

Legislative Analysis



DRUG CRIMES: CIVIL ASSET FORFEITURE

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House Bill 4001 (H-2) as reported from committee
Sponsor: Rep. Jason Wentworth

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4002 (H-3) as reported from committee
Sponsor: Rep. David LaGrand

Committee: Judiciary
Complete to 2-27-19

BRIEF SUMMARY: House Bill 4001 would do all of the following:

- Prohibit civil asset forfeitures for crimes involving controlled substances unless a criminal proceeding is completed and the defendant is convicted or pleads guilty.
- Specify situations in which a forfeiture proceeding could go forward without a criminal conviction or guilty plea, such as when no one claims the property or the defendant cannot be located and arrested.
- Apply only to seizures of property valued at \$50,000 or less (excluding the value of the contraband).
- Limit applicability of the above provisions to forfeiture proceedings pending on, or initiated on or after, the bill's effective date.

House Bill 4002 would do all of the following:

- Require a person charged with a drug crime to be notified of the seizing entity's intent to forfeit and dispose of the property and require objections to forfeiture of the property to be filed on a form developed by the State Court Administrative Office. (This applies to seizures without a warrant that do not exceed \$50,000 in value.)
- Require a civil forfeiture action to be stayed while criminal proceedings are ongoing.
- Require the plaintiff to prove that the property is subject to forfeiture. If a claimant to the property was not convicted or pled guilty, the plaintiff would have to prove that the claimant knew or should have known about or had consented to the crime.
- Require property to be returned to an owner if a warrant for commission of a crime is not issued within 90 days of the seizure, charges are dismissed, or the person charged with the crime is acquitted.
- Provide an exemption to seizure or forfeiture if the owner of the property notified law enforcement of the commission of the crime and had served an eviction notice.

Each bill would take effect 90 days after it is enacted. The bills are tie-barred to each other, which means that neither bill could take effect unless both bills were enacted into law.

FISCAL IMPACT: The bill would have an indeterminate, yet possibly substantive, fiscal impact on state and local law enforcement agencies. (See *Fiscal Information*, below, for a detailed discussion.)

THE APPARENT PROBLEM:

Michigan law allows property to be seized by governmental entities if the property is suspected of having been used for or derived from crimes connected with controlled substances. Generally speaking, the state's civil asset forfeiture provisions allow the seizing entity to petition a court to have that property forfeited, meaning that the seizing entity takes possession of the seized property. Forfeited property can then be used or sold by the seizing entity and, in some instances, used for law enforcement purposes.

Civil asset forfeiture laws are generally believed to deter crime by taking away the financial incentive for the criminal activity; for example, besides the threat of going to prison, a person could also lose cars, homes, or jewelry bought with money gained from the illegal activity. Seizing a house or equipment used in the manufacture of controlled substances can shut down or hinder further criminal actions at that location, thus decreasing or preventing crime.

In recent years, civil asset forfeiture laws have come under scrutiny in Michigan and across the country. Detractors say that they are misused and even abused, with some calling seizure and forfeiture practices "policing for profit." According to some, money from the sale of forfeited property can be an incentive for aggressive seizure and forfeiture policies.

Over the past few years, several states have revised their civil forfeiture statutes to beef up property protections for citizens, with New Mexico, Nebraska, and North Carolina ending civil forfeiture altogether. At least 11 other states require a criminal conviction before some or all forfeiture proceedings can be initiated. Michigan enacted legislation in 2015 and 2016 that, among other things, required governmental entities to file annual reports with the Department of State Police (MSP) regarding property that was seized and forfeited, required MSP to post the information on its website, raised the threshold for forfeiture of property related to controlled substance violations under the Public Health Code to clear and convincing evidence, and, for property seizures with a value that does not exceed \$50,000 conducted without a warrant, eliminated the requirement that a written claim by the property owner to recover the property be accompanied by a bond.¹

Despite the recent changes, some feel that the protections did not go far enough. For instance, the seized property is not automatically returned if charges are not brought or are dropped or the person is acquitted. Though citizens can petition a court to have their property returned when it is not connected to the commission of a crime, many citizens cannot afford the court costs and legal fees to do so, especially considering that the typical case involves about \$500 worth of assets. For such small property seizures, some would like to see further changes to require a conviction or guilty plea before the seizing entity could forfeit or dispose of the property.

