-840, error by circuit court when it failed to instruct jury on robbery in the second degree under §708-841 and theft in the fourth degree under this section, which were included offenses of robbery in the first degree, was harmless. 123 H. 456 (App.), 235 P.3d 1168 (2010).

COMMENTARY ON §§708-830 TO 708-833

The Code follows the Model Penal Code and other recent revisions in consolidating under a single offense the traditionally distinct common-law crimes of larceny, embezzlement, obtaining by false pretenses, obtaining by trick or device, fraudulent conversion, cheating, extortion, and blackmail. Such consolidation is desirable both from the standpoint of conceptual simplicity and to eliminate pointless procedural obstacles.[1] Nonetheless, the numerous and diverse circumstances involved in individual theft offenses require that the general offense be differentiated by degrees and that the severity of the penalties authorized be correlated with the aggravating circumstances presented by the form and object of the offense. Accordingly, §708-830 provides that a person commits theft if the person engages in any of the modes of conduct specified therein, and §§708-831 through 833 divide theft into three degrees differentiated by the mode of the conduct involved and the object of the theft.

It should be noted that in all theft offenses, the requisite mental state is intent to deprive the owner of the value of property or services. Although in most instances the actor will intend to appropriate the value of property or services for the actor's own benefit, that is not the gravamen of the offense.

Obtaining or exerting unauthorized control. Section 708-830(1) is concerned with obtaining or exerting control over the property of another with intent to deprive the other of the property. A wide range of behavior is included within this definition, from stealthily and covertly treating the property of another as one's own to blatantly snatching it from the person of the owner. This definition contains elements of the traditional offenses of larceny, embezzlement, and fraudulent conversion. And, unlike the case with traditional embezzlement statutes, the relation in which the actor stands to the victim

is immaterial. Likewise, there are no limitations with regard to the trust involved in fraudulent conversion: the coverage includes property held by the actor in any capacity. All kinds of property, both real and personal, movable and immovable, are included within this definition.[2] The definition of the phrase "property of another" has previously been discussed in relation to the criminal property damage offenses of part III, and is intended to cover situations in which the actor has an interest in the property involved.[3] "Obtain" is broadly defined to mean, when used in relation to property, "to bring about a transfer of possession or other interest, whether to the obtainer or to another.[4] "Control over the property" is also broadly defined and means any exercise of dominion, including taking, possession, and sale.[5]

Deception. Section 708-830(2) covers the same kind of deprivation to a property owner as that covered in subsection (1), except that the deprivation here proscribed is accomplished by deception. Indeed, the obtaining or exerting of control may be accomplished with the owner's specific authorization. "Deception" includes any false impression for which the actor is responsible by either act or omission: a detailed definition of the term is provided by §708-800. With regard to contractual obligations, a present intent not to perform would constitute deception, although mere breach at some future time, without such present intent, would not. A specific exception is provided in the definition for matters having no pecuniary significance and for advertising claims unlikely to deceive ordinary persons.

Extortion. Section 708-830(3) covers theft by threat, i.e., extortion. "Extortion" is defined in §708-800 in some detail. This mode of theft includes some aspects of separate offenses formerly designated as extortion and blackmail. Under the Code, the threat may be either express or implied. The threat need not be to do something itself unlawful: it is the context which renders the conduct unlawful. However, not all threats made to obtain property are included. As the commentary to the Model Penal Code observes:

> A law which included all threats made for the purpose of obtaining property would embrace a large portion of accepted economic bargaining. Examples of menaces which ought not to be included are: to breach a contract, to persuade others to breach their contracts, to infringe a patent or trademark, to change a will, to refuse to do business or to cease doing business, to sue, to vote stock one way or another. For the most part these are situations in which a private property economy must tolerate considerable 'economic coercion' as an incident to free

bargaining. Civil remedies are usually adequate to deal with the abuse of the privileges. Some coercive economic bargaining may call for legal restriction by anti-trust laws, labor legislation and the like; but theft penalties would be quite inappropriate.[6]

Appropriation. Section 708-830(4) covers property over which the actor has gained control either by chance or through mistake on the part of some other person. The actor must know the property to be lost, mislaid, or mistakenly delivered. It is essential here that there be some control over, and not merely knowledge of the existence or location of, the property concerned. The requisite state of mind, intent, requires that the failure to take measures to restore the property be intentional, so that a negligent or even reckless failure in this regard would not suffice to establish liability. What measures are considered sufficient (i.e., reasonable) toward restoring the property are to be established from the viewpoint of a reasonable person in the actor's circumstances. It should be noted that, unlike the common-law offense of larceny, the actor's state of mind at the moment of finding the property is not conclusive to a determination of theft under subsection (4). The actor may, at the time of finding, intend to restore the property to its owner, subsequently decide not to, continue to exert control over the property, and thus be guilty of theft.

Obtaining services by deception or extortion. Section 708-830(5) covers theft of services, rather than property, under circumstances similar to those specified in §708-830(1) to (3). To begin with, the actor must know that the services are available only for compensation rather than gratuitously. In order to preclude spurious defenses based on a claim of intent to pay for services at a later date, a special rule of prima facie evidence is provided where payment is usually made upon receipt of service. Where compensation for services is ordinarily paid immediately upon the rendering of them, such as in the case of hotels, restaurants, and the like, absconding without payment or offer to pay is prima facie evidence that the services were obtained by deception, i.e., obtained with intent not to pay for them. The evidentiary rule is not difficult to overcome where the accused has any evidence to the contrary, but merely allows the prosecutor to get the prosecutor's case to the jury on an issue where direct proof is difficult, if not impossible, to obtain.

Diversion of services. Subsection (6) covers those cases in which the actor has authorized control over the services of another to which the actor is not entitled, and the actor diverts those services to a person not entitled thereto. This

subsection would, for instance, cover the diversion of utility services by an employee of a utility company.

Failure to make required disposition of funds. Section 708-830(7)(a) makes it theft to obtain property from anyone upon an agreement or legal obligation to make a specified payment or disposition and then to deal with the property, its proceeds, or a reserve fund from which payment was to be made, as the actor's own and to fail to make the required disposition. It is not necessary, under the Code, to identify the particular property, proceeds, or funds which the accused has appropriated and which the accused has in the accused's possession: this avoids the common-law necessity of proof of the victim's continued constructive possession. Courts have had difficulty in regarding this type of wrongful appropriation as theft because it arises out of a breach of a civil contractual obligation. The evidentiary rule, provided in this subsection, that financial institutions and government officers and employees are, prima facie, aware of their legal obligations to make certain payments and distributions is a statutory crystallization of common experience. Concomitantly, failure to pay or account upon lawful demand, or falsification of accounts, is, prima facie, evidence that the officer or employee has intentionally dealt with the property as the officer's or the employee's own. The burden of proving guilt is not affected; the evidentiary rule merely allows the prosecution to take the point to the jury.

Subsection (7)(b) is aimed at the same failure to make an agreed upon or legally required disposition of funds following receipt of personal services from an employee.

Receiving stolen property. Subsection (8) is based upon the premise that if the prosecution can demonstrate the requisite intent to deprive the owner of the owner's property, it makes little difference whether the defendant engaged in theft directly (e.g., obtained the property directly from the owner) or did so indirectly through the mediation of another person. It should be sufficient to constitute a form of theft that the actor knows that the property was stolen when the actor has control over it and that the actor intends to deprive the owner of its value. The actor may accomplish the actor's intent through receipt, retention, or disposal, all of which are acts consistent with an intent to deprive. If the actor is a dealer in the type of property received, the fact that the actor acquired the property for grossly inadequate consideration is made prima facie evidence that the actor knew of the previous theft.

Degrees of theft. The Code is in accord with the Model Penal Code and other recent revisions in grading the theft offenses

according to the mode of the theft, the object involved, and the value of the property or services stolen.[7] The gradation is based on the theory that theft from the person, or of a firearm, or of property or services of relatively high value presents greater social harm and that the actor in such cases may require greater rehabilitation efforts. Moreover, the ordinary person, insofar as value of the property or services is concerned, "feels a lesser repugnance to taking small amounts than large amounts."[8] Accordingly, the general offense has been divided into three degrees, according to the aggravations of the circumstances of the theft. With respect to value, $200 constitutes the lower limit for class C felony liability, $50 for misdemeanor liability, and any value suffices for petty misdemeanor liability.

Previous Hawaii law exhibited the profusion of theft statutes which is symptomatic of statutory enactment of the piecemeal common-law development. The consolidated theft offenses, presented by these sections, are to be preferred to the scattered coverage of the prior law. The type of conduct dealt with under the consolidated theft offenses was found in previous chapters dealing with taxes,[9] banks,[10] insurance,[11] embezzlement,[12] extortion,[13] fraudulent conveyances,[14] gross cheat,[15] larceny,[16] and receiving stolen goods.[17] An examination of those chapters, each containing numerous sections, will indicate that within certain chapters the sections were not internally consistent and that as between the chapters the provisions were not comparatively consistent.

In addition to eliminating the sheer bulk and redundancy of statutory provisions dealing with various forms of theft, the Code attempts to bring together for related treatment similar forms of conduct and to eliminate areas of possible inconsistency.

SUPPLEMENTAL COMMENTARY ON §§708-830 TO 708-833

Act 102, Session Laws 1972, amended §708-831 by adding paragraph (d). It should also be noted that when the legislature adopted the Code in 1972, it changed the Proposed Draft's recommended value amount from $500 to $200. The legislature stated:

> Your Committee has agreed to decrease the minimum dollar amount of first degree theft from $500 to $200 because the $500 figure is unwarranted, especially in light of the present law relating to larceny and to cover shoplifting and cattle rustling. Conference Committee Report No. 2.

Act 39, Session Laws 1974, amended §708-830 by adding paragraph (9). The new paragraph (9) covers a wide variety of

circumstances involved in the practice of shoplifting. The legislature was concerned with the difficulties involved in the apprehension of shoplifters. House Standing Committee Report No. 651-74, Senate Standing Committee Report No. 848-74.

Act 201, Session Laws 1974, amended §§708-831 and 708-832, relating to theft in the first degree and in the second degree respectively. The amendments provided that in the case of extortion, the penalty for theft in the first degree is a class B felony, and the penalty for theft in the second degree is a class C felony. The legislature felt that the nature of the crime of extortion and the fact that it seems to be one of the principal activities of organized crime, justify stiffer penalties for cases of theft involving extortion. House Standing Committee Report No. 420-74.

Act 242, Session Laws 1974, amended §708-832(1). The amendment provided that the siphoning or taking of gasoline diesel fuel or other petroleum products used as propellants constituted theft in the second degree. The legislature provided for a value limit of $200.

The Senate Judiciary Committee in Standing Committee Report No. 972-74 declared:

> Your Committee feels the serious situation in the community relates to all fuel and not just gasoline.... Your Committee wishes to further note that theft of more than $200 of gasoline and other related petroleum products will carry a maximum penalty of 5 years in jail and a $5,000 fine.

Act 158, Session Laws 1975, amended §708-831 by adding paragraph (e) to subsection (1). The intent of the amendment was to aid ranchers in proceeding against individuals who slaughter livestock upon their land by making such an act theft in the first degree. Senate Standing Committee Report No. 825, House Standing Committee Report No. 423.

Act 106, Session Laws 1979, amended §§708-830, 708-831, and 708-832 as part of a consolidation of laws pertaining to extortion.

Act 68, Session Laws 1981, broadened the coverage of §708-831(e). The subsection formerly made it an offense for a person to possess carcasses or meat while on fenced or enclosed premises but did not extend to situations where a person possessed live animals, or carcasses or meat in other locations.

Act 314, Session Laws 1986, amended §§708-831 to 708-833 by increasing the dollar amount of the property involved in the theft offenses. The previous figures were designated in 1972 when the Code was first codified. With the increase, the dollar amount will more accurately reflect current property values and consequently the offenses will warrant the level of culpability

intended when the offenses were originally drafted. Senate Standing Committee Report No. 820-86.

Act 54, Session Laws 1992, amended §708-831 by providing for the offense of theft in the second degree of an aquaculture product from fenced or enclosed premises to deter pilfering, since thefts from aquaculture farms may cause devastating losses to research facilities and businesses. House Standing Committee Report No. 1184-92, Senate Standing Committee Report No. 1671.

Act 289, Session Laws 1992, amended §§708-830.5 and 708-831 by upgrading the offense of theft of a firearm, dynamite, or other explosive from a class C to a class B felony. The legislature felt that the serious and hazardous nature of firearm thefts and thefts of dynamite and other explosives justified the upgrade in the penalty and classification. Conference Committee Report No. 52.

Act 14, Session Laws 1993, amended §708-830.5 by providing that theft in the first degree includes theft of services in which the value exceeds $20,000. The legislature found that this amendment was necessary to restore legislative intent and provide consistency within the penal code, in particular with §708-831, as amended by Act 314, Session Laws 1986. House Standing Committee Report No. 186, Senate Standing Committee Report No. 1065.

Act 218, Session Laws 1993, amended §708-831 to provide that persons who commit the theft of agricultural equipment, supplies, or products, under certain conditions, shall be subject to a class C felony. The legislature sought to discourage the theft of agricultural equipment, supplies, or products, finding that many agricultural enterprises in the State are isolated and subject to theft, and that losses from the island of Hawaii alone exceed $200,000 per year. Conference Committee Report No. 52.

Act 228, Session Laws 1998, amended §708-831 by making the offense of theft in the second degree of an aquaculture product or of agricultural equipment, supplies, or products subject to the requirement that the theft occur on: (a) premises that are fenced, enclosed, or secured in a manner designed to exclude intruders; or (b) premises upon which there is displayed the signage, "Private Property." The legislature realized that the costs incurred under current signage requirements pursuant to §708-831 were onerous and believed that Act 228 would reduce unnecessary costs to farmers and ranchers. Conference Committee Report No. 145.

Act 87, Session Laws 2001, amended §708-830 to allow photocopies of unaltered price or name tags, or other markings on goods or merchandise and printed register receipts as prima facie evidence regarding value and ownership in theft cases.

The legislature found that expanding §708-830(8) to include photocopies of the price tags or price markings was in conformity with rule 1003, Hawaii rules of evidence, which permits the admissibility of duplicate copies to the same extent as an original unless a genuine question is raised as to the authenticity of the original or under circumstances that it would be unfair to admit the duplicate in lieu of the original. The legislature also found that the statutory requirement for proof of value in theft cases had not kept pace with the technology of recordkeeping of merchandise stock prices. With proper evidentiary foundation, photocopies of price tags and printed register receipts are reliable evidence of value. Senate Standing Committee Report No. 714, House Standing Committee Report No. 1519.

Act 182, Session Laws 2005, amended §708-831 by providing that a person commits theft in the second degree if the person commits theft of agricultural equipment, supplies, or products, valued from over $100 and up to and including $20,000, or of agricultural products that exceed 25 pounds, from premises that are fenced, enclosed, or secured in a manner designed to exclude intruders, or there is prominently displayed on the premises a sign that provides sufficient notice and reads "Private Property." The section was also amended to provide that possession of agricultural products without ownership and movement certificates is prima facie evidence that the products are or have been stolen. Act 182 addressed the problem of agricultural theft in Hawaii by amending various provisions of Hawaii's theft laws relating to agricultural livestock and products. Conference Committee Report No. 77, Senate Standing Committee Report No. 1359.

Act 116, Session Laws 2006, amended §708-830.5, expanding the offense of theft in the first degree to include theft of property or services of more than $300, during a civil defense emergency proclaimed by the governor or during a period of disaster relief. Act 116 penalized the commission of certain crimes during a time of a civil defense emergency proclaimed by the governor or during a period of disaster relief. The legislature found that Hurricanes Katrina and Rita created situations that highlighted the prevalence of opportunistic crimes that can occur during these times. When resources are needed to restore law and order, emergency response aid to victims may be hampered or delayed, leaving victims at an increased risk of bodily injury or death. Stronger measures to control law and order may deter looting and other crimes. Senate Standing Committee Report Nos. 2938 and 3302, House Standing Committee Report No. 757-06, Conference Committee Report No. 64-06.

Act 156, Session Laws 2006, amended §708-831 by replacing the word "aquaculture" with "aquacultural" in the phrase "aquaculture product" as a conforming amendment.

Act 230, Session Laws 2006, amended §708-830 by adding the word "unauthorized" in paragraph (1) and by making other technical nonsubstantive amendments.

Act 230, Session Laws 2006, amended §708-832(1) by providing that theft of gasoline or related petroleum products valued at $300, formerly $200, constitutes theft in the third degree. House Standing Committee Report No. 665-06.

Act 125, Session Laws 2012, amended §708-831(1) by: (1) making theft of agricultural commodities generally known to be marketed for commercial purposes an offense of theft in the second degree; (2) defining agricultural commodities; (3) specifying the contents of signs to give sufficient notice to exclude intruders from a fenced or enclosed premise containing an aquacultural product or agricultural equipment, supplies, or products; and (4) including theft of agricultural equipment, supplies, or products under the offense of theft in the second degree if, at the point of entry of the premise, a crop is visible. The legislature found that agricultural theft continues to be a significant problem in the State and has resulted in millions of dollars in losses for the agricultural industry. The legislature further found that existing laws were not stringent enough to deter potential thieves. Act 125 would allow prosecutors to develop stronger cases against thieves of agricultural products and commodities. Senate Standing Committee Report Nos. 2289 and 3322.

Act 111, Session Laws 2014, which amended §708-830.5(1), updated and recodified Hawaii's emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

§§708-830 To 708-833 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 58 (1954); see also Tentative Draft No. 1, Appendix at 101-109 (1953).

2. §708-800.

3. Cf. §708-800 and supra at 25-26.

4. §708-800.

5. Cf. §708-800.

6. M.P.C., Tentative Draft No. 2, comments at 75 (1954).

7. M.P.C. §223.1(2); Prop. Mich. Rev. Cr. Code §§3206-3208.

8. M.P.C., Tentative Draft No. 2, comments at 109 (1954).

9. H.R.S. §238-6(f).

10. Id. §403-143.

11. Id. §431-397(b).

12. Id. Chapter 739.

13. Id. Chapter 741.

14. Id. Chapter 745.

15. Id. Chapter 747.

16. Id. Chapter 750.

17. Id. Chapter 761.

" **§708-833.5 Shoplifting.** A person convicted of committing theft by means of shoplifting as defined in section 708-830 shall be sentenced to the following minimum fines:

(1) In cases involving a class C felony, the minimum fine shall be four times the value or aggregate value of the property involved;

(2) In cases involving a misdemeanor, the minimum fine shall be three times the value or aggregate value of the property involved;

(3) In cases involving a petty misdemeanor, the minimum fine shall be twice the value or aggregate value of the property involved;

(4) If a person has previously been convicted of committing theft by means of shoplifting as defined in section 708-830, the minimum fine shall be doubled that specified in paragraphs (1), (2), and (3), respectively, as set forth above; provided in the event the convicted person defaults in payment of any fine, and the default was not contumacious, the court may sentence the person to community services as authorized by section 706-605(1)(d). [L 1979, c 202, §2; am L 1982, c 233, §1; am L 1986, c 314, §67; am L 2016, c 231, §40]

Cross References

Civil liability for shoplifting, see §663A-2.
Unauthorized removal of shopping carts, see §633-16.

COMMENTARY ON §708-833.5

Act 202, Session Laws 1979, established this section to provide minimum mandatory fines for shoplifting offenses, but has retained the alternative of paying fines through court ordered public service work. The legislature believed the public service work alternative preferable to the establishment of a "debtor's prison". Conference Committee Report No. 72.

Act 233, Session Laws 1982, doubled the fines on persons who repeatedly shoplift.

Act 314, Session Laws 1986, increased the dollar amounts of the property involved in the offense of shoplifting. With the increase, the dollar amounts will more accurately reflect current property values and consequently the offense will warrant the level of culpability intended when it was originally drafted. Senate Standing Committee Report No. 820-86.

