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BILL ANALYSIS

Senate Fiscal Agency

Lansing, Michigan 48909

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House Bill 4778 (Substitute S-2 as reported)
Sponsor: Representative Justine Barns
House Committee: Judiciary
Senate Committee: Criminal Justice, Urban Affairs, and Economic Development

Date Completed: 3-15-88

RATIONALE

Michigan law provides for the forfeiture of the profits of such offenses as drug dealing, gambling, and "chop-shop" operations, but there is no similar authority for the confiscation and forfeiture of assets gained or used in the commission of other crimes. Under current law, the pecuniary rewards of those crimes may outweigh the threat of criminal penalties. To minimize this incentive and ensure that a convicted criminal does not profit from his or her criminal act, some people believe that the Revised Judicature Act should be amended to authorize the forfeiture of assets connected with the commission of various crimes likely to have significant and identifiable gains.

CONTENT

House Bill 4778 (S-2) would add a new chapter to the Revised Judicature Act to provide for the forfeiture of personal and real property used for or obtained through the commission of any of some 60 crimes specified by the bill. Those crimes include arson, bribery, burglary, embezzlement, securities fraud, larceny, robbery, Medicaid fraud, and distribution of obscene material to a minor. The bill would do all of the following:

- Describe the types of property that would be subject to forfeiture.
- Specify the procedure for the seizure of property subject to forfeiture.
- Require certain notices to be given after a seizure of the filing of a lien.
- Outline the procedures for the return of seized property, the forfeiture process, and the distribution of forfeited proceeds.
- Specify the court that would have jurisdiction over forfeiture proceedings.

The bill would take effect on June 1, 1988.

Scope of the Bill

Generally, property used for or obtained through the commission of a crime named by the bill would be subject to seizure by and forfeiture to a local unit of government or the State. Property would not be subject to forfeiture, however, if the owner did not have prior knowledge of or did not consent to the commission of the crime; or if the owner gave written notice of the commission of the crime to a law enforcement agency and served a written notice to quit upon the person who committed the crime. Forfeiture of property encumbered by a security interest or an unpaid balance on a land contract would be subject to the interest of the secured party or land contract vendor, if he or she had no prior knowledge of, or did not consent to, the crime. Real property used in committing a crime or that was the

primary residence of a spouse or dependent child of the owner would be exempted, unless that spouse or dependent child had prior knowledge of and consented to the commission of the crime. Forfeiture of property obtained by the sale or exchange of proceeds of a crime (termed "substitute proceeds" of a crime) would be limited to the crime's proceeds plus the amount by which restitution or damages owed to the victim exceeded the value of the proceeds of the crime.

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 the obtaining of a court order and there was probable cause to believe that the property was the proceeds or instrumentality of a crime.
- 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" 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 district 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 the filing of a lien, the police (or for real property, the Attorney General, prosecutor, or city or township attorney) would have to notify various interested parties of the pending forfeiture and disposal, including each mortgagee, person holding a security interest, person having a valid lien, and victim of the crime. The police immediately would have to notify the local prosecutor, or, if applicable, the Attorney General, of the seizure of personal property.

Return of Property

Noncontraband property belonging to a victim would have to be returned promptly unless ownership was disputed, or the property was needed for evidence pursuant to the Crime Victim's Rights Act.

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A person who had no prior knowledge of, or did not consent to, the commission of the crime could ask the district court to return the property or discharge the lien on any of the following grounds:

- The property was seized illegally.
- The property was not subject to forfeiture under the bill.
- The person had an ownership or security interest in the property and neither had prior knowledge of, nor consented to, the commission of the crime.

The court would have to hear the motion within 30 days after it was filed. At the hearing, the prosecution would have the burden of establishing probable cause to believe that the property was subject to forfeiture, and that the person seeking return had prior knowledge of, or had consented to, the commission of the crime, and, if illegal seizure were claimed, that the property was legally seized. If the prosecutor failed to sustain the burden of proof, the court would have to order the property returned or lien discharged. Testimony at a hearing on property's 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.

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, and such a motion would have to be heard within seven days. If the owner established that he or she held legal title and that use of the vehicle was necessary to 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 had been dropped.
- The consenting legal owner was acquitted.
- In the case of multiple defendants, all persons charged had been acquitted.
- The court ordered return or discharge.

If property were returned to the owner or a lien were discharged, the prosecuting attorney would have to notify the persons who received notice of seizure and intent to forfeit. Such notice would have to be in writing and delivered by certified mail. If delivery could not reasonably be accomplished, the notice of return or discharge would have to be published in a newspaper of general circulation for 10 consecutive publishing days.

Forfeiture Proceedings

Forfeiture proceedings could not commence until after conviction for the crime. Separate forfeiture procedures would be established depending on the total value of the property. For property whose value was less than \$100,000, the State or local unit of government would have to notify interested parties within seven days and, if no claim were filed within 21 days, could declare the property forfeited. If a claim were filed, or if the property's value were more than \$100,000, the unit of government seeking forfeiture would have to file a civil action within seven days after the expiration of the 21-day claim period.