¹ Public Acts 148 to 154 of 2015 and Public Act 418 of 2016.

THE CONTENT OF THE BILLS:

House Bill 4001 would add section 7521a to Article 7 (Controlled Substances) of the Public Health Code to prohibit property seized for a violation of Article 7, as provided in section 7522, from being subject to forfeiture under section 7521 or a disposition under section 7524 (see **Background Information**, below) unless a criminal proceeding involving or relating to the property has been completed and the defendant either is convicted of or pleads guilty to a controlled substance violation under Article 7.

A criminal conviction or guilty plea would not be required if any of the following apply:

- No person claims any interest in the property as provided under section 7523 or the property owner withdraws his or her claim. If a claim is withdrawn, the prosecuting attorney or the attorney general, as appropriate, would have to review the seizure of the property and approve its forfeiture before the property could be forfeited.
- The property owner waives the criminal conviction or plea requirement and elects to proceed with the civil forfeiture proceeding.
- A criminal charge has been filed and one or both of the following apply:
 - The defendant is outside the state and cannot reasonably be extradited or brought back for prosecution.
 - The defendant has not been located despite reasonable efforts to locate and arrest him or her.

The bill would not prohibit the immediate destruction of property that is not lawfully possessed by any person or that is dangerous to the health or safety of the public, regardless of whether the person is convicted of a violation of Article 7.

Applicability

The bill would apply only to forfeiture proceedings pending on, or initiated on or after, the bill's effective date, and only to a forfeiture proceeding in which the aggregate net equity value of the property and currency seized was \$50,000 or less, excluding the value of contraband.

Proposed MCL 333.7521a

House Bill 4002 would revise section 7523 of the Public Health Code and add section 7523a. Section 7523 of the Code provides a procedure to be followed if the property was seized under section 7522 without process (warrant) and the total value of the seized property is \$50,000 or less. Among other things, the procedure requires the seizing entity to notify the property's owner of the seizure and of the intent to forfeit and dispose of the property. If the owner's name and address are not reasonable ascertainable, a notice must be published in a newspaper in the county where the property was seized. Any person claiming an interest in that property has 20 days to file a signed, written claim expressing interest in the property. The bill would require the notice to be published in the newspaper and on either the public website of the local unit of government or of the Department of Attorney General. In addition, the bill would require that, if criminal charges were filed

against a person, the person charged would also have to be notified of the entity's intent to forfeit and dispose of the property.

Further, the bill would add that the written claim expressing interest in the seized property and any objection to forfeiture would have to be made on a form to be developed by the State Court Administrative Office (described below). An objection would have to be written, verified, and signed by the claimant and include a detailed description of the property and the property interest asserted. The verification would have to include a certification—under the penalty of perjury—stating that the undersigned has examined the claim and believes it to be, to the best of his or her knowledge, true and complete.

Form asserting a claim for property less than \$50,000 when seized without a warrant

The bill would require the State Court Administrative Office to develop and make available to law enforcement agencies, courts, and the public a form for asserting an ownership interest in seized property. The form would have to require a claimant to provide a detailed description of the property, the claimant's ownership interest in the property, and a signed attestation that the claimant has a bona fide ownership interest in the property.

Forfeiture actions

A civil forfeiture action would have to be stayed until the applicable criminal proceedings are over if the provisions of House Bill 4001 apply, the seized property is subject to forfeiture under section 7521 of the Act, and a person has filed a claim under section 7523. The forfeiture action would have to proceed:

- After the defendant is convicted or enters a guilty plea to the offense involved; or
- No person claimed an interest in the property or the owner withdraws his or her claim; the owner waives the criminal conviction or plea requirement; or a criminal charge has been filed but the defendant either cannot be located or is outside of Michigan and cannot be reasonably extradited or brought back for prosecution.