Act 231, Session Laws 2016, amended this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§708-834 Defenses: unawareness of ownership; claim of right; household belongings; co-interest not a defense.** (1) It is a defense to a prosecution for theft that the defendant:

(a) Was unaware that the property or service was that of another; or

(b) Believed that the defendant was entitled to the property or services under a claim of right or that

the defendant was authorized, by the owner or by law, to obtain or exert control as the defendant did.

(2) If the owner of the property is the defendant's spouse or reciprocal beneficiary, it is a defense to a prosecution for theft of property that:

(a) The property which is obtained or over which unauthorized control is exerted constitutes household belongings; and

(b) The defendant and the defendant's spouse or reciprocal beneficiary were living together at the time of the conduct.

(3) "Household belongings" means furniture, personal effects, vehicles, money or its equivalent in amounts customarily used for household purposes, and other property usually found in and about the common dwelling and accessible to its occupants.

(4) In a prosecution for theft, it is not a defense that the defendant has an interest in the property if the owner has an interest in the property to which the defendant is not entitled. [L 1972, c 9, pt of §1; am L 1979, c 106, §8; am L 1980, c 232, §41; gen ch 1993; am L 1997, c 383, §69]

COMMENTARY ON §708-834

Both the defenses allowed under §708-834(1) are probably unnecessary in light of an informed reading of the substantive definitions of the various modes of theft. The existence of either condition (a) or (b) would relieve the actor of the culpability required to establish the offense: the actor could not have intended to deprive another of property (or refuse payment for services) unless the actor was aware that the property or services were that of another; and a claim of right, assuming that it amounts to a belief that the actor is the true owner, would not only indicate that the actor did not have the requisite mental state, it would constitute a mistake of fact defense under §702-218. The summary and restatement of this subsection is principally for purposes of clarity and emphasis.

The marital defense of subsection (2) is based upon various theories. First, the uncertainty of ownership of much household property, together with the potential bitterness of interspousal conflict, provide numerous opportunities for a miscarriage of justice.[1] Alternatively, it is said that household belongings, defined in subsection (3), constitute a kind of "common pool of wealth," and that misappropriations in this context are so generally tolerated as not to deviate substantially from socially-accepted norms. A wife who rifles her husband's wallet, or a husband who pawns his wife's jewelry,

does not present a grave danger to the community, so long as the activity is so confined. Finally, criminal courts are unsuited to handle breakdowns in the family structure of which interspousal theft complaints are only a symptom.[2]

Subsection (4) is intended to cover the situation where an aggrieved person attempts to seek an informal solution by threatening legal action unless restitution, indemnification, or compensation is made. The most significant instance of this device is the waiver of prosecution commonly offered by insurance companies in exchange for the return of valuable merchandise. The rationale here is that it is hardly fair to penalize someone for trying to recover one's own goods (or the value thereof), nor could the penal law realistically expect to suppress such natural inclinations.

Subsection (5) merely requires that the interest which the actor asserts under a claim of right must be inconsistent with that of the victim. The premise is that if the interest is not inconsistent, it does not justify the actor's possession as opposed to that of the victim. Furthermore, it is felt that "co- owners should be as well protected against the depredations of other co-owners as they are against outsiders."[3]

SUPPLEMENTAL COMMENTARY ON §708-834

Act 106, Session Laws 1979, amended this section as part of a consolidation of laws pertaining to extortion.

Act 232, Session Laws 1980, added subsection (4) and the words "co-interest not a defense" in the section heading to restore language erroneously omitted by L 1979, Act 107, §8.

Act 383, Session Laws 1997, amended this section to provide a defense to prosecution for theft of property to reciprocal beneficiaries. In establishing the status of reciprocal beneficiaries, the Act provides certain rights and benefits and represents a commitment to provide substantially similar government rights to those couples who are barred by law from marriage. Conference Committee Report No. 2.

Case Notes

Claim of right defense discussed. 62 H. 25, 608 P.2d 855 (1980).

Claim of right defense to theft under this section does not apply in a prosecution for robbery. 83 H. 264, 925 P.2d 1088 (1996).

Appeals court erred in concluding that petitioner adduced sufficient evidence to warrant instruction on a claim-of-right defense where petitioner's theory of defense warranted a general

mistake of fact instruction; a claim-of-right defense must encompass some form of pre-existing ownership or possession of specific property, and petitioner's claim of entitlement to welfare benefits was not one of "true ownership" in "specific personal property", but merely a belief in entitlement to some undefined future benefit that was never in petitioner's possession at any point prior to the alleged theft. 122 H. 271, 226 P.3d 441 (2010).

Subsection (1)(b)'s defense was not applicable to offense of unauthorized control of propelled vehicle (§708-836). 10 H. App. 200, 862 P.2d 1073 (1993).

Trial court erred harmfully in excluding, pursuant to HRE rules 401 and 403, defendant's exhibit with respect to defendant's theft-by-deception charges under §708-830(2), on the grounds that defendant's analysis of the tax laws was irrelevant and that evidence of defendant's legal theories would confuse the jury, where evidence that defendant, based on defendant's understanding of the tax laws, had a good faith belief that defendant did not owe taxes on defendant's wages was relevant to whether defendant acted by deception and whether defendant had a defense under subsection (1). 119 H. 60 (App.), 193 P.3d 1260 (2008).

§708-834 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 104 (1954).

2. Id. at 104-5.

3. See Prop. Mich. Rev. Cr. Code, comments at 246.

" **§708-835 Proof of theft offense.** A charge of an offense of theft in any degree may be proved by evidence that it was committed in any manner that would be theft under section 708-830, notwithstanding the specification of a different manner in the indictment, information, or other charge, subject only to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise. [L 1972, c 9, pt of §1]

COMMENTARY ON §708-835

As outlined in the commentary on §708-830, one of the principal reasons for the consolidation of various related common-law and statutory offenses under the single theft statute

is to eliminate pointless procedural obstacles in prosecution. The possibility of quashing a theft indictment because of variance would substantially pervert the virtue of simplicity which such consolidation seeks to achieve. Subject only to the court's power to ensure a fair trial (e.g., to ensure that the accused has adequate time and information to prepare a defense), any charge of theft may be proved by demonstration, beyond a reasonable doubt, that the accused's actions came within the definition of one of the subsections of §708-830.[1]

Case Notes

The law does not permit the conviction of a defendant of two counts of theft for, first, having obtained or taken an item of property and, second, for having disposed of or sold the same item of property; the taking and/or selling of one item of property is only one theft. 93 H. 22 (App.), 995 P.2d 323 (2000).

_____

§708-835 Commentary:

1. See generally, M.P.C., Tentative Draft No. 1, Appendix A at 101-109 (1953).

" **[§708-835.4] Unauthorized operation of a recording device in a motion picture theater.** (1) A person commits the offense of unauthorized operation of a recording device in a motion picture theater if the person knowingly operates the audiovisual recording function of any device in a motion picture theater while a motion picture is being exhibited, without the consent of the motion picture theater owner.

(2) This section shall not prevent any lawfully authorized investigative, protective, law enforcement, or intelligence-gathering employee or agent of the local, state, or federal government, from operating any audiovisual recording device in a motion picture theater as part of lawfully authorized investigative, protective, law enforcement, or intelligence-gathering activities.

(3) Unauthorized operation of a recording device in a motion picture theater is a misdemeanor.

(4) For the purposes of this section:

"Audiovisual recording function" means the capability of a device to record or transmit a motion picture or any part thereof by means of any technology.

"Motion picture theater" means a movie theater, screening room, or other venue in use primarily for the exhibition of a motion picture at the time of the offense. [L 2005, c 59, §1]

COMMENTARY ON §708-835.4

Act 59, Session Laws 2005, created the misdemeanor offense of unauthorized operation of a recording device in a motion picture theater. An exception is made for legitimate uses of audiovisual recording devices for a lawfully authorized investigative, protective, law enforcement, or intelligence-gathering employee or agent of the local, state, or federal government. The legislature found that movie piracy through unauthorized audiovisual recordings made in movie theaters has resulted in losses to the motion picture industry, including actors, producers, and distributors of motion pictures. Illicitly copied movies are illegally duplicated, packaged, and distributed across the country and abroad, further aggravating industry losses. Conference Committee Report No. 71, House Standing Committee Report No. 827.

" **§708-835.5 Theft of livestock.** (1) A person commits the offense of theft of livestock if the person commits theft by:

(a) Having in the person's possession a live animal of the bovine, equine, swine, sheep, or goat species, or its carcass or meat, while in or upon premises that the person knowingly entered or remained unlawfully in or upon, and that are fenced or enclosed in a manner designed to exclude intruders; or

(b) Having in the person's possession a live animal, carcass, or meat in any other location.

(2) Possession of livestock without a livestock ownership and movement certificate, when a certificate is required pursuant to section 142-49, is prima facie evidence that the livestock is or has been stolen.

(3) Theft of livestock is a class C felony.

(4) A person convicted of committing the offense of theft of livestock shall be sentenced in accordance with chapter 706, except that for a first offense the court shall impose a minimum sentence of a fine of at least $1,000 or restitution, whichever is greater. [L 1990, c 28, §1; am L 2005, c 182, §4; am L 2006, c 230, §39]

COMMENTARY ON §708-835.5

Act 28, Session Laws 1990, added this section to specify the minimum sentences for this class C felony. House Standing Committee Report No. 78-90.

Act 182, Session Laws 2005, amended this section by establishing that possession of livestock without a livestock ownership and movement certificate is prima facie evidence that the livestock is or has been stolen. Act 182 addressed the problem of agricultural theft in Hawaii by amending various provisions of Hawaii's theft laws relating to agricultural livestock and products. Conference Committee Report No. 77, Senate Standing Committee Report No. 1359.

Act 230, Session Laws 2006, amended subsection (1) by adding goats to the types of live animal or meat, the theft of which constitutes theft of livestock. House Standing Committee Report No. 665-06.

" **[§708-835.55] Theft; agricultural product; sentencing.** (1) Whenever a person is sentenced under sections 708-830.5, 708-831, 708-832, or 708-833, for an offense involving theft of an agricultural product or commodity, in addition to any penalty prescribed by those sections, the person shall be required to make payment to the property owner for:

(a) The value of the stolen agricultural product or commodity, pursuant to section 706-646; and

(b) The cost of replanting the agricultural product or commodity.

(2) For purposes of this section, "agricultural product or commodity" includes:

(a) Floricultural, horticultural, viticultural, aquacultural, forestry products or commodities; and

(b) Shrubbery, nuts, coffee, seeds, and other farm or plantation products or commodities,

whether for personal or commercial use. [L 2012, c 125, §1]

COMMENTARY ON §708-835.55

Act 125, Session Laws 2012, added this section, requiring persons sentenced for theft in the first, second, third, or fourth degree for an offense involving theft of an agricultural product or commodity to pay restitution to the victim in an amount equal to the value of what was stolen and the cost of replanting. The legislature found that agricultural theft continues to be a significant problem in the State and has resulted in millions of dollars in losses for the agricultural industry. The legislature further found that existing laws were not stringent enough to deter potential thieves. Act 125 would allow prosecutors to develop stronger cases against thieves of

agricultural products and commodities. Senate Standing Committee Report No. 2289, Senate Standing Committee Report No. 3322.

" **[§708-835.6] Telemarketing fraud.** (1) A person commits the offense of telemarketing fraud if, with intent to defraud or misrepresent, that person obtains or attempts to obtain the transfer of possession, control, or ownership of the property of another through communications conducted at least in part by telephone and involving direct or implied claims that the person contacted:

(a) Will or is about to receive anything of value; or

(b) May be able to recover any losses suffered by the person contacted in connection with a prize promotion.

(2) Telemarketing fraud is a class B felony. In addition, any property used or intended for use in the commission of, attempt to commit, or conspiracy to commit telemarketing fraud, or that facilitated or assisted this activity, shall be forfeited subject to chapter 712A.

(3) For purposes of this section, "telemarketing" means a plan, program, or campaign, including a prize promotion or investment opportunity, that:

(a) Is conducted to include the purchase of goods or services or to solicit funds or contributions by use of one or more telephones; and

(b) Involves more than one telephone call. [L 2001, c 277, §1]

COMMENTARY ON §708-835.6

Act 277, Session Laws 2001, added this section to create a criminal offense of telemarketing fraud, involving use at least in part of a telephone and direct or implied claims of receiving anything of value or of recovering losses from a prize promotion. Act 277 also provides for forfeiture of property used in the commission of the crime.

The legislature found telemarketing fraud to be one of the fastest growing forms of fraud in the United States. Telemarketers often target older citizens, knowing many of them have significant assets from a lifetime of saving. Act 277 is part of a larger effort to combat this serious crime and to protect consumers from unscrupulous practices. Act 277 allows Hawaii to increase its efforts and provide greater protection to its citizens from unscrupulous telemarketing practices. Senate Standing Committee Report No. 809, House Standing Committee Report No. 1128.

" **[§708-835.7] Theft of copper.** (1) A person commits the offense of theft of copper if the person commits theft of copper that weighs a pound or more, but not including legal tender of the United States.

(2) Theft of copper is a class C felony. [L 2007, c 197, §§2, 7; am L 2009, c 44, §1]

Cross References

Scrap dealer requirements, see chapter 445, pt X.

COMMENTARY ON §708-835.7

Act 197, Session Laws 2007, established theft of copper as a felony offense, to deter the theft of copper. The offense applies to copper weighing a pound or more. Act 197 has a sunset date of July 1, 2009. Conference Committee Report No. 70.

Act 44, Session Laws 2009, made permanent the offense of theft of copper, as well as the documentation requirements for the sale of copper to scrap metal dealers and related penalties. The legislature found that the prohibitions, record-keeping requirements, and penalties in the current law had proven effective at deterring the theft of copper and should be made permanent. Senate Standing Committee Report No. 1240.

" **[§708-835.8] Theft of beer keg.** (1) A person commits the offense of theft of beer keg if the person commits theft of a beer keg.

(2) For the purposes of this section, "beer keg" means a metal container used to hold five gallons or more of liquid that is stamped, engraved, stenciled, or otherwise marked with the name of a brewery manufacturer; provided that a deposit beverage container, as defined under section 342G-101, shall not be considered a beer keg.

(3) Theft of beer keg is a misdemeanor. [L 2008, c 53, §§1, 6; am L 2009, c 44, §2]

Cross References

Scrap dealer requirements, see chapter 445, pt X.

COMMENTARY ON §708-835.8

Act 53, Session Laws 2008, added this section, establishing the misdemeanor offense of theft of a beer keg. Metal beer kegs were being stolen at escalating rates, largely because they can

be redeemed for fast cash at scrap dealerships. House Standing Committee Report Nos. 1113-08 and 1671-08.

Act 44, Session Laws 2009, made permanent the prohibition against stealing beer kegs and the documentation requirements for scrap metal dealers. The legislature found that the prohibitions, record-keeping requirements, and penalties in the current law had proven effective at deterring the theft of beer kegs and should be made permanent. Senate Standing Committee Report No. 1240.

" **[§708-835.9] Theft of urn.** (1) A person commits the offense of theft of urn if the person:

(a) Obtains an urn through any means described in section 708-830; or

(b) Violates section 445-233 in regard to an urn.

(2) For the purposes of this section, "urn" means a container that is or has been used to hold human ashes.

(3) Theft of urn is a class C felony. [L 2016, c 199, §1]

Cross References

Scrap dealer requirements, see chapter 445, part X.

COMMENTARY ON §708-835.9

Act 199, Session Laws 2016, added this section, establishing the offense of theft of an urn, which includes obtaining an urn through any means described under the offense of theft under §708-830 or violating the statement requirements of scrap dealers under §445-233, as a class C felony. The legislature found that Act 199 would help to prevent persons from stealing urns from cemeteries, especially for the metal redemption value of the urns. Senate Standing Committee Report No. 3463, Conference Committee Report No. 60-16.

" **§708-836 Unauthorized control of propelled vehicle.** (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to a prosecution under this section that the defendant:

(a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or

(b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

(5) Unauthorized control of a propelled vehicle is a class C felony. [L 1972, c 9, pt of §1; am L 1974, c 38, §1; gen ch 1993; am L 1996, c 195, §2; am L 1999, c 11, §1; am L 2001, c 87, §2]

COMMENTARY ON §708-836

[Section 708-836 was amended by Act 38, Session Laws 1974. See Supplemental Commentary on §708-836. The Commentary below was based on the original version in the Proposed Draft.]

This section is intended to deal with the special case of "joy riding," where the vehicle is returned in undamaged condition, and the temporary borrowing is just for the pleasure (or convenience) of operating the vehicle. The offense is a relatively mild one, and, as it is generally committed by youngsters, the penalty is set at the misdemeanor level. Note that the unauthorized control over the vehicle must be operation of the vehicle: the use of the vehicle as a shelter, for example, ought not to come within the prohibition of this section.[1] The prevalence of "joy riding" predominantly relates to motor-propelled vehicles, and the Code limits this special offense of misappropriation to such property. The misdemeanor sanction is felt too severe to apply to other forms of unauthorized use of personal property unless other aggravating attendant circumstances are present.

The affirmative defense allowed under subsection (3) is felt necessary to "exempt from criminal liability a good deal of informal borrowing of automobiles by members of the same household or friends of the owner."[2]

Previously Hawaii had no statute dealing specifically with the problem of unauthorized use of a propelled vehicle. Instead, such cases were prosecuted as the offense of "malicious conversion"[3] which covered any

unauthorized moving, taking, carrying away, or converting, no matter how temporary. The offense was punishable by a possible fine of $1000 or term of imprisonment of five years or both. The distinction provided by this part, and the reduction proposed in this section, represent needed changes in Hawaii law.

SUPPLEMENTAL COMMENTARY ON §708-836

Act 38, Session Laws 1974, amended this section to refer to the unauthorized "control," rather than unauthorized "operation" of a propelled vehicle. The penalty for the offense was raised from a misdemeanor to a class C felony, and the offense was broadened to include the situation where a change in the identity of the vehicle is made without the owner's consent.

Act 195, Session Laws 1996, amended this section by amending the definition of "owner," for purposes of this section, and by amending the affirmative defense, to provide an affirmative defense to a person who had authorization to use the vehicle from an agent of the owner and to a lien holder or legal owner of the propelled vehicle, or authorized agent, engaged in lawful repossession of the propelled vehicle. The legislature found that the current affirmative defense, together with the current definition of "owner" (in §708-800) as a person having possession of the vehicle even when the possession is unlawful, provided an unintended loophole for defendants, who could avoid conviction by alleging that a "friend" loaned the vehicle to the defendants. Senate Standing Committee Report No. 1659, Conference Committee Report No. 61.

Act 11, Session Laws 1999, amended this section by amending the state of mind required for the offense of unauthorized control of propelled vehicle to include a knowing state of mind. The legislature found that in the prosecution of a charge of unauthorized control of propelled vehicle the State must prove that the defendant intentionally exerted unauthorized control over the vehicle. Consequently, the State may be unable to prove guilt beyond a reasonable doubt when the defendant claims that the defendant thought the defendant had permission from another person whom the defendant believed to be the owner or the agent of the automobile owner. The inclusion of the "knowing" state of mind to the offense would address this problem. House Standing Committee Report No. 1459.

Act 87, Session Laws 2001, established the legal owner as the owner of a vehicle that has no registered owner under this section. The legislature found that there was a gap in the definition of "owner" in the offense of unauthorized control of propelled vehicle. Current law limited "owner" to the

registered owner or unrecorded owner pending transfer. The amendments to the definition of "owner" were necessary to cover propelled vehicles that are not required to be registered, such as golf carts or construction equipment. Senate Standing Committee Report No. 714, House Standing Committee Report No. 1519.

