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FORFEITURES UNDER DRUG LAW

House Bill 5327 as enrolled
Second Analysis (1-4-91)

Sponsor: Rep. Bill Martin
House Committee: Judiciary
Senate Committee: Appropriations

THE APPARENT PROBLEM:

The Public Health Code contains a forfeiture law that authorizes the seizure and forfeiture to the government of property used in connection with drug trafficking; after applicable procedural requirements are met, the proceeds are to be used to enhance drug law enforcement efforts. During discussion of a legislative proposal to devote a portion of forfeiture proceeds to drug education, a longstanding problem became more apparent: estimates on the amount of money involved were hard to come by because the law required no reporting or accounting of seizures and forfeitures. It seems clear, though, that when the agency involved is a large urban police department or multi-county narcotics squad, the seizures can amount to millions of dollars a year. As an example of what can happen, critics point to the Detroit Police Department, whose forfeiture fund took in over \$12 million in a three-year period; that figure included over \$800,000 in investment earnings, suggesting that a significant portion of the fund was not being expended. Some of the expenditures that were made from the forfeiture fund were questioned, and it appears that some of the money was funneled into the secret service fund that is a subject of federal inquiry. Legislation has been proposed to provide for greater accountability under the forfeiture law.

THE CONTENT OF THE BILL:

The bill would amend the property forfeiture provisions contained within the Public Health Code to:

- lower from \$100,000 to \$50,000 the threshold figure above which a forfeiture must be pursued through the circuit court. The law now allows a forfeiture to be accomplished administratively if the total value of the property seized does not exceed \$100,000; in such cases, civil proceedings are instituted in the circuit court only if someone claims an interest in the seized property.
- require each local unit of government involved in a forfeiture to make an annual report to the Office of Drug Agencies for analysis and transmittal to the legislature. A report on the preceding year would be due February 1, and would have to contain, as applicable:
 - the number of forfeiture proceedings that the local unit of government instituted in the circuit court, the number that were concluded, and the number pending at the end of the year;
 - the number of forfeitures accomplished by the local unit of government without a forfeiture proceeding in the circuit court;
 - the net total proceeds of drug-related forfeitures instituted by the local unit of government that the local unit is required to account for and report to the state treasurer;
 - an inventory of property received by the local unit of government; and

- a statement explaining how the money received by the local unit of government was being used to enhance drug law enforcement efforts.
- require the forfeiture records of a local unit of government to be audited in accordance with the Uniform System of Accounting Act (which would apply to counties) or the Uniform Budgeting and Accounting Act (which would apply to cities, villages, and townships). In addition, the records could be audited by an auditor of the local unit of government.
- specify that forfeiture proceeds be deposited with the treasurer of the entity having budgetary authority over the seizing agency.
- require that not only forfeiture proceeds, but also all interest and earnings on those proceeds be used for enforcement of drug laws. The money would be appropriated by the entity having budgetary authority over the seizing agency. Forfeiture proceeds would serve as a supplement to, and not a replacement for, funds budgeted on January 1, 1991 for drug law enforcement efforts.
- authorize the court to order a person claiming an interest in forfeited property to pay the expenses of the forfeiture proceedings.

The bill would take effect April 1, 1991.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have an indeterminate impact on the state and local units of government. The bill is expected to increase court caseloads, depending on the number of cases in which the estimated amount of seized property is between \$50,000 and \$100,000. (1-4-91)

ARGUMENTS:

For:

The bill would promote greater accountability in forfeiture actions. It would require annual reports on forfeiture actions, authorize audits of forfeiture funds, insist that the money be used for drug law enforcement, and require judicial review of all seizures in excess of \$50,000 (the current threshold is \$100,000). Reporting requirements, auditing oversight, and the lower threshold should help to curb the potential for abuse while improving credibility for law enforcement agencies. Reports and audits would especially help in ascertaining the frequency and size of administrative forfeitures, where court proceedings are held only if the seizure is contested. Compilation and analysis of statewide forfeiture data will help the legislature to make informed policy decisions; it could also correct misconceptions over the amount of money being obtained through forfeiture actions, demonstrating that the sums are not as great as some may think. Legitimate law enforcement has nothing to lose under the bill, while the public has much to gain.