A forfeiture hearing would have to be held within 28 days of a plea or conviction to the extent practicable and consistent with the interests of justice. At the hearing, the plaintiff would have to prove one or both of the following, as applicable:

- The property is subject to forfeiture under section 7521(a).
- The person claiming an interest in the property—if he or she is other than the one convicted of or pleading guilty to the crime—had prior knowledge of or had consented to the commission of the crime.

If the plaintiff cannot meet this burden of proof, the property must be returned to the owner not more than 14 days from the date the court issues a dispositive order. Further, except as otherwise provided in section 7521a (HB 4001), property would have to be returned to the owner not more than 14 days after any of the following occurs:

- A warrant is not issued against a person for the commission of a crime within 90 days after the property had been seized.
- All charges against the person relating to the commission of a crime are dismissed.
- The person charged with committing a crime is acquitted of that crime.

- In the case of multiple defendants, all persons charged with committing a crime are acquitted of the crime.
- Entry of a court order for the return of the property.

Any party to a forfeiture proceeding could seek an extension of the time periods described above for good cause, and the court may grant a motion for an extension for good cause.

Exemption to seizure or forfeiture

Property would not be subject to seizure under section 7522 or forfeiture under section 7521 if the owner of the property, upon learning of the commission of a crime, had served written and timely notice of the crime upon an appropriate law enforcement agency and also had served a written and timely notice to quit upon the person who committed the crime (i.e., an eviction notice). [Note: As written, it is unclear whether this provision would apply to any and all forfeitures regardless of the value of the property seized or be limited to forfeitures of property valued at \$50,000 or less.]

MCL 333.7523 and proposed MCL 333.7523a

BACKGROUND INFORMATION:

Article 7 (Controlled Substances) of the Public Health Code prohibits certain activities, such as the manufacture, delivery, and possession of controlled substances, and establishes penalties for violations. Under section 7522, certain property involved in drug crimes may be seized with a warrant, or without a warrant under certain circumstances such as incident to a lawful arrest. The types of property subject to forfeiture are listed in section 7521. Besides obvious objects such as the illegal drugs and associated paraphernalia and books and records (including formulas) related to drug offenses, vehicles such as cars, boats, and planes can also be seized and forfeited if used to commit or facilitate a drug violation. Anything of value, including cash, may also be seized and subject to forfeiture if used or intended to be used to facilitate a violation or if furnished or intended to be furnished in exchange for a controlled substance, imitation controlled substance, or other drug in violation of Article 7 and traceable to the exchange.

Section 7524 allows the state or the local unit of government that seized the property to retain it for official use or sell any property that is not required by law to be destroyed and that is not harmful to the public. The proceeds, and any money or other things of value, must be deposited with the state treasurer if the state was the seizing entity or with the appropriate treasurer having budgetary authority of a local seizing entity, and must be disposed of as specified: to cover, for instance, expenses related to the maintenance of the property while in custody or costs associated with the sale of the property, among other things. Lights for plant growth or scales that were forfeited may be donated to elementary or secondary schools or colleges or universities for educational purposes.

FISCAL INFORMATION:

Jointly examined, House Bills 4001 and 4002 would have an indeterminate, but potentially significant, fiscal impact on the Department of State Police and on local law enforcement agencies, due to potential revenue reductions resulting from proposed changes to civil asset forfeiture. The impact on law enforcement agencies would depend on the number of instances where civil asset forfeiture in controlled substance cases does not result in one of the following, as such cases would no longer be subject to civil asset forfeiture: criminal conviction or plea agreement, no person claiming an interest in the seized property or the owner withdrawing his or her property claim, the owner waiving the criminal conviction or plea requirement and electing to proceed with the civil forfeiture proceeding, or a criminal charge being filed and the defendant being outside the state and unable to be extradited for prosecution or unable to be located despite reasonable efforts having been made by law enforcement to do so. Changes to asset forfeiture proposed in the bills could result in law enforcement agencies requiring funding from other sources to supplant controlled substance-related forfeiture revenues, depending on the amount of assets obtained by law enforcement agencies through civil asset forfeiture and the extent to which these funds are used in support of law enforcement operations.