Case Notes

Section covers defendant's unauthorized use of truck for defendant's convenience; evidence sufficient to sustain conviction. 789 F.2d 1364 (1986).

Officer had probable cause to believe defendant was an accomplice where: (1) car's license plate and "punched" ignition were located in such places that would suggest defendant knew vehicle was stolen; and (2) defendant and car driver were parked at a house whose owner knew defendant but not the driver, suggesting that defendant assisted in the decision to park at the house, thereby aiding or attempting to aid driver's commission of an unauthorized control of a propelled vehicle (UCPV) violation; thus evidence was sufficient to provide more than a mere suspicion that defendant committed the offense of UCPV either as a principal or accomplice. 109 H. 84, 123 P.3d 679 (2005).

Because this section does not "plainly appear" to render its specified state of mind inapplicable to the authorization element, the intentional or knowing states of mind apply to the authorization element; thus, a defendant prosecuted under this section may assert the mistake-of-fact defense under §702-218 with respect to the authorization element, where defendant claims that defendant mistakenly believed that the person who authorized defendant's operation of the vehicle was the vehicle's registered owner, because such a belief would potentially negative the state of mind required to establish the authorization element of the offense. 117 H. 235, 178 P.3d 1 (2008).

Section 708-834(1)(b)'s defense was not applicable to offense. 10 H. App. 200, 862 P.2d 1073 (1993).

Section only requires proof that the defendant's intentional conduct was to accomplish at least one of two objectives, that is, to operate the vehicle or to change the identity of the vehicle without having obtained the owner's consent in either event. 93 H. 344 (App.), 3 P.3d 510 (2000).

Under this section, proving that a person operated another's propelled vehicle without the owner's consent also necessarily establishes that the person "exerted unauthorized control" over the vehicle. 110 H. 386 (App.), 133 P.3d 815 (2006).

There was substantial evidence to convict defendant under this section where truck owner testified that owner called police to report truck missing and that owner had not given anyone permission to drive it, did not know, nor give permission to defendant to drive it, arresting officer testified that after officer stopped truck, check on patrol car's computer indicated that truck was stolen, and witness testified that witness saw defendant drive truck earlier that day. 112 H. 192 (App.), 145 P.3d 735 (2006).

There was sufficient evidence to convict defendant of unauthorized control of a propelled vehicle under this section where defendant testified that defendant drove the van, and victim testified that the van belonged to victim and victim had not given defendant permission to drive the van. 123 H. 456 (App.), 235 P.3d 1168 (2010).

Cited: State v. Ferreira, 56 H. 107, 530 P.2d 5 (1974).

Discussed: 86 H. 207, 948 P.2d 1048 (1997).

Mentioned: 753 F. Supp. 2d 1092 (2010).

_____

§708-836 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 89 (1954). However, §§708-803 and 804 cover the situation.

2. M.P.C., Proposed Official Draft, notes at 174 (1962).

3. H.R.S. §752-1.

" **§708-836.5 Unauthorized entry into motor vehicle in the first degree.** (1) A person commits the offense of unauthorized entry into motor vehicle in the first degree if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle, without being invited, licensed, or otherwise authorized to enter or remain within the vehicle, with the intent to commit a crime against a person or against property rights.

(2) Unauthorized entry into motor vehicle in the first degree is a class C felony. [L 1996, c 87, §2; am L 2006, c 230, §40]

Cross References

Interference with the operator of a public transit vehicle, see §711-1112.

COMMENTARY ON §708-836.5

Act 87, Session Laws 1996, added this section to the Penal Code and made the offense of unauthorized entry into motor vehicle a class C felony due to the increased number of car thefts in the State. Senate Standing Committee Report No. 2598.

Act 230, Session Laws 2006, amended this section to create the offense of unauthorized entry into motor vehicle in the first degree.

Case Notes

Appellant asserted that appellant's conviction for unauthorized entry into a motor vehicle was improper because applicable federal statutes governed, thereby precluding this statute from being assimilated into federal law; affirmed. 392 F.3d 1050 (2004).

Specifying the particular crime intended to be committed is not an essential element which must be alleged in order to charge the crime of unauthorized entry into motor vehicle. 97 H. 492, 40 P.3d 894 (2002).

For the purposes of this section, "entry" is defined as the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body introduced for the purpose of committing a crime against a person or against property rights. 100 H. 383, 60 P.3d 333 (2002).

" **[§708-836.6] Unauthorized entry into motor vehicle in the second degree.** (1) A person commits the offense of unauthorized entry into a motor vehicle in the second degree if the person intentionally or knowingly enters into a motor vehicle without being invited, licensed, or otherwise authorized to do so.

(2) Unauthorized entry into a motor vehicle in the second degree is a misdemeanor. [L 2006, c 230, §3]

COMMENTARY ON §708-836.6

Act 230, Session Laws 2006, added the misdemeanor crime of unauthorized entry into motor vehicle in the second degree. House Standing Committee Report No. 665-06.

" **[§708-837] Failure to return a rental motor vehicle; penalty.** [(1)] A person commits the offense of failure to return a rental motor vehicle when he intentionally does not return the motor vehicle to the person, or his agent, from whom the vehicle was rented within forty-eight hours after the time

stated on the rental agreement, unless the person renting the vehicle gives notice that he will not be able to return the vehicle in the stated time and extends the time in which the vehicle will be returned.

[(2)] Failure to return a rental motor vehicle is a misdemeanor. [L 1973, c 63, §1]

COMMENTARY ON §708-837

This section was added by Act 63, Session Laws 1973, "to provide an incentive to a person who rents a motor vehicle to return it to its lawful owner." House Standing Committee Report No. 821.

The Committee Report further states that "rental agencies have been plagued for a number of years with overdue and abandoned vehicles. Presently, there is no legal means available to compel a person to return the vehicle when it is overdue. This proposed bill would make it a misdemeanor if a person intentionally fails to return a rental motor vehicle."

Case Notes

Where police stopped defendant's rental car after they had received a report from the car's owner that the car was overdue, police had reasonable suspicion to stop the car, even if the report turned out to be mistaken due to its timing, because the police were acting on a police report from the car's owner, whose honesty had not been questioned. 241 F.3d 1124 (2001).

Mentioned: 86 H. 207, 948 P.2d 1048 (1997).

" **[§708-837.5] Failure to return leased or rented personal property; penalty.** [(1)] A person commits the offense of failure to return leased or rented personal property other than a rental motor vehicle, when he knowingly or intentionally does not return the leased or rented personal property to the person, or his agent, from whom the personal property was leased or rented within fourteen days after the return date stated in the lease or rental contract, unless the person leasing or renting the personal property gives notice that he will not be able to return the leased or rented personal property by the date stated and with the permission of the owner of the property or his agent extends the date by which the personal property will be returned.

[(2)] Failure to return leased or rented personal property is a petty misdemeanor. [L 1980, c 171, §6]

Cross References

As to civil remedies, see §§603-29, 604-6.2, and 633-8.

COMMENTARY ON §708-837.5

Act 171, Session Laws 1980, enacted this section as part of a package of penal sanctions and civil remedies intended "to provide an effective means for businesses, which have rented personal property to others, to obtain speedy and rightful return of their property while respecting the rights of persons who have leased the property." Conference Committee Report No. 37-80 (57-80).

" **§708-838 Removal of identification marks.** A person commits the offense of removal of identification marks if

(1) The person defaces, erases, or otherwise alters any serial number or identification mark placed or inscribed by the manufacturer, or

(2) The person knowingly, to conceal the true ownership of the property of another, defaces, erases, or otherwise alters any serial number or identification mark placed or inscribed

on any bicycle, movable or immovable construction tool or equipment, appliance, merchandise, or other article for the purpose of identifying the bicycle, movable or immovable tool or equipment, appliance, merchandise or other article or its component parts, with a value of more than $50. A person removes identification marks if the person attempts to or succeeds in erasing, defacing, altering, or removing a serial number or identification mark or part thereof, on the property of another.

Removal of identification marks is a misdemeanor. [L 1973, c 72, pt of §2; am L 1977, c 27, §1]

" **§708-839 Unlawful possession.** It shall be unlawful for any person to possess any bicycle, movable construction tool or equipment, appliance, merchandise, or other article, or any part thereof

(1) Where the serial number or identification mark placed on the same by the manufacturer for the purpose of identification, or

(2) Knowing the serial number or identification mark placed on the same for the purpose of identification, has been erased, altered, changed or removed for the purpose of changing the identity of the foregoing items.

Unlawful possession is a misdemeanor. [L 1973, c 72, pt of §2; am L 1977, c 27, §2]

COMMENTARY ON §§708-838 AND 708-839

Act 72, Session Laws 1973, added these two new sections to the Code. These sections prohibit the defacing, removal, or alteration of any factory or owner identification mark or serial number from any merchandise on which the same has been inscribed or marked, and thereby provide more effective protection to the public from theft and traffic of stolen merchandise.

The Senate Consumer Protection Committee in Standing Committee Report No. 802 stated:

> Police are hampered many times in their efforts to identify and recover stolen merchandise because the serial numbers or the identification marks are removed or obliterated. These marks are removed to frustrate the police and so that the thieves can resell the items. The resale of untraceable firearms is a practice which directly contributes to violent crimes in the community.

SUPPLEMENTAL COMMENTARY ON §§708-838 AND 708-839

Act 27, Session Laws 1977, amended these sections to provide for two classes of identification marks--those placed by manufacturers and those affixed by others--and to differentiate the mental aspect required for the imposition of liability as to each class. Section 708-838, as amended, thus seeks to impose liability for altering manufacturer's marks without requiring any specific intent. But for altering other marks, it requires acting "knowingly, to conceal the true ownership of the property of another." Similarly §708-839, as now amended, intends to impose liability for the mere possession of the merchandise where merchandise with altered manufacturer's marks are involved, but to require possession with knowledge of the alteration where other marks are concerned. House Standing Committee Report No. 873.

In addition, Act 27 deleted all references to firearms from these sections, the offense of removing identification marks from firearms being covered by §134-10.

" **[§708-839.5] Theft of utility services.** (1) For purposes of this section:

"Customer" means the person in whose name the utility service is provided.

"Divert" means to change the intended course or path of utility services without the authorization or consent of the utility.

"Person" means any individual, partnership, firm, association, corporation, or other legal entity.

"Reconnection" means the reconnection of utility service by a customer or other person after service has been lawfully disconnected by the utility.

"Utility" means any public utility as defined in section 269-1, that provides electricity, gas, or water services.

"Utility service" means the provision of electricity, gas, water, or any other service provided by the utility for compensation.

(2) A person commits the offense of theft of utility services if the person, with intent to obtain utility services for the person's own or another's use without paying the full lawful charge therefor, or with intent to deprive any utility of any part of the full lawful charge for utility services it provides, commits, authorizes, solicits, aids, or abets any of the following:

(a) Diverts, or causes to be diverted utility services, by any means whatsoever;

(b) Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function;

(c) Makes or causes to be made any connection or reconnection with property owned or used by the utility to provide utility services, without the authorization or consent of the utility; or

(d) Uses or receives the direct benefit of all or a portion of utility services with knowledge or reason to believe that a diversion, prevention of accurate measuring function, or unauthorized connection existed at the time of use or that the use or receipt was otherwise without the authorization or consent of the utility.

(3) In any prosecution under this section, the presence of any of the following objects, circumstances, or conditions on premises controlled by the customer, or by the person using or receiving the direct benefit of all or a portion of utility services obtained in violation of this section, shall create a rebuttable presumption that the customer or person intended to and did violate this section:

(a) Any instrument, apparatus, or device primarily designed to be used to obtain utility services without paying the full lawful charge therefor; or

(b) Any meter that has been diverted or prevented from accurately performing its measuring function so as to cause no measurement or inaccurate measurement of utility services.

(4) A person commits the offense of theft of utility services in the first degree in cases where the theft:

(a) Accrues to the benefit of any commercial trade or business, including any commercial trade or business operating in a residence, home, or dwelling;

(b) Is obtained through the services of a person hired to commit the theft of utility services; in which event, both the person hired and the person responsible for the hiring shall be punished under this section as a class C felony; or

(c) Accrues to the benefit of a residence, home, or dwelling where the value of the theft of utility services exceeds $750.

Theft of utility services in the first degree is a class C felony, and shall be sentenced in accordance with chapter 706, except that for a first offense the court shall impose a minimum sentence of a fine of at least $1,000 or two times the value of the theft, whichever is greater.

(5) A person commits theft of utility services in the second degree if the person commits theft of utility services other than as provided in subsection (4). Theft of utility services in the second degree is a misdemeanor and shall be sentenced in accordance with chapter 706, except that for a first offense the court shall impose a minimum sentence of a fine of $500, with an increase of $500 for each succeeding conviction under this subsection. [L 1996, c 256, §2; am L 2016, c 231, §41]

COMMENTARY ON §708-839.5

Act 256, Session Laws 1996, added this section, which establishes and defines the crime of theft of utility services. The legislature recognized that theft of utility services was widespread throughout the utility industry, that utility companies often spread the loss of revenues from the thefts to rate payers, and that attempting to steal utility services can pose a threat of physical injury to innocent persons and the thief. The legislature also acknowledged that current theft statutes do not specifically provide for thefts of utility services. The legislature found that a new type of theft needed to be established to deter the theft of utility services. House Standing Committee Report No. 1519-96, Senate Standing Committee Report No. 2062.

Act 231, Session Laws 2016, amended subsection (4) by raising the monetary threshold for the offense. The amendment implemented recommendations made by the Penal Code Review

Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **[§708-839.55] Unauthorized possession of confidential personal information.** (1) A person commits the offense of unauthorized possession of confidential personal information if that person intentionally or knowingly possesses, without authorization, any confidential personal information of another in any form, including but not limited to mail, physical documents, identification cards, or information stored in digital form.

(2) It is an affirmative defense that the person who possessed the confidential personal information of another did so under the reasonable belief that the person in possession was authorized by law or by the consent of the other person to possess the confidential personal information.

(3) Unauthorized possession of confidential personal information is a class C felony. [L 2006, c 139, §2]

COMMENTARY ON §708-839.55

Act 139, Session Laws 2006, added this section to increase the protection of personal information by making it a class C felony to intentionally or knowingly possess the confidential information of another without authorization. Hawaii law enforcement has found it difficult to curb the rise in identity theft-related crimes when identity thieves in possession of personal information who have not yet caused a monetary loss to the victim cannot be prosecuted for crimes other than petty misdemeanor thefts. The legislature found that adding a law to make intentionally or knowingly possessing the confidential information of another without authorization a class C felony would help to deter identity theft crimes. Senate Standing Committee Report No. 2636, Conference Committee Report No. 111-06.

Case Notes

Defendant's conduct caused or threatened the harm or evil sought to be prevented by this section where defendant had been in possession of complainant's confidential personal information since an unspecified time when the two were neighbors and had used the information to attempt to avoid arrest on two known occasions. Had defendant not been arrested, defendant would have had a continuing opportunity to utilize complainant's confidential personal information; accordingly, defendant's possession of complainant's confidential personal information

implicated the precise harm the legislature sought to avoid in enacting this section. 129 H. 172, 297 P.3d 188 (2013).

Where the plain, obvious, and unambiguous meaning of this section merely requires intentional or knowing unauthorized possession of confidential personal information and there is no statutory language requiring that the confidential personal information actually be used to impersonate another person in order to constitute the offense, and to require "impersonation" would be contrary to the legislature's manifest intent to criminalize mere unauthorized possession, the circuit court erred in its construction of this section. 125 H. 172 (App.), 254 P.3d 483 (2011).

" **[§708-839.6] Identity theft in the first degree.** (1) A person commits the offense of identity theft in the first degree if that person makes or causes to be made, either directly or indirectly, a transmission of any personal information of another by any oral statement, any written statement, or any statement conveyed by any electronic means, with the intent to:

(a) Facilitate the commission of a murder in any degree, a class A felony, kidnapping, unlawful imprisonment in any degree, extortion in any degree, any offense under chapter 134, criminal property damage in the first or second degree, escape in any degree, any offense under part VI of chapter 710, any offense under section 711-1103, or any offense under chapter 842; or

(b) Commit the offense of theft in the first degree from the person whose personal information is used, or from any other person or entity.

(2) Identity theft in the first degree is a class A felony. [L 2002, c 224, pt of §1]

Cross References

Protection of personal information, civil remedies, see chapters 487J, 487N, and 487R.

Retail merchant club card requirements, see chapter 487D.

" **[§708-839.7] Identity theft in the second degree.** (1) A person commits the offense of identity theft in the second degree if that person makes or causes to be made, either directly or indirectly, a transmission of any personal information of another by any oral statement, any written statement, or any statement conveyed by any electronic means, with the intent to commit the offense of theft in the second degree from any person or entity.

(2) Identity theft in the second degree is a class B felony. [L 2002, c 224, pt of §1]

Case Notes

The phrase "transmission of any personal information of another" prohibits the transmission of personal information of an actual person, but not the transmission of information associated with a fictitious person; where defendant did not transmit the personal information of an actual person, defendant did not satisfy the conduct element of this section and could not be convicted of identity theft in the second degree. 120 H. 387, 206 P.3d 841 (2009).

" **[§708-839.8] Identity theft in the third degree.** (1) A person commits the offense of identity theft in the third degree if that person makes or causes to be made, either directly or indirectly, a transmission of any personal information of another by any oral statement, any written statement, or any statement conveyed by any electronic means, with the intent to commit the offense of theft in the third or fourth degree from any person or entity.

(2) Identity theft in the third degree is a class C felony. [L 2002, c 224, pt of §1]

Case Notes

As this section does not require impersonation of a person in order to constitute the offense, only the transmission of a person's personal information with the intent to commit the specified theft offense, the circuit court erred in its construction of this section. 125 H. 172 (App.), 254 P.3d 483 (2011).

COMMENTARY ON §§708-839.6 TO 708-839.8

Act 224, Session Laws 2002, added these sections to provide criminal penalties for persons who commit identity theft of another individual. The legislature found that misappropriation of personal identification information was on the rise. Act 224 addresses the criminal conduct associated with intentional identity theft. Conference Committee Report No. 25-02.

"PART V. ROBBERY

§708-840 Robbery in the first degree. (1) A person commits the offense of robbery in the first degree if, in the

course of committing theft or non-consensual taking of a motor vehicle:

(a) The person attempts to kill another or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another;

(b) The person is armed with a dangerous instrument or a simulated firearm and:

(i) The person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance; or

(ii) The person threatens the imminent use of force against the person of anyone present with intent to compel acquiescence to the taking of or escaping with the property;

(c) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster; or

(d) The person threatens the imminent use of force against the person of anyone present with intent to compel acquiescence to the taking of or escaping with the property during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster.

(2) As used in this section:

"Dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

"Simulated firearm" means any object that:

(a) Substantially resembles a firearm;

(b) Can reasonably be perceived to be a firearm; or

(c) Is used or brandished as a firearm.

(3) Robbery in the first degree is a class A felony. [L 1972, c 9, pt of §1; am L 1983, c 68, §1; am L 1986, c 314, §68; gen ch 1993; am L 1998, c 68, §1; am L 2006, c 116, §7 and c 230, §41; am L 2013, c 255, §2; am L 2014, c 111, §21]

Case Notes

Act of violence or intimidation need not be done for very purpose of taking the property to constitute robbery. 56 H. 343, 537 P.2d 724 (1975).

In absence of evidence that gun was not loaded or capable of being fired, an inference exists that it was capable of inflicting the harm which the robber threatened and was a dangerous instrument within this section. 57 H. 150, 552 P.2d 357 (1976).

Whether instrument used in robbery is a dangerous instrument is a question of fact for jury to resolve. 57 H. 365, 556 P.2d 569 (1976).

Assault by person armed with dangerous instrument with intent to rob is within subsection (1)(b)(i). 59 H. 148, 577 P.2d 793 (1978).

Accomplice. 62 H. 25, 608 P.2d 855 (1980).

