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REVISE LARCENY STATUTES

House Bill 4444 (Substitute H-1)
Sponsor: Rep. Candace Curtis

House Bill 4445 (Substitute H-1)
Sponsor: Rep. Michael Nye

House Bill 4446 (Substitute H-1)
Sponsor: Rep. Kirk Profit

Committee: Judiciary
Revised First Analysis (3-18-98)

THE APPARENT PROBLEM:

Michigan's statutes punishing various sorts of larceny crimes generally distinguish between misdemeanor and felony offenses based on the value of the property stolen; typically, this threshold is \$100, although it can be as low as \$5 (for larceny from a motor vehicle or trailer) or as high as \$500 (for use of a utility service without consent). For simple larceny, the \$100 threshold has remained unchanged since 1957, when Public Act 69 of that year doubled the \$50 threshold that had previously been in effect since at least 1931, when the penal code was first enacted as Public Act 328 of 1931. In the ensuing years, inflation alone has caused offenses once considered misdemeanors to become felonies. Many have for some time been urging that the misdemeanor/felony threshold be raised, and that the penalties applied to various types of larceny be standardized.

However, to raise the misdemeanor/felony larceny threshold carries additional complications. If the threshold is raised, then merchants who sought criminal penalties would have less with which to prosecute shoplifters and bad check passers. Therefore, it has been argued, any increase in the misdemeanor/felony threshold should be accompanied by changes in the retail fraud and bad check statutes, especially with regard to civil remedies, that would improve merchants' ability to take action against and find redress from shoplifters, credit thieves, and bad check passers.

THE CONTENT OF THE BILLS:

The bills constitute a package of legislation to revise penalties for larceny offenses and increase civil penalties for retail fraud. Generally, current criminal penalties would be replaced with a four-tier structure providing for escalating penalties for offenses involving greater sums; repeat offenses would carry special penalties. Separate penalty structures, however, would exist for passing bad checks, credit card fraud, and retail fraud. The demarcation between misdemeanor and felony offenses, now generally set at \$100, would be increased to \$1,000. House Bills 4444 and 4445 would amend the Michigan Penal Code (MCL 750.131 et al.) to revise criminal penalties for 13 different larceny offenses, plus bad check offenses, credit card fraud, and retail fraud. House Bill 4446 would amend the Revised Judicature Act (MCL 600.2952 and 600.2953) with regard to civil remedies available to victims of bad checks and retail fraud, increasing costs and damages that a business may recover in a civil action (often a small claims action). The bills would take effect January 1, 1998. None of the bills could take effect unless all were enacted. A more detailed explanation follows.

Four-tier structure. Current penalties for 13 different larceny offenses carrying misdemeanor/felony thresholds ranging from \$5 to \$500 would be replaced with a four-tier structure setting the felony threshold at \$1,000. If the property involved was valued at less than \$200, the offense would be a misdemeanor

punishable by up to 93 days in jail, and/or a maximum fine of \$500 or three times the value of the property, whichever was greater. If the property was worth at least \$200 but less than \$1,000, the offense would be a misdemeanor punishable by up to one year in jail, and/or a maximum fine of up to \$2,000 or three times the value of the property, whichever was greater. If the property was worth more than \$1,000 but less than \$20,000, the offense would be a felony punishable by up to five years in prison, and/or a maximum fine of \$10,000 or three times the value of the property, whichever was greater. If the property was worth \$20,000 or more, the offense would be a felony punishable by up to ten years in prison and/or a fine of up to \$15,000 or three times the value of the property, whichever was greater.

This structure would apply to the following offenses: larceny; larceny from a motor vehicle or a trailer (the current law regarding larceny from a motor vehicle does not include stereos, telephones, computers, and other electronic devices in the list of items that if stolen from a motor vehicle or trailer would complete the crime of larceny from a motor vehicle; the bill would add these items to the list); larceny by refusal to return a rented motor vehicle; receiving and concealing stolen property; embezzlement; embezzlement by chattel mortgagor, vendee, or lessee; embezzlement of a chattel mortgage; embezzlement of property belonging partly to oneself; false pretenses with intent to defraud; use of a financial transaction device to withdraw or transfer funds in violation of contractual limits; malicious destruction of personal property; malicious destruction of a building; and, malicious destruction of tombs and grave markers.

Aggregate damage. In cases involving any of the thirteen offenses, where damages resulted from separate incidents that were part of a scheme or course of conduct, damages that occurred over a 12-month period could be figured in the aggregate so as to increase the level of the offense. In cases involving embezzlement; embezzlement by chattel mortgagor, vendee, or lessee; embezzlement of a chattel mortgage; and/or embezzlement of property belonging partly to oneself, the damages could be figured in aggregate without any time restrictions, if the scheme or course of conduct had been directed against a single person, a governmental entity within the state, or other legal entity.