The bills would have no impact on forfeiture cases where the aggregate value of the forfeited property and currency exceeds \$50,000. Law enforcement agencies with low reliance on revenues from controlled substance civil asset forfeiture cases involving \$50,000 or less would also not experience significant revenue reductions from the bills. However, the bills would likely lead to a decrease in the number of cases resulting in forfeiture revenue, due to the bills' limiting of forfeitures of less than \$50,000 to the cases listed in the previous paragraph.

The statewide volume of forfeiture cases under the Public Health Code involving assets with an aggregate value less than \$50,000 is indeterminate. According to the 2018 Asset Forfeiture Report issued by the Department of State Police, 278 law enforcement entities received funds from asset forfeiture during a reporting period between January and December of 2017. During that reporting period, a total of 5,558 forfeitures were related to violations of the Public Health Code. Of all statewide reported cases of asset forfeiture (6,662 in total), 736 were not charged with a criminal violation; 220 were charged but not convicted; and 2,876 were associated with convictions, with an additional 2,368 charges pending at the conclusion of the reporting period. Total net statewide forfeiture proceeds were approximately \$13.1 million during the reporting period. The largest uses of proceeds from forfeitures under violations of the Public Health Code were as follows: law enforcement equipment (36%), vehicles (9%), personnel (8.5%), and supplies and materials (7%).

House Bill 4002 would have a minimal fiscal impact on SCAO, as it would be responsible for developing and making available to law enforcement agencies, courts, and the public a form for asserting an ownership interest in seized property. Costs for developing the form would be supported by existing appropriations.

ARGUMENTS:

For:

House Bills 4001 and 4002 strengthen changes made in recent years to the drug forfeiture laws by restricting the circumstances under which the state or a local seizing entity can dispose of or forfeit property in cases involving a property value of \$50,000 or less. Often the seized property eligible to be returned to the owner is worth about \$500 to \$1,000, an amount that may be significant to its owner but not worth lawyer and court fees that can reach \$20,000 or more to reclaim the property. Because forfeiture is a civil proceeding, court-appointed attorneys are not provided to indigent or low-income persons. Moreover, some say that the lack of forfeiture provisions within the Michigan Medical Marihuana Act makes registered users and caregivers vulnerable to raids. Small business owners also have reported being suspected of illegal activity when found to be carrying large amounts of cash to deposit at a bank or to purchase supplies.

Further, by the time a case is dropped or the person is acquitted, the property may already have been disposed of despite the proper filing of a claim to recover the seized property. Some report lengthy waits to get property returned, having only partial amounts of the property returned, or, if the property was already disposed of, having to accept only a partial return on what the original property had been worth.

The legislation addresses these weaknesses in current law by requiring, for cases involving property with a value of \$50,000 or less, that the property cannot be subject to forfeiture or disposition by the seizing entity unless the defendant in the criminal case is convicted of or pleads guilty to the charges. If the owner of the property does not claim it or withdraws a claim, or the defendant has fled the state, the seizing entity could keep, sell, or dispose of the property as provided for under the forfeiture provisions. Reasonable time frames are included in House Bill 4002 for forfeiture hearings and the return of seized property. Importantly, the bill would provide some flexibility, as a party to a forfeiture proceeding could request an extension of any of the time frames, and the court could grant the request, for good cause.

The legislation would also require a standardized form to be developed and made available to law enforcement and to people whose property was seized that will make it easier for those whose property was seized without a warrant to file a claim to have their property returned.