Applicability of claim of right defense. 62 H. 25, 608 P.2d 855 (1980).

An unloaded gun as a dangerous instrument. 63 H. 405, 629 P.2d 626 (1981).

Threatened use of force against several persons did not constitute more than one count of robbery. 65 H. 156, 648 P.2d 197 (1982); 4 H. App. 573, 670 P.2d 1290 (1983).

Firearms are per se dangerous weapons. 69 H. 44, 731 P.2d 1261 (1987).

Jury instruction should have stated that if jury found defendant committed attempted murder and robbery concurrently, it need not render two verdicts. 70 H. 618, 780 P.2d 1097 (1989).

Defendant convicted of both kidnapping and robbery because crimes did not occur concurrently. 71 H. 46, 781 P.2d 662 (1989).

Trial judge erred in refusing to instruct jury regarding the possible merger of the robbery and kidnapping counts against defendant. 77 H. 17, 881 P.2d 504 (1994).

First degree burglary not an included offense of first degree robbery. 81 H. 309, 916 P.2d 1210 (1996).

Theft and attempted theft, regardless of degree, are included offenses of first degree robbery. 81 H. 309, 916 P.2d 1210 (1996).

A victim's awareness of the theft is a necessary element of robbery pursuant to subsection (1)(b)(ii). 86 H. 37, 947 P.2d 349 (1997).

Where defendant's conviction and sentence under this section was an included offense under §134-6(a) and defendant's convictions under both §134-4(a) and this section violated §701-109(1)(a), defendant's conviction and sentence under this section reversed. 91 H. 33, 979 P.2d 1059 (1999).

Where defendant's convictions were premised upon the use of "any firearm" and language of indictments and trial court's instructions "to wit, a semiautomatic pistol" did not alter the

statutory elements of §§134-6, 134-7, or this section, trial court's error of not providing definition of "semiautomatic firearm" did not warrant reversal of convictions of first degree robbery, carrying or use of firearm in commission of separate felony, or felon in possession of firearm. 91 H. 33, 979 P.2d 1059 (1999).

As subsection (1)(b)(i) does not require that a defendant use force in order to compel another person to acquiesce in his or her taking of property, it is not an element of the offense that the person against whom the defendant is alleged to have used force, or the owner of the property, be aware of the theft; thus, trial court did not err in failing to instruct the jury that the "victim" of the theft--whether the person against whom force was used or the owner of the property taken--must be aware of the theft. 99 H. 390, 56 P.3d 692 (2002).

Whether a loaded pellet pistol is a dangerous instrument is a question of fact. 1 H. App. 481, 620 P.2d 1087 (1980).

Where defendant did not use force in the course of committing theft, no first degree robbery committed within meaning of paragraph (1)(b)(i). 9 H. App. 263, 833 P.2d 902 (1992).

Instructions constituted plain error, where (1) court instructed jury that a knife is a dangerous instrument; and (2) instruction defined the imminent use of force. 9 H. App. 628, 859 P.2d 925 (1993).

Where there was substantial evidence that the manner in which the "little black stick" was used was capable of producing serious bodily injury as defined under §707-700, minor was properly convicted as an accomplice to robbery in the first degree under this section. 107 H. 439 (App.), 114 P.3d 945 (2005).

As robbery in the first degree under subsection (1)(b)(ii) does not include the element required under §708-810(1)(c) for burglary in the first degree of intentionally entering or remaining unlawfully in a building, it was possible for defendant to commit robbery in the first degree without committing burglary in the first degree; thus the crimes are not included in each other and do not merge. 109 H. 327 (App.), 126 P.3d 370 (2005).

There was sufficient evidence to convict defendant of robbery in the first degree under this section where, inter alia, victim testified at trial that when defendant's brother put a knife to victim's neck and asked for victim's money, defendant held down victim's hands, and that both asked the victim where the victim's money was. 123 H. 456 (App.), 235 P.3d 1168 (2010).

Where jury convicted defendant of robbery in the first degree under this section, error by circuit court when it failed to instruct jury on robbery in the second degree under §708-841 and

theft in the fourth degree under §708-833, which were included offenses of robbery in the first degree, was harmless. 123 H. 456 (App.), 235 P.3d 1168 (2010).

" **§708-841 Robbery in the second degree.** (1) A person commits the offense of robbery in the second degree if, in the course of committing theft or non-consensual taking of a motor vehicle:

(a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance;

(b) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property; or

(c) The person recklessly inflicts serious bodily injury upon another.

(2) Robbery in the second degree is a class B felony. [L 1972, c 9, pt of §1; am L 1983, c 68, §2; am L 1986, c 314, §69; gen ch 1993; am L 2006, c 230, §42]

Case Notes

Circuit court's failure to give a specific unanimity instruction that the jury was required to agree unanimously as to the person against whom defendant used force constituted plain error and there was at least a reasonable possibility that the circuit court's error contributed to defendant's conviction; thus, the error was not harmless beyond a reasonable doubt. 131 H. 19, 313 P.2d 708 (2013).

Under §701-109(1)(c), petitioner could not be convicted of both robbery in the second degree and assault in the first degree; the jury inconsistently found that petitioner intentionally or knowingly and recklessly inflicted serious bodily injury on complainant. 131 H. 353, 319 P.3d 272 (2013).

Where petitioner, convicted of robbery in the second degree and assault in the first degree (§707-710), could not be convicted of both offenses, the assault conviction was reversed; among other things, there was sufficient evidence to convict petitioner as to robbery in the second degree and because the penalties for the robbery and assault convictions are the same, it could not be said that petitioner would be prejudiced by dismissal of the assault charge. 131 H. 353, 319 P.3d 272 (2013).

Evidence of threat of force held sufficient. 2 H. App. 259, 630 P.2d 126 (1981).

Where jury convicted defendant of robbery in the first degree under §708-840, error by circuit court when it failed to instruct jury on robbery in the second degree under this section and theft in the fourth degree under §708-833, which were included offenses of robbery in the first degree, was harmless. 123 H. 456 (App.), 235 P.3d 1168 (2010).

COMMENTARY ON §§708-840 AND 708-841

Basically, robbery appears to consist of both theft and threatened or actual assault. It is significant to note, however, that the theft acts as an incentive to the threatened use of force. Thus the combination of these two criminal activities has a multiplicative, rather than a simple additive effect. This increased risk of harm is one reason why robbery is treated as a separate offense and more severely penalized than the sum of its simple components would seem to indicate.[1] Another reason which has been advanced for the separate treatment of robbery is that the average citizen feels a special degree of affront at the prospect of having his possessions taken through the threat or use of force.[2] In a slightly different vein, it has also been suggested that such an offender "exhibits himself as seriously deviated from community norms, requiring more extensive incapacitation and retraining."[3]

When the legislature adopted the Code in 1972, it consolidated the Proposed Draft's three degrees of robbery into two degrees. The simple threat or use of force or the reckless infliction of serious bodily injury in the commission of a theft constitutes robbery in the second degree and carries a class B felony sanction. Where the person committing the above acts is armed with a dangerous instrument, or intentionally inflicts serious bodily harm, or attempts to kill, the offense is increased to the first degree and its sanction to a class A felony.

Previous Hawaii law also recognized two degrees of robbery. Robbery was defined as the "stealing of a thing from the person of another or from his custody or presence, by force or putting him in fear."[4] Robbery in the first degree was robbery by one armed with a dangerous weapon who injured another in committing the robbery or who, if resisted, intended to kill or injure another.[5] All other robbery was second degree robbery.[6] Thus, the Code's definitions of the offenses are substantively similar to those of prior Hawaii law; however, the Code's definitions are more inclusive than prior law and are linguistically correlated with the theft offenses.

SUPPLEMENTAL COMMENTARY ON §§708-840 AND 708-841

Act 68, Session Laws 1983, amended §§708-840 and 708-841 so that a person could be charged with robbery if that person, in committing theft, used force intended to overcome any person's resistance. This amendment was believed necessary because often a property owner is not present when force is used to take that owner's property. In that case, under prior law the person forcibly taking the property could not have been charged with robbery. Senate Standing Committee Report No. 788.

Act 68, Session Laws 1998, amended §708-840 by including in the offense of robbery in the first degree, situations where a person knowingly inflicts or attempts to inflict serious bodily injury on another in the course of committing a theft. The legislature believed that since robbery was essentially an assault committed during the course of a theft, the statutory scheme involving the highest degree of robbery, robbery in the first degree, should be consistent with that of the assault statutes, and thus, robbery in the first degree should include both the intentional and knowing states of mind. Act 68 made the offense of robbery in the first degree consistent with the offense of assault in the first degree. House Standing Committee Report No. 1231-98.

Act 116, Session Laws 2006, amended §708-840, expanding the offense of robbery in the first degree to include using force to commit a theft or threatening imminent use of force against a person during a time of civil defense emergency or during a period of disaster relief. Act 116 penalized the commission of certain crimes during a time of a civil defense emergency proclaimed by the governor or during a period of disaster relief. The legislature found that Hurricanes Katrina and Rita created situations that highlighted the prevalence of opportunistic crimes that can occur during these times. When resources are needed to restore law and order, emergency response aid to victims may be hampered or delayed, leaving victims at an increased risk of bodily injury or death. Stronger measures to control law and order may deter looting and other crimes. Senate Standing Committee Report Nos. 2938 and 3302, Conference Committee Report No. 64-06.

Act 230, Session Laws 2006, amended §§708-840(1) and 708-841(1) by establishing motor vehicle theft as part of the offenses of robbery in the first and second degrees, respectively. House Standing Committee Report No. 665-06.

Act 255, Session Laws 2013, amended §708-840(1) and (2) to include the use of a simulated firearm in the offense of robbery in the first degree. The legislature found that simulated firearms are becoming increasingly difficult to discern from real firearms and as a result, simulated firearms are being used to commit serious criminal offenses. The victims in these

crimes believe that the weapons are real and are terrorized when threatened with one. Under existing law, if the weapon is not a real firearm, the suspect cannot be charged with the higher offense of robbery in the first degree and the charge is reduced to a misdemeanor. Senate Standing Committee Report No. 488, House Standing Committee Report No. 1231.

Act 111, Session Laws 2014, which amended §708-840(1), updated and recodified Hawaii's emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

§§708-840 And 708-841 Commentary:

1. See Prop. Mich. Rev. Cr. Code, comments at 256.

2. M.P.C., Tentative Draft No. 11, comments at 69 (1960).

3. Id.

4. H.R.S. §765-1.

5. Id. §765-8.

6. Id.

" **§708-842 Robbery; "in the course of committing a theft".** An act shall be deemed "in the course of committing a theft or non-consensual taking of a motor vehicle" if it occurs in an attempt to commit theft or non-consensual taking of a motor vehicle, in the commission of theft or non-consensual taking of a motor vehicle, or in the flight after the attempt or commission. [L 1972, c 9, pt of §1; am L 2006, c 230, §43]

COMMENTARY ON §708-842

The nature and operation of this section is concisely explained by the Model Penal Code:

> This provision is unusual only insofar as it makes classification of robbery depend in part on behavior after the theft might be said to have been accomplished. The thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the theft had there been need for it. No rule-of-thumb is proposed to delimit the time and space of "flight," which should be interpreted in accordance with the rationale. The concept of "fresh pursuit" will be helpful in suggesting realistic bounds between the occasion of the theft and a later occasion when the escaped thief is apprehended.[1]

Previous Hawaii statutory law failed to provide a standard for the determination of the duration of the "theft" aspect of a robbery--a standard which is needed in order to determine when the employment of force or threatened force converts the "theft" into a "robbery."

SUPPLEMENTAL COMMENTARY ON §708-842

Act 230, Session Laws 2006, established motor vehicle theft as part of the offenses of robbery in the first and second degrees. House Standing Committee Report No. 665-06. Act 230 amended this section to conform to the amendments made to the offenses of robbery in the first and second degrees.

Case Notes

Theft and attempted theft, regardless of degree, are included offenses of first degree robbery. 81 H. 309, 916 P.2d 1210 (1996).

Force was not used "in the course of committing theft" where force used was while defendant was returning stolen liquor bottle to store owner. 9 H. App. 263, 833 P.2d 902 (1992).

---

§708-842 Commentary:

1. M.P.C., Tentative Draft No. 11, comments at 70 (1960).

"PART VI. FORGERY AND RELATED OFFENSES

§708-850 Definitions of terms in this part. In this part, unless a different meaning plainly is required:

"Complete written instrument" means a written instrument which purports to be genuine and fully drawn with respect to every essential feature thereof.

"Falsely alter", in relation to a written instrument, means to change, without the authority of the ostensible maker, drawer, or issuing commercial establishment, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker, authorized by the maker, or issuing commercial establishment.

"Falsely complete", in relation to a written instrument, means to transform, by adding, inserting, or changing matter, an incomplete written instrument into a complete one, without the authority of the ostensible maker, drawer, or issuing commercial establishment, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker[,] authorized by the maker, or issuing commercial establishment.

"Falsely endorse", in relation to a written instrument, means to endorse, without the authority of the ostensible maker, drawer, or issuing commercial establishment, any part of a written instrument, whether complete or incomplete, so that the written instrument so endorsed falsely appears or purports to be authorized by the ostensible maker, drawer, or issuing commercial establishment.

"Falsely make", in relation to a written instrument, means to make or draw a complete written instrument, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker or issuing commercial establishment, but which is not either because the ostensible maker, or issuing commercial establishment is fictitious or because, if real, the same did not authorize the making or drawing thereof.

"Forged instrument" means a written instrument which has been falsely made, completed, endorsed, or altered.

"Fraudulently encode magnetic ink character recognition numbers", in relation to a written instrument, means to change, alter, erase, add, create, tamper with, or manipulate the magnetic ink character recognition numbers, or symbols representing to be magnetic ink character recognition numbers, from the issuing commercial establishment.

"Incomplete written instrument" means a written instrument which contains some matter by way of content or authentication

but which requires additional matter in order to render it a complete written instrument.

"Utter", in relation to a forged instrument, means to offer, whether accepted or not, a forged instrument with representation by acts or words, oral or in writing, that the instrument is genuine.

"Written instrument" means:

(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or

(b) Any token, coin, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification. [L 1972, c 9, pt of §1; am L 1988, c 155, §1; am L 1993, c 13, §1; gen ch 1993; am L 1997, c 243, §1]

Revision Note

Numeric designations deleted and definitions rearranged pursuant to §23G-15.

COMMENTARY ON §708-850

Section 708-850 provides definitions of terms used repeatedly throughout this part; it does not specify any offense. A discussion of the definitions, when called for, is found in the commentary on the sections employing the terms defined.

SUPPLEMENTAL COMMENTARY ON §708-850

Act 155, Session Laws 1988, added the term "falsely endorses" to this section. Previously, forging a written instrument did not include false endorsements as a method of forging a written instrument; therefore, false endorsement was prosecuted as a theft. House Standing Committee Report No. 467-88.

Act 13, Session Laws 1993, amended the definition of "forged instrument" to specify that a false endorsement is a method of forging a written instrument. The legislature found that this amendment added clarity and consistency to definitions regarding forgery and related offenses in the Penal Code, and was also consistent with the legislative intent as established in Act 155, Session Laws 1988, which included false endorsement as a method of committing the offense of forgery to strengthen the existing forgery laws at that time. House Standing Committee Report No. 84, Senate Standing Committee Report No. 1064.

Act 243, Session Laws 1997, made it an offense of forgery if a person fraudulently encoded the magnetic ink character recognition numbers on a written instrument. The Act amended

this section by adding a definition for "fraudulently encode magnetic ink character recognition numbers". The Act also amended this section by adding "issuing commercial establishment" to the class of issuers protected from forgery, false making, false completion, false altering, and false endorsement.

The legislature found that increasingly advanced technology has changed the way in which commercial paper can be handled between parties. One of the technological changes involved the use of magnetic character recognition numbers that enable scanners to quickly obtain information from the document. Changing the magnetic codes effectively tells the scanner different information than that intended, making it a forgery in fact, if not in name. However, that type of document alteration was not currently prohibited by law. The legislature found that the Act would protect parties in that type of situation. Senate Standing Committee Report No. 1551, House Standing Committee Report No. 987.

Case Notes

"Falsely complete": in a prosecution for forgery, the element of completing a check without authority of the ostensible drawer may be proven by circumstantial evidence. 79 H. 175 (App.), 900 P.2d 172 (1995).

" **§708-851 Forgery in the first degree.** (1) A person commits the offense of forgery in the first degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument, or fraudulently encodes the magnetic ink character recognition numbers, which is or purports to be, or which is calculated to become or to represent if completed:

(a) Part of an issue of stamps, securities, or other valuable instruments issued by a government or governmental agency; or

(b) Part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property.

(2) Forgery in the first degree is a class B felony. [L 1972, c 9, pt of §1; am L 1988, c 155, §2; gen ch 1992; am L 1997, c 243, §2]

" **§708-852 Forgery in the second degree.** (1) A person commits the offense of forgery in the second degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged

instrument, or fraudulently encodes the magnetic ink character recognition numbers, which is or purports to be, or which is calculated to become or to represent if completed, a deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

(2) Forgery in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1988, c 155, §3; gen ch 1992; am L 1997, c 243, §3]

Case Notes

Charges in indictment held sufficient though inarticulately drawn. 55 H. 621, 525 P.2d 571 (1974).

There was substantial evidence which a reasonable mind might accept as adequate to convict defendant. 79 H. 175 (App.), 900 P.2d 172 (1995).

" **§708-853 Forgery in the third degree.** (1) A person commits the offense of forgery in the third degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument.

(2) Forgery in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1988, c 155, §4; gen ch 1992]

COMMENTARY ON §§708-851 TO 708-853

As the drafters of the Model Penal Code noted, a revision of the criminal law which deals effectively with theft, fraud, attempt, and complicity diminishes the need for a separate offense of forgery. However, as in the case of the M.P.C.,

> We retain forgery as a distinct offense partly because the concept is so embedded in statute and popular understanding that it would be inconvenient and unlikely that any legislature would completely abandon it, and partly in recognition of the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce, and of perpetrating large scale frauds.[1]

The Code establishes three degrees of forgery. The simple and least serious offense is forgery in the third degree, and involves the false making, completion, or alteration of any written instrument. The requisite state of mind is an "intent to defraud," which is specially defined to include knowledge that the actor is facilitating injury to the valuable interest of another, as well as intent to accomplish such injury.[2]

"Written instrument" is broadly defined by §708-850(1) to include not only written or printed matter, but also coins, stamps, badges, seals, etc., which are evidence of value, right, privilege, or identification. Falsely making, falsely completing, and falsely altering a written instrument are also specifically defined in subsections 708-850(4), (5), and (6), respectively: the essential common element is that the final product falsely purports to be an authentic creation of its ostensible maker. Because truly serious forgeries are dealt with under the offenses of first or second degree forgery, forgery in the third degree is made a misdemeanor.

If the forged instrument is one which affects a legal right or interest, the offense is considered forgery in the second degree, and the sanction is increased to a class C felony. This category includes wills, deeds, contractual instruments, and generally all negotiable instruments and instruments relating to secured transactions.[3] These instruments are more stringently protected because of (1) the greater potential for individual harm which may generally result from the forgery of such instruments, and (2) the serious business and economic disruptions which would result from the undermining of public confidence in such matters.