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 the person had prior knowledge of or had consented to the crime.

If the government failed to meet its burden of proof, the property would have to be returned to the owner within seven days.

Distribution of Forfeiture Proceeds

The government could sell any forfeited property that was not required by law to be destroyed and was not considered harmful to the public, and could distribute the proceeds and any other money or thing of value forfeited under the bill in the following order of priority:

- To pay any outstanding security interest of a secured party who had no prior knowledge of, nor had consented to, the commission of the crime.
- To satisfy any order of restitution in the prosecution of the crime.
- To pay the claim of each person who showed that he or she was a victim of the crime to the extent that the claim was not covered by an order of restitution.
- To pay any outstanding lien against the property that was imposed by a governmental unit.
- To pay the proper expenses of the proceedings for forfeiture and sale, including, but not limited to, expenses incurred during the seizure process, maintaining custody of the property, advertising expenses, and court costs.

The balance would have to be distributed by the court to the unit or units of government involved in effecting the forfeiture. Of the amount received by a unit of government, 75% would have to be used to enhance law enforcement and 25% to implement the Crime Victim's Rights Act. The governmental unit would have to report annually on these uses to the Department of Management and Budget.

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.

Jurisdiction

The bill specifies that its forfeiture actions and related proceedings would have to be brought in the district court pursuant to that court's equity jurisdiction that would be established under the bill. In a local unit of government that has a municipal court, however, the circuit court would have original jurisdiction.

MCL 608.308 et al.

SENATE COMMITTEE ACTION

The Senate Committee on Criminal Justice, Urban Affairs, and Economic Development adopted a substitute (S-2) to the bill that enhances the protection of landlords and persons with a security interest in property from forfeiture. The Senate substitute provides that property would not be subject to seizure or forfeiture if the owner of the property notified an appropriate law enforcement agency of the commission of a crime and served a notice to quit upon the person who committed the crime. Also, the Senate

substitute specifies that the first priority for the disposition of the proceeds of a forfeiture action would be to pay a secured party who had no prior knowledge of, nor had consented to, the crime. It also would require that notice of seizure and intent to forfeit be given to each mortgagee of, or person holding a security interest in or having a valid lien on, "real property, a mobile home, motor vehicle, watercraft, or other personal property".

In addition, the Senate substitute does not specify that appeals of a forfeiture proceeding would be heard in the Court of Appeals, as did the House-passed version of the bill. Finally, the Senate substitute would take effect on June 1, 1988, rather than April 1.

FISCAL IMPACT

The bill would have an indeterminate impact on State and local government. The amount and value of property that could be seized under the provisions of this bill are not determinable.

ARGUMENTS

Supporting Argument

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 successful drug forfeiture provisions, would ensure that property used for or obtained through criminal activity was yielded to units of government, who then would use that property to help victims of crime. The bill would implement a forfeiture system with due regard for the rights of innocent parties such as lienholders, mortgagees, 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.

Supporting Argument

The bill adequately accommodates the needs of law enforcement. By specifying that 75% of the balance of forfeited proceeds remaining after restitution and payment of a security interest would be devoted to law enforcement enhancement, the bill would assist in implementing increased and more aggressive law enforcement.

Response: More than the 25% of that balance should go to the Crime Victims Compensation Fund. That Fund covers the medical expenses, lost wages, and other losses of crime victims without regard to whether the criminal profited or was convicted, and regardless of whether they were injured by economic or noneconomic crime. Consequently, when there are confiscated proceeds of a crime, those profits should be used to aid all victims. Further, there is a question of propriety when a governmental agency stands to profit materially and directly from its law enforcement efforts against certain crimes but not others.

Opposing Argument

The bill does not offer enough protection for a spouse and dependent children of a criminal. Although the bill would exempt real property that was the primary residence of such an individual if he or she had no "prior knowledge of" or had not "consented to" the crime, it does not adequately define "knowledge" or "consent". A spouse or dependent child could be in a situation in which he or she knew of the crimes but was powerless to do anything about it, because of fear of, or subjugation to, the criminal. Such an individual's home should not be taken away, but under the bill it could be.

Opposing Argument

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

Opposing Argument

State and local governments should be able to obtain forfeiture proceeds to satisfy tax arrearages. Such amounts represent another form of a debt owed to society for which the bill should provide.

Opposing Argument

The bill would exempt from forfeiture real property that was an instrumentality of a crime, but personal property that was an instrument of the crime could be seized and forfeited. The bill should treat all property equally.

Response: In crimes such as embezzlement, the role of real property may be difficult to define. It would be unfair to seize real property that may have been used only tangentially.

Opposing Argument

The bill would create a major expansion of jurisdiction for the district court. The rights to and amounts of property involved in cases arising under the bill could be of sufficient magnitude to require the attention of the Circuit Court. The Circuit Court would be the more appropriate arena for forfeiture actions, just as it has jurisdiction over actions under the drug forfeiture law.

Response: Circuit Court caseloads on the civil docket already are backlogged. Putting the bill under the authority of the Circuit Court would exacerbate that docket problem and delay actions brought under the bill.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.