Against:

The wisdom of lowering the \$100,000 threshold, especially as much as the bill proposes, is debatable. By increasing the number of actions that must be processed through the circuit court, the bill would increase burdens on the courts. The additional time necessary to resolve matters through the court would mean greater costs for local agencies that would have to store and maintain the property. The alternative to judicial forfeiture, administrative forfeiture, does not leave people without recourse: the property owner is notified of the seizure and has 20 days to protest the forfeiture and invoke court review. Rather than mandate that even uncontested actions be processed through the courts, the bill would do better to at least retain the current \$100,000 threshold for mandatory court review. Even the \$100,000 threshold conflicts with a recent U.S. Government Accounting Office (GAO) recommendation that the \$100,000 federal threshold for judicial review of cash seizures be raised; the GAO noted that requiring uncontested cash seizures to be forfeited judicially added an unnecessary burden for the courts and contributed to inefficient use of U.S. attorney resources. In contrast, raising the threshold would reduce the burdens on courts and prosecutors, and allow money to be put to use sooner by government without affecting individual due process rights.

Response: Reports are that most seizures are under the \$50,000 threshold proposed by the bill, meaning that burdens would increase little for the justice system. However, the bill would promote an important principle of justice: that a person's property should not be seized without due process of law. While a person may contest an administrative forfeiture and initiate court proceedings, the law requires prompt response to a written or published notice and demands the posting of a \$250 bond; such requirements place limits on a person's ability to assert his or her rights. Given the intrusion on property rights that forfeiture actions represent, the bill does well to limit administrative forfeitures to those under \$50,000.

Against:

The bill's requirements for annual reports have been criticized from several perspectives. Some note that the requirements would unduly burden local units of government by calling for locals to file a special report that included information that would have to be obtained from courts and prosecutors; it would be better, say some, for the report to be limited to financial information and included with the annual audit report made to the Department of Treasury. Others have questioned whether the report would provide meaningful information; it does not appear that reports would provide clear information on the unencumbered value of property seized, on the proportion of seizures that are contested, on the amount of money generated through administrative as opposed to judicial forfeitures, on the costs incurred, or on important details on how forfeiture proceeds were spent. The report requirements further lack clarity of language: they call for an accounting of the number of proceedings instituted by the "local unit of government," when technically speaking it is the prosecuting attorney who institutes some forfeiture actions.

Response: The report requirements are an integral part of the bill; it is important to know what and how property is getting seized so that the state can be sure that the money is being spent on drug law enforcement as required, and the legislature can make informed decisions. To reduce the requirements would be to diminish the benefits of the bill. Indeed, some have suggested that the report requirements would be changed for the better by including some sort of sanction for the failure to report.

Against:

By requiring that forfeiture money henceforth supplement drug law enforcement money budgeted as of January 1, 1991, the bill would make it difficult for local budgets to be altered to accommodate changing economic times. In this way and others, the bill would constitute an unacceptable intrusion by the state into local management decisions.

Response: Problems have arisen with forfeiture money not being spent in a timely manner, or being spent on things that do not enhance drug law enforcement efforts. The requirement that forfeiture funds supplement other funds helps to ensure that the money is spent as required by law.

Against:

Under the bill, the losing property owner in forfeiture proceedings could be ordered to pay the expenses of the proceedings. This strikes many as extreme; it would punish a person for exercising his or her rights, or even for not exercising them, if the matter was one of an uncontested seizure of property over the \$50,000 threshold.

Response: Many believe that the public should not have to pay the cost of such proceedings. The provision would in addition forestall disputes between local agencies over their relative costs and rights to reimbursement from forfeiture proceeds.