



**House
Legislative
Analysis
Section**

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CREATE GENERAL FORFEITURE LAW

House Bill 4778 as passed by the House
Second Analysis (1-5-88)

Sponsor: Rep. Justine Barns
Committee: Judiciary

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THE APPARENT PROBLEM:

Michigan law provides for the forfeiture to the government of property used in connection with drug dealing, but there is no similar authority for the confiscation and forfeiture of assets gained or used in the commission of various other crimes. The pecuniary rewards of those crimes may for the criminal outweigh the threat of criminal penalties. To minimize this incentive and ensure that a convicted criminal does not profit from his or her crime, amendments to the Revised Judicature Act have been proposed to authorize the forfeiture of assets connected with the commission of various crimes likely to have significant and identifiable gains.

THE CONTENT OF THE BILL:

The bill would add a new chapter to the Revised Judicature Act to provide for the forfeiture of property used for or obtained through the commission of any of some 60 crimes listed by bill. Those crimes would include arson, bribery, burglary, embezzlement, securities fraud, larceny, robbery, Medicaid fraud, and distribution of obscene material to a minor. Although law enforcement agencies could seize property prior to the criminal trial, forfeiture proceedings could not be instituted until after criminal conviction. The district court would have equitable jurisdiction over forfeiture proceedings and other actions brought under the bill. However, in a local unit of government where there was a municipal court, the circuit court would have original jurisdiction over forfeiture proceedings. Forfeiture appeals would be to the Court of Appeals. The bill would take effect April 1, 1988.

Scope

Generally, property used for or obtained through the commission of a crime named by the bill would be subject to forfeiture. However, property would not be subject to forfeiture if the owner did not know of or consent to the commission of the crime. Forfeiture of property encumbered by a bona fide security interest or an unpaid balance on a land contract would be subject to the interest of the secured party or land contract vendor. Real property used in committing a crime or that was the primary residence of a spouse or dependant child of the owner would be exempted as long as that family member did not know of or consent to the crime. Forfeiture of property obtained by the sale or exchange of proceeds of a crime (termed "substituted proceeds" of a crime) would be limited to the crime's proceeds plus any amount necessary to bring the sum equal to the amount of restitution or damages owed the victim.

Seizure

Personal property could be seized without process if any of the following applied: the property was used in committing a crime or constituted proceeds of it, and the seizure was incident to a lawful arrest; the seizure was made under a valid search or inspection warrant; there was probable cause to believe that the property was dangerous to health or safety; exigent circumstances precluded obtaining process or there was probable cause

to believe that the property was the proceeds or instrumentality of a crime; or the property was the subject of a prior judgment in favor of the state in a forfeiture proceeding.

Seized personal property would not be subject to an action to recover personal property, but rather would be considered to be in the custody of the "seizing agency" (that is, the police) subject only to applicable portions of the bill or an order and judgment of the court.

Real property could be "seized" through the filing of a lien against it. The court, upon a showing of probable cause from the attorney general or local prosecutor, could authorize the filing of the lien.

Notices

Within seven days after seizure or lien filing, the police (or for real property, the attorney general, prosecutor, or city or township attorney) would notify various interested parties of the pending forfeiture and disposal. The police would have to immediately notify the local prosecutor, or, if applicable, the attorney general, of the seizure of personal property.

Return of Property

Non-contraband property belonging to a victim would be returned promptly unless ownership was disputed or the property was needed for evidence "pursuant to" the Crime Victim's Rights Act.

Each person formally notified of a seizure or lien filing could ask the court to return the property or discharge the lien on any of the following grounds: that the property was illegally seized; that the property was not subject to forfeiture under the bill; or that the person had an ownership or security interest in the property and neither knew of or consented to the crime. The court would have to hold a hearing on the matter at the earliest possible time.

At that hearing, the prosecutor (or attorney general or city or township attorney) would have the burden of establishing probable cause to believe that the property was subject to forfeiture and that the person seeking return knew of or consented to the crime, and, if illegal seizure was claimed, that the property was legally seized. If the prosecutor failed to sustain the burden of proof, the court would order the property returned or lien discharged.

For a seized motor vehicle, the owner could ask the court to require the police to file a lien on the vehicle and return it. If the owner established that he or she held legal title and that use of the vehicle was necessary for the owner or his or her family, the court could order the vehicle's return, as long as it also ordered a lien placed on the vehicle.

Property would have to be returned or a lien discharged within seven days after one of the following occurred: a warrant was not issued within seven days after seizure or lien filing; all charges against the consenting legal owner

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had been dropped; the consenting legal owner was acquitted; in the case of multiple defendants, all persons charged had been acquitted; or, the court ordered return or discharge.

Testimony at a hearing on property return could not be used at a criminal proceeding other than for perjury, nor would it constitute a waiver of the constitutional right against self-incrimination.

Forfeiture Procedures

Forfeiture proceedings could not commence until after conviction for the crime. Separate procedures would be established for property with a total value of under \$100,000 and for property valued at over \$100,000. For property of less than \$100,000, the state or local unit of government would give notice to interested parties and if no claim was filed within 21 days, would declare the property forfeited. If a claim was filed, or if the property was worth more than \$100,000, the unit of government seeking forfeiture would have to file a civil action.