Forgery, in any of its forms, of governmental or corporate financial issues or instruments, constitutes a class B felony. Impairment of public confidence in instruments or symbols of commerce could have disastrous effect upon governmental processes and the economy in general and clearly represents the most aggravated form of forgery. It is significant, in this regard, that such instruments were the first to be protected by the common law of forgery.[4] Moreover, it is felt that an additional danger exists since the average citizen cannot easily protect oneself against skillfully made forgeries of this kind; and professional criminals are most likely to concentrate on forging such instruments. Note that a forgery in the first degree must appear as part of a series. Thus, for example, only stocks, bonds, stamps, and securities which represent part of a larger issue fall within the definition of this offense. How many individual instruments constitute an issue is a matter left to case-by-case judicial interpretation.[5]

The Code's definition of the simple offense of forgery is nearly identical to that found in prior Hawaii law: "Forgery is the fraudulent making or altering a [sic] writing with the intent to deceive another and prejudice him in some right."[6] Moreover, Hawaii recognized two degrees of forgery. Forgery of a deed of conveyance, lease, promissory note, bill of exchange, due bill, check, order, and the like, involving a value of $100 or more, was roughly equivalent to the Code's forgery in the

second degree, but drew a sentence similar to the Code's class B felony. All other forgery was forgery in the second degree and carried a sentence similar to the Code's class C felony. It is felt that the Code's gradation, solely according to the kind of instrument forged, is more indicative of the actual and potential degree of public and private harm involved. Moreover, the division of the offense into three degrees provides for more equitable treatment of forgery offenders.

Hawaii law previously provided an extraordinary penalty for repeated forgery offenses in the form of an additional sentence up to one-half the maximum allowed for last conviction.[7] Such severe treatment is rather difficult to justify rationally, and is found in neither the Model Penal Code nor the recent revisions of other states. The Code omits such selective sentencing provisions. The problem of habitual offenders is dealt with generally under chapter 706 (Disposition of Convicted Defendants).

SUPPLEMENTAL COMMENTARY ON §§708-851 TO 708-853

Act 155, Session Laws 1988, added the term "endorses" to these sections. Previously, forging a written instrument did not include false endorsements as a method of forging a written instrument; therefore, false endorsement was prosecuted as a theft. False endorsement, as a theft charge, carried a lighter sentence than forgery. The legislature felt the inclusion of false endorsements in these sections would strengthen the existing forgery laws. House Standing Committee Report No. 467-88, Senate Standing Committee Report No. 2550.

Act 243, Session Laws 1997, amended §§708-851 and 708-852 by making it an offense of forgery to fraudulently encode magnetic ink character recognition numbers on a written instrument. The legislature found that increasingly advanced technology has changed the way in which commercial paper can be handled between parties. One of the technological changes involved the use of magnetic character recognition numbers that enable scanners to quickly obtain information from the document. Changing the magnetic codes effectively tells the scanner different information than that intended, making it a forgery in fact, if not in name. However, that type of document alteration was not currently prohibited by law. The legislature found that the Act would protect parties in that type of situation. Senate Standing Committee Report No. 1551, House Standing Committee Report No. 987.

---

§§708-851 To 708-853 Commentary:

1. M.P.C., Tentative Draft No. 11, comments at 80 (1960).

2. Cf. §708-800.

3. Prop. Mich. Rev. Cr. Code, comments at 266.

4. M.P.C., Tentative Draft No. 11, comments at 78-79 (1960).

5. Prop. Mich. Rev. Cr. Code, comments at 266.

6. H.R.S. §743-1.

7. Id. §743-10.

" **§708-854 Criminal possession of a forgery device.** (1) A person commits the offense of criminal possession of a forgery device if:

(a) The person makes or possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed or adapted for use in forging written instruments; or

(b) The person makes or possesses any device, apparatus, equipment, or article capable of or adaptable to use in forging written instruments with intent to use it oneself, or to aid or permit another to use it, for purposes of forgery.

(2) Criminal possession of a forgery device is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §708-854

This section punishes the making or possession of (a) a device specifically adapted for forgery, which has no other significant use, and the character of which is known to the actor, or (b) a device which may be adapted to forgery, where the actor has an intent so to employ the article (or aid in its employment).

Like the section dealing with possession of burglar's tools, this section provides a basis for police intervention at the inchoate or preparatory stage of criminal activity. Note, however, that in order to establish the offense the prosecution must prove the requisite state of knowledge or intent.

" **§708-855 Criminal simulation.** (1) A person commits the offense of criminal simulation if, with intent to defraud, the person makes, alters, or utters any object, so that it appears

to have an antiquity, rarity, source, or authorship that it does not in fact possess.

(2) In subsection (1), "utter" means to offer, whether accepted or not, an object with representation by acts or words, oral or in writing, relating to its antiquity, rarity, source, or authorship.

(3) Criminal simulation is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §708-855

The special case of objects which have value not for what they represent, but for what they are (e.g., antiques, works of art, rare natural objects, etc.), is dealt with separately from the forgery offenses. Cases of falsification as it relates to such objects are treated separately because (a) commercial and economic repercussions are not likely to extend significantly beyond the individuals involved in the transaction, (b) there exists no danger of undermining a substantial and necessary public confidence in a medium of commerce, and (c), with regard to the typically unusual, one-of-a-kind, items and transactions involved, a given individual is both more likely and more able to protect oneself against the offender.

Previous Hawaii law had no provisions equivalent to criminal simulation.

" **§708-856 Obtaining signature by deception.** (1) A person commits the offense of obtaining a signature by deception if, with intent to defraud, the person:

(a) Causes another, by deception, to sign or execute a written instrument; or

(b) Utters the written instrument specified in [paragraph] (a).

(2) Obtaining a signature by deception is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §708-856

The conduct proscribed by this section does not constitute forgery, but is typically preparatory to theft by deception. A signature is not "property" within the meaning of §708-800, and hence cannot be the subject of a theft provision. Nor does forgery cover the result, since the instrument is precisely what it purports to be, i.e., an authentic creation of its ostensible maker. But since the individual culpability and probable results of such actions are so little distinguishable from those of forgery, it is felt that a penalty commensurate with that for

the lowest forgery offense (forgery in the third degree, §708-853) ought to attach to obtaining a signature by deception. Note that the requisite intent to defraud, as defined in §708-800, is the same as that required for the forgery offenses.

" **§708-857 Negotiating a worthless negotiable instrument.** (1) A person commits the offense of negotiating a worthless negotiable instrument if that person intentionally issues or negotiates a negotiable instrument knowing that it will not be honored by the maker or drawee.

(2) For the purpose of this section, as well as in any prosecution for theft committed by means of a worthless negotiable instrument, either of the following shall be prima facie evidence that the drawer knew that the negotiable instrument would not be honored upon presentation:

(a) The drawer had no account with the drawee at the time the negotiable instrument was negotiated; or

(b) Payment was refused by the drawee for lack of funds upon presentation within thirty days after date or issue, whichever is later, and the drawer failed to make good within ten days after actual receipt of a notice of dishonor, as defined in section 490:3-503.

(3) The definitions of the following terms shall apply to this section:

"Issue" as defined in section 490:3-105.

"Negotiable instrument" as defined in section 490:3-104.

"Negotiation" as defined in section 490:3-201.

(4) Negotiating a worthless negotiable instrument is a misdemeanor. [L 1972, c 9, pt of §1; am L 1993, c 33, §2]

Revision Note

In subsection (3), paragraph designations deleted and punctuation changed pursuant to §23G-15.

COMMENTARY ON §708-857

This section is concerned with the passage of worthless negotiable instruments where the actor has knowledge that the instrument will not be honored. Originally, bad check legislation was necessitated by the common-law limitations on promissory fraud: misrepresentation of a future fact was not sufficient to establish theft by deception. Such artificial distinctions are largely obviated by the definition of "deception" used in the Code's theft provisions.[1] As noted in the comments to the Proposed Michigan Code,

> the elimination of the promissory fraud doctrine thus eliminates the need for a bad check statute in its traditional form. This might suggest that there is no point served in continuing a bad check statute in the Draft. In answer, the statute can serve a useful purpose when the merchant or bank that is in fact defrauded does not wish to prosecute but the bank on which the bad check is drawn does.[2]

This section, moreover, protects the prevailing system of negotiable paper in addition to those individuals involved in a given case. Since emphasis in "bad check" cases ought to be placed upon the theft, rather than on the bad check itself, the sanction provided for this offense is relatively mild, i.e., a misdemeanor, and the grade of the offense does not, as in the case of theft offenses, vary according to the amount involved.

The incorporation of the Uniform Commercial Code's definitions of "issue," "negotiable instrument," and "negotiation" in subsection (3), is intended to insure that in this area, where protection of commercial transactions are reinforced with criminal sanctions, the civil and penal law are closely correlated. The use of the U.C.C.'s definition of "negotiation" insures that the indorser with knowledge or expectation of ultimate nonpayment, as well as the drawer, with such knowledge or expectation, will be covered.

Under the evidentiary rules established in subsection (2), the prosecution fulfills its initial burden of proving intent by demonstrating, beyond a reasonable doubt, either that the issuer had no account with the drawee, or that such an instrument was not made good within ten days of receipt of notice of dishonor. Again, the definitions of the Uniform Commercial Code are used for both convenience and uniformity. Note, however, the modifications toward leniency necessitated in adapting a civil statute to criminal use: actual, rather than constructive, receipt of notice of dishonor is required before the time in which the actor must make good begins to run. The time period required by subsection (2)(b) does not prevent prosecution before the time has elapsed, but only denies to the prosecution the benefit of that particular evidentiary provision before the stated time has elapsed.

Previous Hawaii law defined this offense similarly, except that Hawaii law required an intent to defraud.[3] The Code provides that knowledge of insufficient funds is adequate culpability for the imposition of this penalty. Moreover, distinguishing such knowledge from an intent to defraud introduces conceptual niceties of questionable value. Hawaii law also recognized both the prima facie evidence of the requisite culpability based upon insufficient funds and failure

to correct the insufficiency within five days.[4] The Code attempts to better correlate this offense, both in language and substance, with the civil law relating to negotiable instruments.

SUPPLEMENTAL COMMENTARY ON §708-857

Act 33, Session Laws 1993, amended this section by updating cross references to article 3 of the Uniform Commercial Code, which was repealed and replaced by Act 118, Session Laws 1991. House Standing Committee Report No. 513, Senate Standing Committee Report No. 1068.

Case Notes

Section construed as permitting but not compelling the inference of guilt under subsection (2)(b). 57 H. 526, 560 P.2d 110 (1977).

§708-857 Commentary:

1. §708-800.

2. Prop. Mich. Rev. Cr. Code, comments at 276.

3. H.R.S. §744-1.

4. Id. §744-3.

" **§708-858 Suppressing a testamentary or recordable instrument.** (1) A person commits the offense of suppressing a testamentary instrument if, with intent to defraud, the person destroys, removes, or conceals any will, codicil, or other testamentary instrument.

(2) A person commits the offense of suppressing a recordable instrument if, with intent to defraud, the person destroys, removes, or conceals any deed, mortgage, security instrument, or other written instrument for which the law provides public recording.

(3) Each offense defined in this section is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §708-858

This section makes it a class C felony to destroy, remove, or conceal certain testamentary instruments or instruments for

which the law provides recording. Despite the overlapping coverage, to some extent, with offenses of criminal property damage (§§708-820 to 823), there exists certain additional incidence of harm because the destruction of a will or a deed, for example, could have substantially the same effect as forgery if the destruction gave efficacy to a prior document and the grantor or testator refused or was unable to remedy the situation. This additional element of harm is the principal reason for the present section.

Previous Hawaii law did not recognize suppressing a testamentary or recordable instrument as a separate criminal offense.

"PART VII. BUSINESS AND COMMERCIAL FRAUDS

§708-870 Deceptive business practices. (1) A person commits the offense of deceptive business practices if in the course of engaging in a business, occupation, or profession the person knowingly or recklessly:

(a) Uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity;

(b) Sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service;

(c) Takes or attempts to take more than the represented quantity of any commodity or service when as buyer the person furnishes the weight or measure;

(d) Sells or offers for sale adulterated commodities; or

(e) Sells or offers or exposes for sale mislabeled commodities.

(2) "Adulterated" means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage.

(3) "Mislabeled" means:

(a) Varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage; or

(b) Represented as being another person's product, though otherwise labeled accurately as to quality and quantity.

(4) Deceptive business practices is a misdemeanor.

(5) This section does not apply to deceptive business practices, as defined in subsection (1), for which a specific

penalty is provided by a statute other than this Code. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (1)(b) and (c), "or" deleted pursuant to §23G-15.

COMMENTARY ON §708-870

This section proscribes knowingly or recklessly engaging in certain business practices likely to deceive customers or clients. The basic purpose of the section is to provide a single punishment and simple definition for various offenses related to false weights and measures, adulteration, and mislabeling of commodities.

This section is not intended as detailed regulation of the subject area, but rather only to control the criminal penalties utilized to enforce legislation dealing with deceptive business practices. However, recognizing the tremendous body of law specifically regulating various deceptive business practices and the questionable wisdom of a wholesale modification of that body of law, subsection (5) is included to provide that this section shall not apply where statutes outside the Code specifically provide a penalty for the deceptive practice involved. It should be emphasized that criminal sanctions in this area are an extreme measure, and generally not as effective an enforcement tool as statutory licensing, injunction, and private actions.[1]

Subsection (1) defines the offense and is largely self-explanatory. It should be noted, with respect to the state of mind required for conviction, that although (1) recklessness is a lower level of culpability than acting knowingly, and (2) there is a slight redundancy in including the word "knowingly" in the definition of the offense,[2] the clarity of language that is achieved is worth the technical redundancy. Unlike the theft offenses, there is no requirement that (1) defendant obtain property or services, (2) that the defendant obtain by deception, or (3) that the defendant act intentionally. The definitions in subsections (2) and (3) are also self-explanatory. However, it should be pointed out, that all current regulatory standards are included by reference. Where no statutory or regulatory standards exist, it becomes encumbent upon the prosecution to prove a violation of established commercial usage.

Previous Hawaii law contained many penal provisions for deceptive business practices within Title 38 of the Hawaii Revised Statutes dealing with crimes. Most deceptive practices

were covered in the chapter on "Gross Cheat." The penalties in this chapter did not treat similar conduct equally.

The same anomalies will continue to occur in general regulatory provisions. Deceptive business practices relating to gasoline, fuel, and motor oil warrant a $500 fine or six months' imprisonment or both.[3] For selling other than "pure quality" liquor the available sanction is the same,[4] but for selling misbranded or adulterated milk, imprisonment for one year is authorized.[5] When this section of the Code is compared with regulatory legislation outside the Code, inconsistencies in sentences can be found. However, these anomalies and inconsistencies are the inevitable result of our determination, in subsection (5), not to use the Penal Code as a vehicle for the wholesale reform of regulatory legislation relating to deceptive business practices.

§708-870 Commentary:

1. See Prop. Mich. Rev. Cr. Code, comments at 288-89.

2. Cf. §702-208.

3. H.R.S. chapter 451.

4. Id. §§281-73, 281-102.

5. Id. §§445-102, 321-18.

" **§708-871 False advertising.** (1) A person commits the offense of false advertising if, in connection with the promotion of the sale of property or services, the person knowingly or recklessly makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons.

(2) "Misleading statement" includes an offer to sell property or services if the offeror does not intend to sell or provide the advertised property or services:

(a) At the price equal to or lower than the price offered;

(b) In a quantity sufficient to meet the reasonably-expected public demand, unless quantity is specifically stated in the advertisement; or

(c) At all.

(3) False advertising is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (2)(a), "or" deleted pursuant to §23G-15.

Cross References

Action to enjoin violation, see §603-23.5.
Unfair trade practices, see chapters 481 to 481B.

COMMENTARY ON §708-871

This section covers any false or misleading statement, made in any advertisement addressed to the public (or to a substantial number of persons), when the statement is made in connection with the promotion or sale of goods or services. Such conduct probably does not in itself constitute theft by deception, but would rather be considered only preparatory thereto. The requisite culpability, knowledge or recklessness, extends both to the making of the statement and to the deceptive quality thereof. Commonly accepted "puffing," the advertising exaggerations presumed harmless in §708-800, is not intended to be included within the ambit of this section.

Subsection (2) is intended to cover advertising which may not be false on its face, but which is intended as a "bait" or "come-on" to attract the unwary.[1] A person may be liable under a combined reading of subsections (1) and (2) if the person offers goods or services with intent (a) to charge a higher price than that advertised, (b) to offer in a quantity insufficient to meet reasonably-expected demand, or (c) not to sell them at all. Note that under §702-206, hope that the vendor will not have to sell as advertised suffices to fulfill the requisite culpability of intent. Thus merchants who advertise with hope of persuading customers not to purchase the advertised bargain fall within the ambit of subsection (2).

The non-culpable medium or agent publishing false advertising is not liable under this section. The requisite culpability applies to the deceptive quality of the advertisement, so that independent publishing agents who are not culpable with regard to the falsity of the advertisement do not fall within the scope of this section.

Previous Hawaii law dealt with false advertising at considerable length, and was an excellent example of the kind of "telephone book" legislation which seeks to provide in advance for all possible individual contingencies, rather than to provide a general proscription.[2] The false advertising provisions in the prior Hawaii statute required about three-and-a-half pages of print. Substantively, the Code, in its abbreviated and simplified form, is quite similar to the

previous law, except for the Code's somewhat stronger misdemeanor penalty (as opposed to low-grade misdemeanor previously provided).

Case Notes

In class action brought against major cigarette manufacturers, tobacco trade associations, and the industry's public relations firm, first amended complaint asserted violations of federal RICO statutes; Hawaii's RICO statute, §842-2; federal antitrust statutes; Hawaii's antitrust act, chapter 480; various state common-law torts; and false advertising under this section; defendants' motion to dismiss for failure to state a claim granted, where injuries alleged by plaintiffs trust funds in first amended complaint were not direct; even if remoteness doctrine did not bar claims, claims failed for other reasons. 52 F. Supp. 2d 1196 (1999).

§708-871 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 291.

2. H.R.S. §§747-14 through 747-19.

" **[§708-871.5] False labeling of Hawaii-grown coffee.** (1) A person commits the offense of false labeling of Hawaii-grown coffee if the person knowingly transports, distributes, advertises, sells, or possesses with the intent to sell Hawaii-grown green coffee, cherry coffee, or parchment coffee that is falsely labeled with regard to the geographic origin of the Hawaii-grown coffee.

(2) For purposes of this section:

"Cherry coffee" means the unprocessed fruit of the coffee plant.

"Geographic origin" means the geographic areas designated as follows:

(a) Hamakua is the Hamakua district on the island of Hawaii, as designated by the State of Hawaii tax map;

(b) Hawaii is the State of Hawaii;

(c) Kau is the Kau district on the island of Hawaii, as designated by the State of Hawaii tax map;

(d) Kauai is the island of Kauai;

(e) Kona is the north Kona and south Kona districts on the island of Hawaii, as designated by the State of Hawaii tax map;

(f) Maui is the island of Maui;

(g) Molokai is the island of Molokai; and

(h) Oahu is the island of Oahu.

"Green coffee" means the agricultural commodity comprised of green coffee beans.

"Parchment coffee" means the dried product that remains when coffee cherries are processed by removing the coffee seeds from the pulp.

(3) False labeling of Hawaii-grown coffee is a class C felony. [L 2012, c 328, §1]

COMMENTARY ON §708-871.5

Act 328, Session Laws 2012, added this section, making the offense of false labeling of Hawaii-grown coffee with regard to the geographic origin of the coffee a class C felony. Act 328 provided stronger criminal penalties to help deter the distribution of Hawaii-grown coffee that was falsely labeled as to geographic origin. Senate Standing Committee Report No. 3239, Conference Committee Report No. 114-12.

" **§708-872 Falsifying business records.** (1) A person commits the offense of falsifying business records if, with intent to defraud, the person:

(a) Makes or causes a false entry in the business records of an enterprise;

(b) Alters, erases, obliterates, deletes, removes, or destroys a true entry in the business records of an enterprise;

(c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which the person knows to be imposed upon the person by law, other than for the information of the government, or by the nature of the person's position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) For purposes of this section:

"Business record" means any record kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Enterprise" means any entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, industrial, eleemosynary, or social activity.