Reportedly, most of the revenue from forfeitures is from cases in which tens or hundreds of thousands of dollars, even millions, are involved. Since the legislation would not apply to such seizures, some feel it unlikely that state or local law enforcement agencies would experience economic hardship from any loss of revenue under the bill's provisions.

Against:

Reportedly, incidents of abuse by Michigan law enforcement agencies regarding seizures and forfeitures are low. Most agencies follow proper procedures. In some counties, prosecutors will even quickly review a case and identify property that is clearly not

associated with criminal activity and that should be returned immediately. If the issue is curbing unlawful police conduct, requiring or providing for more police oversight could reduce, if not eliminate, bad acts by officers. Additionally, adequate due process protections already exist in law. For instance, a forfeiture hearing is already required and law enforcement must prove—by clear and convincing evidence—that the property is connected with a crime before it can be forfeited.

Representatives of law enforcement say that forfeiture is a necessary tool in the fight against illegal drug trafficking because it not only removes property used in the commission of drug crimes, but also prevents criminals from profiting from criminal activity or using those funds to defend themselves. It is also a useful tool to employ against lower-level participants in building cases against major offenders. Since the proceeds from forfeiture benefit law enforcement and nonprofit agencies by helping to fund their operations, restricting its use may imperil public safety by draining those funds from local police departments and making it easier for criminals to operate. A requirement for conviction or relinquishment, even though only for smaller property amounts, could be circumvented if a criminal hid assets or kept possessions or cash minimal to stay below the \$50,000 threshold.

Against:

The legislation does not allow for money used by law enforcement officers in a sting operation or by confidential informants in a “controlled buy” that was later recovered in a raid or after an arrest to be returned to the law enforcement agency absent a conviction in the case. According to committee testimony, it is not uncommon that by time police arrive at the scene, the person’s stash of drugs has already been sold and all that may remain is the large amount of cash from the drug sales, including the money used by law enforcement officers, or given to informants, to make a drug purchase. If the defendant is acquitted or charges dropped, all the money, including the money provided by the law enforcement agency, will be given to the defendant. Even though the legislation only applies to cases involving assets of \$50,000 or less, the portion attributable to law enforcement could be in the tens of thousands. Just because a case cannot be made, someone should not profit from money that rightfully should be returned to the investigating law enforcement agency.

Against:

In light of a recent U.S. Supreme Court ruling (*Timbs v Indiana*, February 20, 2019) that could impact how states structure forfeiture laws, the bills are premature. Time should be given for a review of whether, or to the extent, Michigan’s laws could be impacted by court’s decision.

Response:

In *Timbs*, the Supreme Court sent the case back to Indiana’s courts for “further proceedings not inconsistent” with the court’s opinion. Simply put, it still may take years for issues highlighted by the Supreme Court regarding the applicability to the states of the Excessive Fines Clause of the Eighth Amendment, and what exactly would constitute an excessive fine, to be fleshed out. Meanwhile, the legislation would provide some relief to a population most impacted by seizures and forfeitures of property that is not connected to criminal drug activity.

POSITIONS:

Representatives of the following entities testified in support of the bills (2-19-19):

- NFIB Michigan (National Federation of Independent Business)
- Mackinac Center
- ACLU of Michigan

The following entities indicated support for the bills (2-19-19):

- Michigan Freedom Fund
- Michigan Cannabis Industry Association
- Criminal Defense Attorneys of Michigan (CDAM)
- Michigan League for Public Policy
- Michigan Credit Union League
- Michigan Bankers Association
- Coalition of Justice Voters

The following entities indicated a neutral position on the bill (2-26-19):

- Michigan Department of State Police
- Michigan Sheriffs' Association

A representative of the Michigan Association of Chiefs of Police testified in opposition to the bills. (2-19-19)

The Prosecuting Attorneys Association of Michigan (PAAM) indicated opposition to the bills. (2-26-19)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.