To prevail at a forfeiture proceeding, the government would have to prove the following by a preponderance of the evidence:

- for personal property, that the property constituted crime proceeds (or substituted proceeds) or was used in committing the crime;
- for real property, that the property constituted proceeds or substituted proceeds;
- if someone other than the convicted criminal claimed an ownership or security interest, that that person knew of or consented to the crime.

If the government failed to meet its burden of proof, property would be returned within seven days to the owner or person with the security interest. However, property would not be returned to a person with a security interest that was less than the property's market value unless the person paid the government the difference between market value and secured interest.

Distribution of Forfeiture Proceeds

The government could sell any property obtained through forfeiture and distribute the proceeds and any other money or thing of value obtained under the bill in the following descending order of priority:

- to satisfy an order of restitution in the prosecution for the crime;
- to pay the claims of each victim to the extent that those claims were not covered by restitution orders;
- to pay the expenses of the proceedings for forfeiture and sale, including expenses incurred during the seizure process, maintenance of custody, advertising, and court costs.

Any balance remaining would go to the local unit(s) of government substantially involved in effecting the forfeiture. Three-quarters of that money would be earmarked for criminal law enforcement and one-quarter for implementation of the Crime Victim's Rights Act. Local units would have to report annually to the Department of Management and Budget on the amounts used for law enforcement and the victims' rights act.

Receivers

If the government requested, the court could appoint a receiver to dispose of forfeited real property. The receiver would be entitled to reasonable compensation and would be authorized to maintain and sell the property.

MCL 600.4701 et al.

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the bill would enhance local revenues to a degree indeterminable at this time. (1-5-88)

ARGUMENTS:

For:

Forfeiture laws can deter would-be criminals. At the least, such laws can prevent the injustice of a convicted criminal profiting from his or her crime. The bill, modeled primarily after the state's successful drug forfeiture law, would ensure that property used for or obtained through criminal activity was yielded up to the government, who then would use that property to enforce criminal laws and to help victims of crime. The bill would accomplish its aims with due regard for the rights of innocent parties such as lienholders and family dependents: it would place limits on what property could be seized and it would provide procedures by which owners could promptly recover wrongfully seized property.

Against:

The bill should do more to help crime victims. As passed by the House, the bill would devote most of the forfeiture proceeds remaining after restitution and payment of expenses to law enforcement rather than to victims programs. In contrast, the committee version of the bill would have earmarked this money for the Crime Victims Compensation Fund, which pays the medical expenses and lost wages of crime victims without regard to whether the criminal profited or was convicted. While the sum involved may not be great, it would be better used for direct aid to crime victims, rather than to law enforcement, particularly as there is a question of propriety when a government stands to profit materially and directly from its law enforcement efforts against certain crimes but not others. There is nothing wrong with a government recouping expenses incurred in a forfeiture action, but the bill could continue to provide for this.

Response: A key element in the narcotics forfeiture law is the ability of local "funding agencies" to retain forfeiture proceeds and use them to combat drug trafficking. Without a similar grant in the bill, law enforcement agencies would lose out on a potentially important source of funding for fighting crime. Earmarking a portion of forfeiture proceeds for law enforcement is a provision that makes the bill a more effective crime-fighting measure.

Against:

State and local governments should be able to obtain forfeiture proceeds to satisfy tax arrearages. Such amounts represent in another form something that the criminal owes society.

Against:

The bill presents a fundamental inequity. Personal property used to commit a crime could be forfeited irrespective of the amount of gain realized from that crime. The punishment would not necessarily fit the crime, but rather could vary wildly from case to case without regard to what the crime was.

Against:

The bill would exempt from forfeiture real property that was used as the instrumentality of a crime—that is, that was used in connection with committing a crime. The bill would be more effective and internally consistent if it applied to all real estate.

Response: In crimes such as embezzlement, the role of real property may be hard to define. It would be unfair to seize real property that may have been only tangentially used, and thereby force innocent parties to take action to recover their property.

Against:

The bill misses an opportunity to take effective action against dangerous drivers. Far too many irresponsible drivers ignore license suspension or revocation and continue to drive, and even drive drunk, without a valid operator's license. The prospect of forfeiting one's car might give these drivers pause and make them obey the law. The bill therefore should allow forfeiture proceedings against people convicted of driving under a suspended license or a similar offense.

Against:

The bill would create a major expansion of jurisdiction for the district court. The rights and amounts of property involved in cases arising under the bill would be of sufficient magnitude to require the attention of the circuit court. The circuit court would be the more appropriate arena for forfeiture actions under the bill, the same way it is for actions under the drug forfeiture law.

Response: Circuit court caseloads on the civil docket are already staggering. To put the bill under the authority of the circuit court would exacerbate the docket problem and delay actions brought under the bill.

POSITIONS:

The Department of State Police supports the bill. (12-23-87)

The Michigan Sheriffs Association supports the bill. (1-5-88)

The Prosecuting Attorneys Association of Michigan supports the bill. (1-5-88)