"Information" includes data, text, images, sounds, codes, computer programs, software, or databases.

"Record" means information that is written or printed, or that is stored in an electronic or other medium and is retrievable in a perceivable form.

(3) Falsifying business records is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2014, c 33, §1]

COMMENTARY ON §708-872

Inclusion of false information in an otherwise genuine document or record is not covered by the forgery offenses. Moreover, only those private records which are required by law to be kept for the information of the government are protected by the prohibition against tampering with public records.[1] "This leaves a large gap in the case of genuine business records, the content of which has been deliberately falsified or rendered incomplete as a prelude to working a fraud on potential customers. Section [708-872] is intended to close this gap."[2] This section is aimed primarily at conduct preparatory to the commission of fraud, as indicated by the requisite culpability of intent to defraud, and not the protection of the integrity of business records as such.

Previous Hawaii law provided no general offense for the falsification of business records.

SUPPLEMENTAL COMMENTARY ON §708-0872

Act 33, Session Laws 2014, amended this section to apply to electronic statements, documents, or records. The legislature found that many government and business records are kept in electronic form. However, the current law prohibited only the alteration of records kept in written form. In 2000, Hawaii adopted the Uniform Electronic Transactions Act, chapter 489E, to recognize the need to establish the legal validity of electronic records, signatures, and contracts. Act 33 protected consumers by making relevant criminal offenses also applicable to electronic statements, documents, or records. Senate Standing Committee Report No. 3330, House Standing Committee Report No. 260-14.

§708-872 Commentary:

1. §710-1017.

2. Prop. Mich. Rev. Cr. Code, comments at 294.

" **§708-873 Defrauding secured creditors.** (1) A person commits the offense of defrauding secured creditors if the person destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

(2) Defrauding secured creditors is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §708-873

The sections dealing with theft are framed in terms of appropriation of property of another; however, a security interest does not make the secured party an owner and the property, by reason of the security interest alone, is not the property of another.[1] It is necessary, therefore, to provide separate penalties for "debtors or conditional vendees who dispose of property subject to a security interest in ways that may prejudice the secured creditor."[2] The requisite culpability is intent to hinder enforcement of the security interest; innocent potential hindering of such interest, such as the temporary removal of a secured chattel from the County or State, ought not to be made subject to criminal sanctions.[3]

The penalty provided is a misdemeanor, regardless of the amount involved. This differs somewhat from the theft offenses. This difference reflects the fact that generally offenders against a secured interest "are less dangerously deviated from social norms than outright thieves who take property to which they have no claim."[4] Moreover, in those cases where the actor intended, at the time the actor undertook the security obligation, to violate the terms thereof, felony penalties will be available under the theft provisions.[5]

Previous Hawaii law provided many offenses relating to defrauding secured creditors. These different offenses distinguished between the kind of property involved, i.e., whether real or personal,[6] between the mode of fraud, e.g., whether the property is concealed or sold,[7] and the type of security arrangement involved, e.g., whether a mortgage of personal property or a conditional sale.[8] The exact reason for these various provisions, sometimes with different penalties, seems unclear. The Code provides a single unified offense with a single penalty for conduct which ought to be regarded by the penal law as presenting substantially the same type of social harm.

---

§708-873 Commentary:

1. §708-800.

2. M.P.C., Tentative Draft No. 11, comments at 98 (1960).

3. Id. at 99.

4. Id. It should also be noted that the circumstances which warrant the formulation of a petty misdemeanor theft offense seem generally absent in defrauding secured creditors.

5. §§708-830 to 833.

6. Compare H.R.S. §745-1 with H.R.S. §745-2.

7. Compare H.R.S. §745-2 with H.R.S. §745-3.

8. Compare H.R.S. §745-3 with H.R.S. §745-7.

" **§708-874 Misapplication of entrusted property.** (1) A person commits the offense of misapplication of entrusted property if, with knowledge that he is misapplying property and that the misapplication involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted, he misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) "Fiduciary" includes a trustee, guardian, personal representative, receiver, or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

(3) To "misapply property" means to deal with the property contrary to law or governmental regulation relating to the custody or disposition of that property; "governmental regulation" includes administrative and judicial rules and orders as well as statutes and ordinances.

(4) Misapplication of property is a misdemeanor. [L 1972, c 9, pt of §1; am L 1976, c 200, pt of §1]

COMMENTARY ON §708-874

This section is intended to discourage both knowing violation of fiduciary obligations and knowing misapplication of property belonging either to the government or to a financial institution. In this context the misapplication is in terms of improper and reckless investment or handling of assets, rather

than of outright theft. For purposes of this section, a fiduciary includes any person (including a corporation) acting in a fiduciary capacity for another person, and a person acting in a fiduciary capacity on behalf of a corporation or organization which is itself a fiduciary. The requirement of knowledge extends to the substantial risk of loss or detriment to the owner.

Misapplication in this context is not theft; there is no intent permanently to deprive the owner of the owner's property. Moreover, the actor does not misappropriate funds, unless there is a specific duty to make payment to someone else. The danger envisioned is the risk "that one who administers or controls the property may deliberately depart from the legal rules applicable to his control of the property in question and may gamble with the property at considerable known risk to the safety of the property in question."[1]

Existing law provides that a trust company that violates, neglects, or refuses to comply with statutory requirements relating to trusts, and an officer, manager, director, or employee who knowingly participates in such violation, commits a misdemeanor if it or he, as the case may be, fails to desist from the practice within seven days following notification by the Director of the Department of Regulatory Agencies.[2] The provision is designed to accomplish certain regulatory ends. The Penal Code does not propose to abolish the regulatory provision; it will, however, in aggravated cases, provide for a direct, unconditional penalty. Where (1) the actor acts knowingly (as opposed to negligently), and (2) the violation of a statutory or administrative requirement amounts to a misapplication of entrusted property (as opposed to violating some other requirement related to trust administration), the warning period is eliminated. There is no need for a warning period if criminal liability is not strictly imposed or predicated on negligence.

Law Journals and Reviews

Student Symposium: Legal Malpractice, 14 HBJ, no. 1, at 3 (1978).

Case Notes

No private right of action exists under this section; therefore, plaintiffs cannot state a claim under the section. 131 H. 62, 315 P.3d 213 (2013).

§708-874 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 302.

2. H.R.S. §406-61.

" **[§708-875] Trademark counterfeiting.** (1) A person commits the offense of trademark counterfeiting who knowingly manufactures, produces, displays, advertises, distributes, offers for sale, sells, or possesses with the intent to sell or distribute any item bearing or identified by a counterfeit mark, knowing that the mark is counterfeit.

(2) As used in this section:

"Counterfeit mark" means any spurious mark that is identical to or confusingly similar to any print, label, trademark, service mark, or trade name registered in accordance with chapter 482 or registered on the Principal Register of the United States Patent and Trademark Office.

"Sale" includes resale.

(3) Trademark counterfeiting is a class C felony.

(4) In any action brought under this section resulting in a conviction or a plea of nolo contendere, the court shall order the forfeiture and destruction of all counterfeit marks and the forfeiture and destruction or other disposition of all items bearing a counterfeit mark, and all personal property, including any items, objects, tools, machines, equipment, instrumentalities, or vehicles of any kind, employed or used in connection with a violation of this section, in accordance with the procedures set forth in chapter 712A. [L 1997, c 277, §1]

COMMENTARY ON §708-875

Act 277, Session Laws 1997, added this section, which establishes the offense of trademark counterfeiting as a class C felony, and which authorizes the forfeiture and destruction or other disposition of counterfeited property. The legislature found that trademark counterfeiting was a recurring problem in Hawaii for retail boutiques and trademark products of the University of Hawaii, and that tourists are often the target for the scams. The legislature believed that the Act would safeguard not only consumers from the sale of counterfeit products, but would also protect the reputation and quality of trademarks and ensure that trademarks are used for their legitimate and intended purposes. House Standing Committee Report No. 1620, Senate Standing Committee Report No. 759.

"PART VIII. OFFENSES AFFECTING OCCUPATIONS

§708-880 Commercial bribery. (1) A person commits the offense of commercial bribery if:

(a) He confers or offers or agrees to confer, directly or indirectly, any benefit upon:

(i) An agent with intent to influence the agent to act contrary to a duty to which, as an agent, he is subject; or

(ii) An appraiser with intent to influence the appraiser in his selection, appraisal, or criticism; or

(b) Being an agent, an appraiser, or agent in charge of employment, he solicits, accepts, or agrees to accept, directly or indirectly, any benefit from another person with intent:

(i) In the case of an agent, that he will thereby be influenced to act contrary to a duty to which, as an agent, he is subject;

(ii) In the case of an appraiser, that he will thereby be influenced in his selection, appraisal, or criticism; or

(iii) In the case of an agent in charge of employment, that he will thereby be influenced in the exercise of his discretion or power with respect to hiring someone, or retaining someone in employment, or discharging or suspending someone from employment.

(2) In this section:

"Agent" means:

(a) An agent or employee of another;

(b) A trustee, guardian, or other fiduciary;

(c) A lawyer, physician, accountant, appraiser, or other professional adviser or informant;

(d) An officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or

(e) An arbitrator or other purportedly disinterested adjudicator or referee.

"Agent in charge of employment" does not include any person conducting a private employment agency licensed and operating in accordance with law.

"Appraiser" means a person who holds oneself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services.

(3) Commercial bribery is a misdemeanor, except in the event that the value of the benefit referred to in subsection (1) exceeds $1,000, in which case commercial bribery shall be a

class C felony. [L 1972, c 9, pt of §1; am L 1979, c 173, §1; am L 2015, c 35, §26]

Revision Note

In subsection (1)(b)(i), "or" deleted and in subsection (2), paragraph designations deleted, definitions rearranged, and punctuation changed pursuant to §23G-15.

COMMENTARY ON §708-880

This section is an attempt to reinforce civil rules of fidelity by penal sanction. To a lesser degree the section serves another secular function: it helps secure independency of business judgment. The premise is that business decisions ought to be made on merit to insure the optimal allocation of resources: bribery undermines this neutral decision-making process in the same way it undermines public administration.[1] Society's interest in promoting civil or commercial fidelity by penalizing those who intentionally violate those rules and in promoting the proper allocation of resources justifies the imposition of a misdemeanor sanction for this offense.

Subsection (1)(a) covers bribe offerors in the commercial context. It covers both agents and appraisers. "Agent" is defined broadly in subsection (2)(a) to cover all areas where a duty of fidelity is owed. The nature and scope of such duties are defined by common and statutory law regulating or creating the various legal relationships involved. Thus, for example, the duty of an employee to an employer may be not to give away trade secrets, whereas the duty of a fiduciary to the fiduciary's beneficiary or a union representative of an employee's welfare fund to employees may be to exercise independent judgment. "Appraiser" is defined broadly in subsection (2)(b) to include, in addition to conventional forms of appraisal, those forms of appraisal that have recently been involved in the "payola" scandals; for example, the bribery of disc jockeys, cinema, theatre and music reviewers, and the like, to "plug" or give favorable reviews to a certain recording, movie, play, composition, etc. Inherent is an element of "consumer protection": we are concerned that the commodity which the appraiser purports to market, that is independence, neutrality, and expertness of judgment, be protected from any undue influences.

Subsection (1)(b) covers commercial bribe solicitors or receivers. In addition to agents and appraisers, subsection (1)(b)(iii) adds a third category: an agent in charge of employment. The special abuses to which those with power to

hire and fire are prone warrant subsection (1)(b)(iii), which sets forth a substantive rule that a benefit shall not be accepted with the intent that some person's status with respect to a job shall be affected thereby, regardless of whether the action constitutes a violation of a duty to a principal. Thus, even though an agent would probably be under a duty to employ the best qualified applicant, acceptance of a benefit from such an applicant should not be allowed.

Previous Hawaii law recognized no penal offense for bribery in the commercial context. There were provisions affecting bribery of appraisers and arbitrators, but these provisions were clearly concerned with bribery of public or quasi-public officials, rather than with private commercial bribery.[2]

SUPPLEMENTAL COMMENTARY ON §708-880

Act 173, Session Laws 1979, amended subsection (3) to upgrade the offense of commercial bribery to a class C felony in certain instances. The legislature found that the practice of exchanging monetary consideration to influence the discretion of officers in private corporations was perhaps more prevalent and of greater public concern than misdemeanor classification would warrant. Senate Standing Committee Report No. 856.

Act 35, Session Laws 2015, amended subsection (2) by changing the paragraph designations in the definition of "agent" and by making a technical nonsubstantive amendment to the definition of "appraiser."

§708-880 Commentary:

1. Cf. commentary to sections on bribery §710-1040.

2. See H.R.S. §725-1.

" **§708-881 Tampering with a publicly-exhibited contest.** (1) A person commits the offense of tampering with a publicly-exhibited contest if:

(a) He confers, or offers or agrees to confer, directly or indirectly, any benefit upon:

(i) A contest participant with intent to influence him not to give his best efforts in a publicly-exhibited contest; or

(ii) A contest official with intent to influence him to perform improperly his duties in connection with a publicly-exhibited contest;

(b) Being a contest participant or contest official, he intentionally solicits, accepts, or agrees to accept,

directly or indirectly, any benefit from another person with intent that he will thereby be influenced:

(i) In the case of a contest participant, not to give his best efforts in a publicly-exhibited contest; or

(ii) In the case of a contest official, to perform improperly his duties in connection with a publicly-exhibited contest; or

(c) With intent to influence the outcome of a publicly-exhibited contest he:

(i) Tampers with any contest participant, contest official, animal, equipment, or other thing involved in the conduct or operation of the contest, in a manner contrary to the rules and usages purporting to govern the contest in question; or

(ii) Substitutes a contest participant, animal, equipment, or other thing involved in the conduct or operation of the contest, for the genuine person, animal, or thing.

(2) In this section:

"Contest official" means any person who acts or expects to act in a publicly-exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly-exhibited contest.

"Contest participant" means any person who participates or expects to participate in a publicly-exhibited contest as a player, contestant, or member of a team, or as a coach, manager, trainer, or other person directly associated with a player, contestant, or team.

"Publicly-exhibited contest" means any professional or amateur sport, athletic game or contest, or race or contest involving machines, persons, or animals, viewed by the public, but does not include an exhibition which does not purport to be and which is not represented as being such a sport, game, contest, or race.

(3) Tampering with a publicly-exhibited contest is a misdemeanor. [L 1972, c 9, pt of §1]

Revision Note

In subsection (1)(a)(ii), "or" deleted and in subsection (2), paragraph designations deleted, definitions rearranged, and punctuation changed pursuant to §23G-15.

COMMENTARY ON §708-881

The purpose of this section is to penalize corruption of publicly-exhibited contests. It represents a broadening of previous legislation penalizing sports bribery and tampering. Note that publicly-exhibited contest includes, by definition in subsection (2)(a), not only sporting events, but also non-athletic contests, such as quiz shows. In addition to the possibilities of wholesale fraud, there is a substantial element of public affront at rigging or tampering with the outcome of publicly-exhibited contests: witness the quiz show scandals of the last decade. Moreover, it is felt that such behavior should be deterred because it "subjects legitimate entertainment and advertising to unfair and debasing competition."[1] The last part of subsection (2)(a) provides an exception for exhibitions, such as some wrestling spectacles, which do not purport to be and are not represented as being a sport, contest, game or race.

Subsection (1)(a) defines the offense in terms of the bribe offeror's conduct, whether it be addressed to the contest participant or the contest official. Subsection (1)(b) defines the offense in terms of the bribe solicitor or receiver. Finally, subsection (1)(c) is addressed to corruption, not by bribery, but by improper meddling or clandestine substitution.

Previous Hawaii law recognized the offense of bribery involving participants and officials in professional or amateur sports contests.[2] The sanction provided seems unduly severe; it is roughly equivalent to the Code's sentence for a class C felony. The Code clarifies the language of the offense, broadens its scope, and reduces the available sanction to a misdemeanor.

§708-881 Commentary:

1. M.P.C., Tentative Draft No. 11, comments at 108 (1960).

2. H.R.S. §725-7.

Note on Ticket Scalping, Fortune Telling, Sorcery, and Allied Practices

Some recent penal revisions have continued to make it an offense to scalp tickets.[1] The offense covers issuing or selling tickets: (1) without the price or seat, if any, printed conspicuously on them, (2) for more than the price printed on the ticket or charged at the place of admission, or (3) in violation of a condition making the tickets "nontransferable."[2] Hawaii previously had a law which covered the second mode of ticket scalping.[3] The Model Penal Code

does not make such activity an offense and any justification for a penal sanction does not readily appear. The potential harm which could result from the issuing or selling of tickets in blank form is adequately covered by the sections on theft by deception and complicity.

Fortune telling has also been made an offense in some codes.[4] Hawaii law previously had such a provision.[5] Again, it is hard to see why this activity should be made a penal offense per se. If the activity amounts, under aggravated circumstances, to theft by deception, the theft sections can be employed. The argument in favor of making fortune telling an offense has been stated by the Michigan revision:

> There may be some question whether this conduct should continue to be criminal. However, persons holding themselves out to possess occult powers very often proceed to take advantage of the gullible and persuade them to turn over money or property. While *this activity amounts to theft by deception* [citing section], it may be difficult to prove. A prohibition against fortune telling, etc., as such drives the activity underground and reduces somewhat the opportunity to practice frauds.[6]

In view of the coverage by the offense of theft, the utility to be gained from driving the activity underground seems marginal. Indeed, driving the activity underground would reduce the opportunity to discover and prove theft by deception which arises in this context.

Hawaii law previously contained a section making sorcery an offense.[7] Since the section is based on using pretended power to cure another, rather than intent to defraud that person, the practice seems adequately covered and penalized as practicing medicine without a license.[8]

For these reasons, the Code intentionally omits provisions making ticket scalping, fortune telling, and sorcery penal offenses.

Note on Ticket Scalping, Fortune Telling, Sorcery, and Allied Practices

1. Prop. Mich. Rev. Cr. Code §4220 and Minnesota Criminal Code §609.805.

2. Id.

3. H.R.S. §747-21.

4. Prop. Mich. Rev. Cr. Code §4225, and N.Y.R.P.L. §165.35.

5. H.R.S. §772-7.

6. Prop. Mich. Rev. Cr. Code, comments at 309. (Emphasis added.)

7. H.R.S. §772-6.

8. Id. §§453-1, 453-2, and 453-13.

"PART IX. [OLD] COMPUTER CRIMES--REPEALED

§§708-890 to 708-896 REPEALED. L 1992, c 225, §3.

PART IX. COMPUTER CRIME

§708-890 Definitions. As used in this part, unless the context otherwise requires:

"Access" means to gain entry to, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network.

"Computer" means any electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes all computer equipment connected or related to such a device in a computer system or computer network, but shall not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.

"Computer equipment" means any equipment or devices, including all input, output, processing, storage, software, or communications facilities, intended to interface with the computer.

"Computer network" means two or more computers or computer systems, interconnected by communication lines, including microwave, electronic, or any other form of communication.

"Computer program" or "software" means a set of computer-readable instructions or statements and related data that, when executed by a computer system, causes the computer system or the computer network to which it is connected to perform computer services.

"Computer services" includes but is not limited to the use of a computer system, computer network, computer program, data prepared for computer use, and data contained within a computer system or computer network.

"Computer system" means a set of interconnected computer equipment intended to operate as a cohesive system.

"Critical infrastructure" means publicly or privately owned or operated systems or assets vital to the defense, security, economic security, public health or safety, or any combination thereof, of the State or nation. "Critical infrastructure" includes:

(1) Gas and oil production, storage, and delivery systems;
(2) Water supply systems;
(3) Telecommunications networks;
(4) Electrical power delivery systems;
(5) Finance and banking systems;
(6) Emergency services, such as medical, police, fire, and rescue services;
(7) Transportation systems and services, such as highways, mass transit, airlines, and airports; and
(8) Government operations that provide essential services to the public.

"Damage" means any impairment to the integrity or availability of data, a program, a system, a network, or computer services.

"Data" means information, facts, concepts, software, or instructions prepared for use in a computer, computer system, or computer network.

"Obtain information" includes but is not limited to mere observation of the data.

"Property" includes financial instruments, data, computer software, computer programs, documents associated with computer systems, money, computer services, or anything else of value.

"Rule of court" means any rule adopted by the supreme court of this State, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

"Statute" means any statute of this State or the federal government.

"Without authorization" means without the permission of or in excess of the permission of an owner, lessor, or rightful user or someone licensed or privileged by an owner, lessor, or rightful user to grant the permission. [L 1992, c 225, pt of §2; am L 2001, c 33, §4; am L 2003, c 3, §17; am L 2014, c 213, §2]

" **§§708-891 to 708-893 [OLD] REPEALED.** L 2001, c 33, §§5 to 7.

§708-891 Computer fraud in the first degree. (1) A person commits the offense of computer fraud in the first degree if the person knowingly accesses a computer, computer system, or computer network with the intent to commit the offense of theft in the first degree.

(2) Computer fraud in the first degree is a class A felony. [L 2001, c 33, pt of §1; am L 2012, c 293, §2]

" **§708-891.5 Computer fraud in the second degree.** (1) A person commits the offense of computer fraud in the second degree if the person knowingly accesses a computer, computer system, or computer network with the intent to commit the offense of theft in the second degree.

(2) Computer fraud in the second degree is a class B felony. [L 2001, c 33, pt of §1; am L 2012, c 293, §3]

" **[§708-891.6] Computer fraud in the third degree.** (1) A person commits the offense of computer fraud in the third degree if the person knowingly accesses a computer, computer system, or computer network with the intent to commit the offense of theft in the third or fourth degree.

(2) Computer fraud in the third degree is a class C felony. [L 2012, c 293, §1]

" **§708-892 Computer damage in the first degree.** (1) A person commits the offense of computer damage in the first degree if the person intentionally causes or attempts to cause damage to a computer, computer system, or computer network that manages or controls any critical infrastructure and the damage results in, or in the case of an attempt to cause damage would have resulted in if completed, the substantial impairment of:

(a) The operation of the computer, computer system, or computer network; or

(b) The critical infrastructure managed or controlled by the computer, computer system, or computer network.

(2) Computer damage in the first degree is a class A felony. [L 2001, c 33, pt of §1; am L 2014, c 213, §3]

" **§708-892.5 Computer damage in the second degree.** (1) A person commits the offense of computer damage in the second degree if:

(a) The person knowingly causes the transmission of a program, information, code, or command, and thereby knowingly causes unauthorized damage to a computer, computer system, or computer network; or

(b) The person intentionally accesses a computer, computer system, or computer network without authorization and thereby knowingly causes damage.

(2) As used in this section, "damage" means:

(a) A loss aggregating at least $5,000 in value, including the costs associated with diagnosis, repair,

replacement, or remediation, during any one-year period to one or more individuals;

(b) The modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; or

(c) Impairment or disruption of government operations.

(3) Computer damage in the second degree is a class B felony. [L 2001, c 33, pt of §1; am L 2014, c 213, §4]

" **[§708-892.6] Computer damage in the third degree.** (1) A person commits the offense of computer damage in the third degree if the person knowingly accesses a computer, computer system, or computer network without authorization and thereby recklessly causes damage.

(2) Computer damage in the third degree is a class C felony. [L 2014, c 213, §1]

" **§708-893 Use of a computer in the commission of a separate crime.** (1) A person commits the offense of use of a computer in the commission of a separate crime if the person knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure, pursue, surveil, contact, harass, annoy, or alarm the victim or intended victim of the following offenses:

(a) Section 707-726, relating to custodial interference in the first degree;

(b) Section 707-727, relating to custodial interference in the second degree;

(c) Section 707-731, relating to sexual assault in the second degree;

(d) Section 707-732, relating to sexual assault in the third degree;

(e) Section 707-733, relating to sexual assault in the fourth degree;

(f) Section 707-751, relating to promoting child abuse in the second degree;

(g) Section 711-1106, relating to harassment;

(h) Section 711-1106.5, relating to harassment by stalking; or

(i) Section 712-1215, relating to promoting pornography for minors.

(2) Use of a computer in the commission of a separate crime is an offense one class or grade, as the case may be, greater than the offense facilitated. Notwithstanding any other law to the contrary, a conviction under this section shall not merge with a conviction for the separate crime. [L 2001, c 33,

pt of §1; am L 2006, c 141, §1; am L 2012, c 192, §1; am L 2016, c 231, §42]

Note

The 2012 amendment is not intended to interfere with First Amendment rights of free speech and expression of any person affected. L 2012, c 192, §3.

" **[§708-894] Forfeiture of property used in computer crimes.** Any property used or intended for use in the commission of, attempt to commit, or conspiracy to commit an offense under this part, or which facilitated or assisted such activity, shall be forfeited subject to the requirements of chapter 712A. [L 2001, c 33, pt of §1]

" **[§708-895] Jurisdiction.** For purposes of prosecution under this part, a person who causes, by any means, the access of a computer, computer system, or computer network in one jurisdiction from another jurisdiction is deemed to have personally accessed the computer, computer system, or computer network in each jurisdiction. [L 2001, c 33, pt of §1]

" **§708-895.5 Unauthorized computer access in the first degree.** (1) A person commits the offense of unauthorized computer access in the first degree if the person knowingly accesses a computer, computer system, or computer network without authorization and thereby obtains information, and:

(a) The offense was committed for the purpose of commercial or private financial gain;

(b) The offense was committed in furtherance of any other crime;

(c) The value of the information obtained exceeds $20,000; or

(d) The information has been determined by statute or rule of court to require protection against unauthorized disclosure.

(2) Unauthorized computer access in the first degree is a class A felony. [L 2001, c 33, pt of §1; am L 2012, c 293, §4]

" **§708-895.6 Unauthorized computer access in the second degree.** (1) A person commits the offense of unauthorized computer access in the second degree if the person knowingly accesses a computer, computer system, or computer network without authorization and thereby obtains information.

(2) Unauthorized computer access in the second degree is a class B felony. [L 2001, c 33, pt of §1; am L 2012, c 293, §5]

" §708-895.7 **Unauthorized computer access in the third degree.** (1) A person commits the offense of unauthorized computer access in the third degree if the person knowingly accesses a computer, computer system, or computer network without authorization.

(2) Unauthorized computer access in the third degree is a class C felony. [L 2001, c 33, pt of §1; am L 2012, c 293, §6]

COMMENTARY ON §§708-890 TO 708-895.7

Act 225, Session Laws 1992, repealed former §§708-890 to 708-896 and added this part [§§708-890 to 708-893] to expand the degree of protection afforded to individuals and organizations from persons who tamper, interfere, damage, and gain unauthorized access to their computers, computer systems, software, and data. Finding that the growth in computer use has resulted in a similar growth in unauthorized access to computer systems, the legislature created two new offenses of "computer fraud" and "unauthorized computer use," both class C felonies. The legislature, however, recognized that other people, including harmless pranksters, students, or curious computer hackers, may gain unauthorized access to computer systems and do no damage to those systems. Although these people have committed a serious breach of privacy, they do not deserve to be charged with a class C felony; the legislature therefore created the affirmative defense of "entry without disruption," authorizing a court to dismiss a prosecution if, having regard for the nature of the alleged conduct and attendant circumstances, it finds that the defendant's conduct did not actually cause harm or damage to a computer system or network. The court must also file a written statement of its reasons for dismissal. Conference Committee Report No. 29.

Act 33, Session Laws 2001, strengthened the State's computer crime laws, by, among other things, replacing statutes relating to computer crimes with several new offenses and provisions to deter computer fraud, damage, and other computer-related perpetrations, allowing the forfeiture of property used in computer crimes, and updating computer-related definitions to reflect modern technology and for clarity. The legislature found that society was adopting at a rapid pace, computer technology to conduct activities of daily living. Computer technology was being utilized not only for purposes of business and recreation, but also for criminal activity. Thus, computer-related criminal activity was on the rise as society's dependence on computers increased. Senate Standing Committee Report No. 1508.

Act 3, Session Laws 2003, made a technical amendment to §708-890, by deleting the brackets around the word "retrieve" in the definition of "access."

Act 141, Session Laws 2006, amended §708-893 to include the use of a computer to obtain control over the property of the victim [to commit theft in the first or second degree]. The legislature found that the use of a computer to commit theft is a growing problem in Hawaii and the number of crimes perpetrated via the Internet is increasing. Using a computer as an instrument of the crime offers the perpetrator relative anonymity, a quick and easy mechanism to commit fraud, and the potential for sizable financial gain. Hawaii's statutes relating to computer fraud are inadequate for purposes of prosecuting internet fraud. The amendment of §708-893 would enable law enforcement to respond more efficiently to the various forms of computer crime. Senate Standing Committee Report Nos. 3116 and 3306.

Act 192, Session Laws 2012, amended §708-893(1) by: (1) establishing that knowingly using a computer to perform certain acts against a victim or intended victim of harassment under §711-1106, or harassment by stalking under §711-1106.5, constitutes the offense of use of a computer in the commission of a separate crime; and (2) clarifying that the offense of use of a computer in the commission of a separate crime also includes knowingly using a computer to pursue, surveil, contact, harass, annoy, or alarm a victim or intended victim. The legislature found that Act 192 would assist in combating cyberbullying and preventing the emotional harm caused by the dissemination of personal information of an individual, whether true or false, via the Internet or wireless cellular communications. Senate Standing Committee Report No. 3232.

Act 293, Session Laws 2012, amended §708-891 to update Hawaii's computer crime statutes by adding language mirroring Hawaii's identity theft statutes to better address the realities of modern cybercrime by changing the offense of computer fraud in the first degree from a class B felony to a class A felony. Act 293 was intended to streamline and update computer crime statutes to better address and combat cybercrime. Senate Standing Committee Report No. 3230, Conference Committee Report No. 36-12.

Act 293, Session Laws 2012, amended §708-891.5 to update Hawaii's computer crime statutes by adding language mirroring Hawaii's identity theft statutes to better address the realities of modern cybercrime by changing the offense of computer fraud in the second degree from a class C felony to a class B felony. Act 293 was intended to streamline and update computer crime statutes to better address and combat cybercrime. Senate

Standing Committee Report No. 3230, Conference Committee Report No. 36-12.

Act 293, Session Laws 2012, added §708-891.6 to establish a new offense of computer fraud in the third degree as a class C felony to update Hawaii's computer crime statutes, adding language mirroring Hawaii's identity theft statutes to better address the realities of modern cybercrime. Act 293 was intended to streamline and update computer crime statutes to better address and combat cybercrime. Senate Standing Committee Report No. 3230, Conference Committee Report No. 36-12.

Act 293, Session Laws 2012, amended §708-895.5 to update Hawaii's computer crime statutes by adding language mirroring Hawaii's identity theft statutes to better address the realities of modern cybercrime by: (1) changing the offense of unauthorized computer access in the first degree from a class B felony to a class A felony; and (2) increasing the minimum value of information obtained that constitutes unauthorized computer access in the first degree from $5,000 to $20,000. Act 293 was intended to streamline and update computer crime statutes to better address and combat cybercrime. Senate Standing Committee Report No. 3230, Conference Committee Report No. 36-12.

Act 293, Session Laws 2012, amended §708-895.6 to update Hawaii's computer crime statutes by adding language mirroring Hawaii's identity theft statutes to better address the realities of modern cybercrime by changing the offense of unauthorized computer access in the second degree from a class C to a class B felony. Act 293 was intended to streamline and update computer crime statutes to better address and combat cybercrime. Senate Standing Committee Report No. 3230, Conference Committee Report No. 36-12.

Act 293, Session Laws 2012, amended §708-895.7 to update Hawaii's computer crime statutes by adding language mirroring Hawaii's identity theft statutes to better address the realities of modern cybercrime by changing the offense of unauthorized computer access in the third degree from a misdemeanor to a class C felony. Act 293 was intended to streamline and update computer crime statutes to better address and combat cybercrime. Senate Standing Committee Report No. 3230, Conference Committee Report No. 36-12.

Act 213, Session Laws 2014, (1) created and established as a class C felony the offense of computer damage in the third degree [(§708-892.6)] as knowingly accessing a computer, computer system, or computer network without authorization and recklessly causing damage; (2) redefined and increased to a class A felony the offense of computer damage in the first degree [(§708-892)] as intentionally causing or attempting to cause damage to a computer, computer system, or computer network

that manages or controls any critical infrastructure and specified that the offense applies to damage to state and federal critical infrastructure; (3) redefined and increased to a class B felony the offense of computer damage in the second degree [(§708-892.5)] as knowingly causing the transmission of a program, information, code, or command, and thereby knowingly causing unauthorized damage to a computer, computer system, or computer network, or intentionally accessing a computer, computer system, or computer network without authorization, and thereby knowingly causing damage; and (4) added a new definition of "critical infrastructure" [(§708-890)]. The legislature found that existing law only applied when a perpetrator used a computer to damage another computer, such as by hacking or transmitting a computer virus. However, greater protections were needed for [computers managing or controlling] critical infrastructure, as damage to these computers jeopardized public health, safety, and security, regardless of how the damage occurred. Senate Standing Committee Report No. 2452, House Standing Committee Report No. 1100-14.

Act 231, Session Laws 2016, amended §708-893(1) by repealing a provision that subjects a person to a separate charge and enhanced penalty for using a computer to commit an underlying theft crime. The amendment implemented the recommendation made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015). The Penal Code Review Committee commented, on page 51 of its report:

> Currently, the enhanced penalties for use of a computer in the commission of a separate crime converts first-degree theft into a class A felony and second-degree theft into a class B felony. The definition of "computer" for purposes of this section would appear to include devices such as smartphones. Given the prevalence of such devices and the widespread use of "computers" in today's society in general, imposing the enhanced penalties for the use of a computer in committing theft seems unduly harsh.

House Standing Committee Report No. 660-16.

"[PART X.] CREDIT CARD OFFENSES

§708-8100 Fraudulent use of a credit card. (1) A person commits the offense of fraudulent use of a credit card, if with intent to defraud the issuer, or another person or organization providing money, goods, services, or anything else of value, or any other person, the person:

(a) Uses or attempts or conspires to use, for the purpose of obtaining money, goods, services, or anything else of value a credit card obtained or retained in

violation of section 708-8102 or a credit card which the person knows is forged, expired, or revoked;

(b) Obtains or attempts or conspires to obtain money, goods, services, or anything else of value by representing without the consent of the cardholder that the person is the holder of a specified card or by representing that the person is the holder of a card and such card has not in fact been issued; or

(c) Uses or attempts or conspires to use a credit card number without the consent of the cardholder for the purpose of obtaining money, goods, services, or anything else of value.

(2) Fraudulent use of a credit card is a class C felony if the value of all money, goods, services, and other things of value obtained or attempted to be obtained exceeds $300 in any six-month period. For purposes of this section, each separate use of a credit card that exceeds $300 constitutes a separate offense.

(3) Fraudulent use of a credit card is a misdemeanor, if the value of all money, goods, services, and other things of value obtained or attempted to be obtained does not exceed $300 in any six-month period.

(4) Knowledge of revocation of a credit card shall be presumed to have been received by a cardholder four days after it has been mailed to the cardholder at the address set forth on the credit card or at the last known address by registered or certified mail, return receipt requested, and, if the address is more than five hundred miles from the place of mailing, by air mail. If the address is located outside the United States, Puerto Rico, the Virgin Islands, the Canal Zone, and Canada, notice shall be presumed to have been received ten days after mailing by registered or certified mail. [L 1986, c 314, pt of §61; am L 1988, c 55, §1; am L 2006, c 230, §44]

Case Notes

Theft in the second degree is not a lesser included offense. 70 H. 434, 774 P.2d 888 (1989).

" **[§708-8100.5] Fraudulent encoding of a credit card.** (1) A person commits the offense of fraudulent encoding of a credit card if, with the intent to defraud the issuer, or another person or organization providing money, goods, services or anything else of value, the person:

(a) Intentionally changes, alters, erases, adds, creates, tampers with, or manipulates a credit card number by

encoding credit card numbers onto the magnetic strip of the credit card;

(b) Knowingly uses, utters, or offers a credit card with changed, altered, erased, added, tampered with, or manipulated magnetically or electronically encoded credit numbers on the magnetic strip of a credit card for the purpose of obtaining money, goods, services, or anything else of value; or

(c) Knowingly sells, or distributes any credit card with changed, altered, erased, added, tampered with, or manipulated magnetically or electronically encoded credit card numbers on the magnetic strip of the credit card.

(2) Fraudulent encoding of a credit card is a class B felony. [L 1993, c 287, §2]

" **[§708-8101] Making a false statement to procure issuance of a credit card.** (1) A person commits the offense of making a false statement to procure issuance of a credit card if the person makes or causes to be made, either directly or indirectly, any false statement in writing, knowing it to be false and with intent that it be relied on, respecting the person's identity or that of any other person, firm, or corporation, for the purpose of procuring the issuance of a credit card.

(2) Making a false statement to procure issuance of a credit card is a misdemeanor. [L 1986, c 314, pt of §61]

" **[§708-8102] Theft, forgery, etc., of credit cards.** (1) A person who takes a credit card from the person, possession, custody, or control of another without the cardholder's consent or who, with knowledge that it has been so taken, receives the credit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder commits the offense of credit card theft. If a person has in the person's possession or under the person's control credit cards issued in the names of two or more other persons, which have been taken or obtained in violation of this subsection, it is prima facie evidence that the person knew that the credit cards had been taken or obtained without the cardholder's consent.

(2) A person who receives a credit card that the person knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder commits the offense of credit card theft.

(3) A person, other than the issuer, who sells a credit card or a person who buys a credit card from a person other than the issuer commits the offense of credit card theft.

(4) A person who, with intent to defraud the issuer, a person or organization providing money, goods, services, or anything else of value, or any other person, obtains control over a credit card as security for a debt commits the offense of credit card theft.

(5) A person, other than the issuer, who during any twelve-month period, receives credit cards issued in the names of two or more persons which the person has reason to know were taken or retained under circumstances which constitute credit card theft or a violation of section 708-8101, commits the offense of credit card theft.

(6) A person who, with intent to defraud a purported issuer, a person or organization providing money, goods, services, or anything else of value, or any other person, falsely makes or falsely embosses a purported credit card or utters such a credit card, or possesses such a credit card with knowledge that the same has been falsely made or falsely embossed commits the offense of credit card forgery. If a person other than the purported issuer possesses two or more credit cards which have been made or embossed in violation of this subsection, it is prima facie evidence that the person intended to defraud or that the person knew the credit cards had been so made or embossed. A person falsely makes a credit card when the person makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or alters a credit card which was validly issued. A person falsely embosses a credit card who, without authorization of the named issuer, completes a credit card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder.

(7) A person other than the cardholder or a person authorized by the cardholder who, with intent to defraud the issuer, or a person or organization providing money, goods, services, or anything else of value, or any other person, signs a credit card, commits the offense of credit card forgery.

(8) Credit card theft is a class C felony.

(9) Credit card forgery is a class C felony. [L 1986, c 314, pt of §61]

" **[§708-8103] Credit card fraud by a provider of goods or services.** (1) A person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon

presentation of a credit card by the cardholder, or any agent or employees of such person, who, with intent to defraud the issuer or cardholder, furnishes money, goods, services, or anything else of value upon presentation of a credit card obtained or retained in violation of section 708-8102 or a credit card which the person knows is forged, expired, or revoked commits the offense of credit card fraud by a provider of goods or services.

(2) A person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of a credit card by the cardholder, or any agent or employee of such person, who, with intent to defraud the issuer or the cardholder, fails to furnish money, goods, services, or anything else of value which the person represents in writing to the issuer that the person has furnished commits the offense of credit card fraud by a provider of goods or services.

(3) Credit card fraud by a provider of goods or services is a class C felony. [L 1986, c 314, pt of §61]

" **[§708-8104] Possession of unauthorized credit card machinery or incomplete cards.** (1) A person other than the cardholder possessing an incomplete credit card, with intent to complete it without the consent of the issuer or a person possessing, with knowledge of its character, machinery, plates, or any other contrivance designed to reproduce instruments purporting to be the credit cards of the issuer who has not consented to the preparation of such credit cards, commits the offense of possession of unauthorized credit card machinery or incomplete cards.

A credit card is incomplete if part of the matter other than the signature of the cardholder, which an issuer requires to appear on the credit card, before it can be used by a cardholder, has not yet been stamped, embossed, imprinted, or written on it.

If a person other than the cardholder or issuer possesses two or more incomplete credit cards, it is prima facie evidence that the person intended to complete them without the consent of the owner.

(2) Possession of unauthorized credit card machinery or incomplete cards is a class C felony. [L 1986, c 314, pt of §61]

" **[§708-8105] Credit card lists prohibited; penalty.** (1) It is unlawful for any person, business, corporation, partnership, or other agency to make available, lend, donate, or sell any list or portion of a list of any credit cardholders and their addresses and account numbers to any third party without the express written permission of the issuer and the cardholders; except that a credit card issuer may make a list of

its cardholders, including names, addresses, and account numbers, available, without the permission of the cardholders, to a third party pursuant to a contract, if the contract contains language requiring the third party to bind through contract each of its subcontractors by including language prohibiting the divulging of any part of the list for any purpose by the subcontractors except to fulfill and service orders pursuant to the contract between the credit card issuer and the authorized third party.

Notwithstanding any contrary provision of this section, a "consumer reporting agency", as that term is defined by the Fair Credit Reporting Act, Public Law No. 91-508, may provide lists of credit account names, addresses, and account numbers to third parties pursuant to that Act. Nothing in this section shall make unlawful or otherwise prohibit the transmittal of any such information to or from a "consumer reporting agency", as that term is defined in the Fair Credit Reporting Act, or a "debt collector", as that term is defined in the Fair Debt Collection Practices Act, Public Law No. 95-109. Notwithstanding the provisions of this section, it is lawful for any corporation to make available, lend, donate, or sell any list or portion of a list of any credit cardholders and their addresses and account numbers to a subsidiary or the parent corporation of such corporation or to another subsidiary of the common parent corporation.

(2) Violation of this section is a misdemeanor. [L 1986, c 314, pt of §61]

" **[§708-8106] Defenses not available.** In any prosecution for violation of this part, the prosecution is not required to establish and it is no defense:

(1) That a person other than the defendant who violated this part has not been convicted, apprehended, or identified; or

(2) That some of the acts constituting the offense did not occur in this State or were not a crime or element of a crime where they did occur. [L 1986, c 314, pt of §61]

COMMENTARY ON §§708-8100 TO 708-8106

Act 314, Session Laws 1986, incorporated into the Code the credit card offenses previously included under chapter 851. Apart from this change, credit card offense penalties were made more severe in recognition of the increase in the criminal abuse of credit cards. Also, Act 314 barred the disclosure of credit cardholder lists, except in limited circumstances, because the

procurement from stores and credit bureaus of those lists increases the likelihood of credit card fraud and theft. Senate Standing Committee Report No. 820-86, Conference Committee Report No. 51-86.

Act 55, Session Laws 1988, amended §708-8100 by lowering the value of money, goods, and services, required as an element of credit card fraud in the class C felony category, from $500 to $300. This amendment makes this section uniform with similar statutory crimes. House Standing Committee Report No. 1173-88.

Act 287, Session Laws 1993, added §708-8100.5 to provide criminal sanctions for the fraudulent encoding of a credit card. The legislature found that criminal elements are now capable of changing the magnetic encoding on a credit card to match a usable code and then use the card without detection, resulting in tremendous potential loss to the State's commerce. The legislature further found that because this type of crime is more serious and sophisticated than simple credit card fraud or simple theft and the potential for economic loss is so great, classification of this offense as a class B felony is appropriate. Conference Committee Report No. 102.

Act 230, Session Laws 2006, amended §708-8100(2) to provide that each separate use of a stolen credit card that exceeds $300 can be charged as a separate incident. House Standing Committee Report No. 665-06.

"PART XI. MONETARY LAUNDERING--REPEALED

§§708-8120 and 708-8121 REPEALED. L 1995, c 119, §3.

Cross References

For present provisions, see chapter 708A.

"[PART XII. CABLE TELEVISION AND TELECOMMUNICATION SERVICE OFFENSES]

§708-8200 Cable television service fraud in the first degree. (1) A person commits cable television service fraud in the first degree if the person knowingly:

(a) Distributes written instructions or plans to make or assemble a cable television service device and knows that the written plans or instructions are intended to be used to make or assemble a device to obtain cable television service without payment of applicable charges; or

(b) Distributes a cable television service device and knows that the device is intended to be used to obtain

cable television service without payment of applicable charges.

(2) Cable television service fraud in the first degree is a class C felony. [L 1987, c 268, pt of §2; am L 1988, c 300, §1; am L 1989, c 261, §19]

" **[§708-8201] Cable television service fraud in the second degree.** (1) A person commits the offense of cable television service fraud in the second degree if the person knowingly:

(a) Possesses a cable television service device with the intent to obtain cable television service without payment of applicable charges; or

(b) Possesses written instructions or plans to make or assemble a cable television service device with the intent to use the written plans or instructions to make or assemble a device to obtain cable television service without payment of applicable charges.

(2) Cable television service fraud in the second degree is a misdemeanor. [L 1987, c 268, pt of §2]

" **§708-8202 Telecommunication service fraud in the first degree.** (1) A person commits the offense of telecommunication service fraud in the first degree if the person:

(a) Knowingly publishes plans or instructions for making, assembling, or using a telecommunication service device, or sells, offers to sell, distributes, transfers, or otherwise makes available written instructions, plans, or materials including hardware, cables, tools, data, computer software, or other information or equipment to make or assemble a telecommunication service device and knows that the written plans, instructions, or materials are intended to be used to make or assemble a device to obtain telecommunication service without payment of applicable charges;

(b) Knowingly makes, assembles, sells, offers to sell, advertises, distributes, transports, transfers, or otherwise makes available a telecommunication service device and knows that the device is intended to be used to obtain telecommunication service without payment of applicable charges; or

(c) With the intent to defraud another of the lawful charge for any telecommunication service that is provided for a charge or compensation:

(i) Publishes, sells, offers for sale, or otherwise makes available an access device, without

obtaining the consent of the holder of the access device or the telecommunication service provider;

(ii) Uses an access device, without obtaining the consent of the holder of the access device or the telecommunication service provider, resulting in obtaining services, the value of which exceeds $300 in any six-month period;

(iii) Engages in a scheme constituting a systematic and continuing course of conduct to obtain an access device from another by false or fraudulent pretenses, representations, or promises and does obtain an access device from the other person; or

(iv) Uses a telecommunication service device for the purpose of obtaining telecommunication services, the value of which exceeds $300 in any six-month period, without obtaining the consent of the holder of the telecommunication service device or the telecommunication service provider.

(2) For the purpose of this section:

"Access device" means any number or code of an existing, canceled, revoked, or nonexistent telephone number, telephone calling card number, credit card number, account number, personal identification number, or other credit device or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers, or other credit devices that can be used to obtain telecommunication service.

"Holder of access device" means a person or organization to which an access device has been issued by a telecommunication service provider.

"Publish" means the communication or dissemination of information to any one or more persons, either orally, in person, or by telephone, radio, television, or computer, or in a writing of any kind, including without limitation a letter, memorandum, circular, handbill, newspaper, magazine article, or book.

(3) Telecommunication service fraud in the first degree is a class C felony. [L 1987, c 268, pt of §2; am L 1988, c 300, §2; am L 1993, c 120, §2; am L 1996, c 222, §3]

" **§708-8203 Telecommunication service fraud in the second degree.** (1) A person commits the offense of telecommunication service fraud in the second degree if the person:

(a) Knowingly possesses a telecommunication service device with the intent to obtain telecommunication service without payment of applicable charges;

(b) Knowingly possesses written instructions or plans to make or assemble a telecommunication service device

with the intent to use the written plans or instructions to make or assemble a device to obtain telecommunication service without payment of applicable charges; or

(c) With the intent to defraud another of the lawful charge for any telecommunication service, that is provided for a charge or compensation:

(i) Uses an access device without obtaining the consent of the holder of the access device or the telecommunication service provider, resulting in obtaining services, the value of which does not exceed $300 in any six-month period; or

(ii) Uses a telecommunication service device for the purpose of obtaining telecommunication services, the value of which does not exceed $300 in any six-month period, without obtaining the consent of the holder of the telecommunication service device or the telecommunication service provider.

(2) For the purposes of this section:

"Access device" means any number or code of an existing, canceled, revoked, or nonexistent telephone number, telephone calling card number, credit card number, account number, personal identification number, or other credit device or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers, or other credit devices that can be used to obtain telecommunication service.

"Holder of access device" means a person or organization to which an access device has been issued by a telecommunication service provider.

(3) Telecommunication service fraud in the second degree is a misdemeanor. [L 1987, c 268, pt of §2; am L 1993, c 120, §3; am L 1996, c 222, §4]

" **§708-8204 Forfeiture of telecommunication service device and cable television service device.** Any telecommunication service device, cable television service device, or instructions or plans therefor, or any materials for making or assembling a telecommunication service device possessed or used in violation of sections 708-8200 to 708-8203 may be ordered forfeited to the State for destruction or other disposition, subject to the requirements of chapter 712A. [L 1987, c 268, pt of §2; am L 1989, c 261, §20; am L 1996, c 222, §5]

Cross References

Definitions of states of mind, see §702-206.

COMMENTARY ON §§708-8200 TO 708-8204

Act 268, Session Laws 1987, placed telecommunication and cable television theft in the Code for the purpose of consolidating this type of theft with other statutory thefts. Previously, all telecommunication and cable television thefts were misdemeanors. This Act made telecommunication and cable thefts a felony under certain circumstances. The reclassification was made to conform Hawaii law with federal law. Senate Standing Committee Report No. 1133.

Act 300, Session Laws 1988, deleted from §§708-8200 and 708-8202 the phrase, "or has reason to believe" as an element of offense under these sections. The Code sets forth certain states of mind required for a criminal conviction and does not recognize "reason to believe" as an accepted criminal state of mind. House Standing Committee Report No. 1588-88, Senate Standing Committee Report No. 2151.

Act 120, Session Laws 1993, amended §§708-8202 and 708-8203 to include the unlawful selling or using of a telephone "access device," defined as any telephone calling card number, credit card number, account number, or personal identification number that can be used to obtain telephone service. The legislature found that this criminal activity impacts telephone services in the State by increasing costs to consumers and businesses, and also affects tourists at airports and other locations when calling card numbers are retrieved from unsuspecting telephone users. House Standing Committee Report No. 1212, Senate Standing Committee Report Nos. 215 and 694.

Act 222, Session Laws 1996, amended §§708-8202, 708-8203, and 708-8204, by, inter alia, establishing the use of a telecommunication service device to obtain telecommunication services as telecommunication service fraud in the first degree or telecommunication service fraud in the second degree. The Act was intended to expand the scope of the law establishing the offense of telecommunication service fraud, to include fraud involving cellular telephone devices and services. The legislature recognized that cellular telephone fraud had become a major problem in the country, increasing consumer costs, and contributing to increased drug-related criminal activity, and that current state law did not provide comprehensive protection for telecommunication services theft. House Standing Committee Report No. 1521-96, Senate Standing Committee Report No. 2017.

"[PART XIII.] ARSON

Cross References

Special sentencing considerations for arson; other actions not prohibited, see §706-606.2.

[§708-8251] Arson in the first degree. (1) A person commits the offense of arson in the first degree if the person intentionally or knowingly sets fire to or causes to be burned property and:

(a) Knowingly places another person in danger of death or bodily injury; or

(b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding $20,000.

(2) Arson in the first degree is a class A felony. [L 2006, c 181, pt of §1]

" **[§708-8252] Arson in the second degree.** (1) A person commits the offense of arson in the second degree if the person intentionally or knowingly sets fire to or causes to be burned property and:

(a) Recklessly places another person in danger of death or bodily injury; or

(b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding $1,500.

(2) Arson in the second degree is a class B felony. [L 2006, c 181, pt of §1]

" **[§708-8253] Arson in the third degree.** (1) A person commits the offense of arson in the third degree if the person intentionally or knowingly sets fire to or causes to be burned property and:

(a) Negligently places another person in danger of death or bodily injury; or

(b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding $500.

(2) Arson in the third degree is a class C felony. [L 2006, c 181, pt of §1]

" **§708-8254 Arson in the fourth degree.** (1) A person commits the offense of arson in the fourth degree if the person intentionally, knowingly, or recklessly sets fire to, or causes to be burned property and thereby damages the property of another without the other's consent.

(2) Arson in the fourth degree is a misdemeanor. [L 2006, c 181, pt of §1; am L 2007, c 11, §2]

COMMENTARY ON §§708-8251 TO 708-8254

Act 181, Session Laws 2006, added this part, establishing the crime of arson in the first, second, third, and fourth degrees, as property damage offenses. The legislature found that fires that are intentionally set cause extensive damage to public and private properties and threaten lives. Conference Committee Report No. 50-06.

Act 11, Session Laws 2007, amended §708-8254(1) to include recklessness in the state of mind requirement for arson in the fourth degree. Senate Standing Committee Report No. 1128, House Standing Committee Report No. 773.

"[PART XIV.] UNLICENSED CONTRACTING OFFENSES

§708-8300 Unlicensed contracting activity. (1) A person commits the offense of unlicensed contracting activity if the person:

(a) Engages in any activity that requires a contractor's license under chapter 444 and is not a licensed contractor engaging in the activity, other than a contractor who inadvertently fails to maintain licensing requirements under chapter 444 and who subsequently corrects the failure so that there was a lapse of no more than sixty days in licensure; or

(b) Uses any word, title, or representation to induce the false belief that the person is licensed under chapter 444 to engage in contracting activity.

(2) Unlicensed contracting activity is a misdemeanor.

(3) Each day the violation of this section continues after written notice of the violation to the unlicensed contractor shall constitute a distinct and separate offense.

(4) It is an affirmative defense to a prosecution under this section that the defendant was a licensed contractor performing activity outside the scope of the defendant's contractor's license. This defense shall not preclude any administrative or civil enforcement action for the unlicensed activity. [L 2012, c 244, pt of §1; am L 2013, c 182, §2]

" **[§708-8301] Habitual unlicensed contracting activity; felony.** (1) A person commits the offense of habitual unlicensed contracting activity if the person has had two or more convictions within ten years, preceding the conduct for which the person is charged under this section, for unlicensed contracting activity in violation of section 436B-27 or 708-8300, and:

(a) Engages in any activity for which a contractor's license is required under chapter 444, and is not licensed as a contractor under chapter 444 when engaging in the activity; or

(b) Uses any word, title, or representation to induce the false belief that the person is licensed under chapter 444 to engage in contracting activity.

(2) A conviction for purposes of this section is a judgment on a verdict, a finding of guilt, or a judgment on a plea of guilty or nolo contendere. The convictions shall have occurred on separate dates and be for separate incidents on separate dates. At the time of the instant offense, the convictions shall not have been expunged by pardon, reversed, or set aside.

(3) Habitual unlicensed contracting activity is a class C felony.

(4) It is an affirmative defense to a prosecution under this section that the defendant was a licensed contractor performing activity outside the scope of the defendant's contractor's license. This defense shall not preclude any administrative or civil enforcement action for the unlicensed activity. [L 2012, c 244, pt of §1]

" **[§708-8302] Unlicensed contractor fraud.** (1) A person commits the offense of unlicensed contractor fraud if the person:

(a) Engages in any activity that requires a contractor's license under chapter 444 and is not licensed as a contractor under chapter 444 when the person engages in the activity; and

(b) While engaged in the activity, obtains or exerts control over the property of another by deception, with intent to deprive the other of the property.

(2) For purposes of this section, "deception", as defined in section 708-800, includes deception as to the person's status as a licensed contractor or as to permits required to engage in the activity. [L 2012, c 244, pt of §1]

" **[§708-8303] Unlicensed contractor fraud in the first degree.** (1) A person commits the offense of unlicensed contractor fraud in the first degree if the person commits unlicensed contractor fraud and the total value of the property over which the person obtains control is equal to or greater than $20,000.

(2) Unlicensed contractor fraud in the first degree is a class B felony. [L 2012, c 244, pt of §1]

" **[§708-8304] Unlicensed contractor fraud in the second degree.** (1) A person commits the offense of unlicensed contractor fraud in the second degree if the person commits unlicensed contractor fraud and the total value of the property over which the person obtains control is less than $20,000.

(2) Unlicensed contractor fraud in the second degree is a class C felony. [L 2012, c 244, pt of §1]

" **§708-8305 Unlicensed contractor fraud; valuation of property.** (1) For purposes of unlicensed contractor fraud, the value of the property shall be the greater of:

(a) The value of property as provided in section 708-801; or

(b) The total value of all moneys and any assets of value paid or lost by the victim or victims pursuant to the same scheme or course of conduct.

(2) The value of any work done by the unlicensed contractor shall not be used as an offset for the value of the property calculated under this section. [L 2012, c 244, pt of §1; am L 2013, c 26, §1]

COMMENTARY ON §§708-8300 TO 708-8305

Act 244, Session Laws 2012, added these sections to deter unlicensed contracting activity. Specifically, Act 244 added a new part containing these sections to chapter 708 that established: (1) misdemeanor and felony offenses relating to unlicensed contracting activity; (2) felony offenses relating to unlicensed contractor fraud; and (3) a method for valuation of property in unlicensed contractor fraud cases. The legislature found that unlicensed contractors often operate without regard to safety and building requirements, unfairly undercut legitimate and licensed business operations, place consumers at risk, and cost the State millions of dollars in lost tax revenue. The legislature further found that unlicensed contractors often continue to engage in illegal work despite receiving civil penalties. Authorizing the imposition of criminal penalties on unlicensed contractors would help reduce the number of unlicensed contractors performing illegal work, promote legitimate businesses, protect consumers, and enhance state revenues. Senate Standing Committee Report No. 3348, Conference Committee Report No. 59-12.

Act 26, Session Laws 2013, amended §708-8305 to clarify that the value of any work done by an unlicensed contractor shall not be used as an offset in calculating the value of the property in unlicensed contractor fraud cases. Minimum thresholds for the total value of the property over which a person obtains control

must be met in order for an act to constitute unlicensed contractor fraud in the first or second degree. By permitting an offset of the value of work illegally performed by an unlicensed contractor, the value of the property was less likely to meet the threshold necessary to constitute the offense. Act 26 made it clear that no offset should be applied when calculating the property value for the offenses. Senate Standing Committee Report No. 456, House Standing Committee Report No. 1410.

Act 182, Session Laws 2013, amended §708-8300(1) by clarifying that a contractor who inadvertently fails to maintain licensing requirements and who subsequently corrects the failure so that there was a lapse of no more than sixty days in licensure shall not be guilty of unlicensed contracting activity. Act 182 was intended to clarify that contractors licensed under chapter 444, who inadvertently failed to renew their licenses should not be treated as unlicensed contractors after the subsequent renewal of their licenses. Act 182 was consistent with existing licensure requirements under chapter 444, by clarifying that a lapse in licensure of no more than sixty days does not constitute unlicensed contracting activity. Senate Standing Committee Report No. 1373.