Repeat offenders. For all 13 offenses, enhanced penalties would be provided for repeat offenders. For

example, if a person was convicted of what would otherwise be a one-year misdemeanor offense of receiving stolen property, but had two or more prior convictions for receiving stolen property, he or she would be guilty of a ten-year felony and subject to a fine of up to \$15,000 or three times the value of the property involved, whichever was greater. Repeat offenses would be elevated as follows: a second offense at the 93-day misdemeanor level or a violation of a substantially similar local ordinance would be treated as a one-year misdemeanor; a second offense at the one-year misdemeanor level or higher would be a five-year felony; and, a third or further offense at the one-year misdemeanor level or higher would be a ten-year felony. For each of these repeat offenses, the applicable fines would be elevated as well as the periods of imprisonment. Enhanced penalties also would apply to repeat offenses involving bad checks or credit card fraud (see below). However, if an individual's sentence for any of these crimes were enhanced under the bills' provisions as the result of the offender having had one or more prior convictions, those prior convictions could not also be used to further enhance the offender's sentence under the habitual offender provisions of the Code of Criminal Procedure.

If the prosecutor intended to seek an enhanced penalty based on a prior conviction, he or she would have to list the prior conviction on the complaint and information. The existence of the prior conviction would be determined by a judge, without a jury, at sentencing. The existence of a prior conviction under these circumstances could be established by any relevant evidence, including: a copy of the judgment of conviction; a transcript of a prior trial, plea-taking, or sentencing; information contained in the presentence report; or, the defendant's statement.

Checks, credit cards; criminal penalties. "Bad check" offenses would continue to be subject to penalties that varied according to the amount of the check and whether the offense was a repeat violation. However, threshold amounts would be increased (although the misdemeanor/felony threshold generally would be \$500, rather than the \$1,000 generally proposed for other offenses listed above), and the penalties would be increased.

At present, a first-offense for passing of a bad check for \$50 or less is a misdemeanor subject to up to 93 days in jail, a fine of up to \$100, or both. If the amount of the check is between \$50 and \$200, a first or second offense is a one-year misdemeanor also

punishable by a \$500 fine. Finally, if the amount of the check is more than \$200, the offense is a 13-month felony punishable by a fine of up to \$500. Under the bill, the 93-day misdemeanor penalty would apply to bad checks of \$100 or less, and the possible fine would be increased to \$500. The one-year misdemeanor penalty would apply to first or second offenses of passing a bad check worth between \$100 and \$500 and would carry a maximum fine of \$1,000 or three times the amount payable on the bad check, whichever was greater. Finally, the 13-month felony would become a two-year felony and the threshold amount for the bad check would be increased to \$500 or more, and the maximum fine would be the greater of \$2,000 or three times the amount payable. As with the larceny crimes, the offender could receive both the fine and the term of imprisonment.

Repeat offenses would also be subject to enhanced penalties similar to those for the larceny offenses. A second or further 93-day misdemeanor offense (or a violation of a substantially similar local ordinance) would be elevated to a one-year misdemeanor, rather than the six-month misdemeanor and/or up to \$250 fine that now applies. A third or subsequent offense involving a bad check worth between \$100 and \$500 would be a felony punishable by up to two year's imprisonment and/or a maximum fine of \$2,000. The provisions regarding the prosecutor's responsibilities when seeking enhanced penalties for repeat offenses involving larceny offenses, as outlined above, would also apply when seeking enhanced penalties for repeat "bad check" offenders.

Credit card fraud, which now carries a \$100 threshold between misdemeanor and felony offenses, would be subject to the same penalty structure proposed for passing bad checks. In addition, the value of the goods, property, services, or other things of value obtained through credit card fraud over any 12-month period could be added together to determine the total value, if the items were obtained in separate incidents under a scheme or course of conduct.

Bad checks; civil remedies. Under current law, criminal prosecution and civil remedies applicable to bad check offenders are exclusive remedies (that is, an offender cannot be subject to both criminal and civil penalties). At present, when a check written for \$500 or less is returned for non-sufficient funds (NSF), the person to whom the check was written (payee) may obtain damages of twice the amount of the check, but not less than \$50 or more than \$500; for an NSF

check written for more than \$500, the maker is liable for the amount of the check. The bill would provide that the civil remedies would be in addition to any criminal sanctions, and eliminate the distinction between checks under and more than \$500, as well as the current limitations on damages, instead specifying damages of twice the amount of the check or \$100, whichever was greater. The bill also would change the statutory notice and demand procedures. A written demand for payment of a dishonored check could be issued by the payee's agent (instead of only the payee) and would allow for delivery to be made by first-class mail instead of requiring that the demand be sent by certified mail, return-receipt requested, restricted delivery. In addition, the text of the statutory written demand would be changed to read more clearly and to comport with the changes in the law. Upon receiving a written demand for payment of the dishonored check, the payee would be required to either pay the full amount of the check plus a \$25 processing fee within four days of the mailing of the written demand, or, within 30 days after the written demand was mailed, pay the full amount of the check and a \$35 processing fee. If the maker of the check failed to properly respond to a written demand for payment and was found liable in civil action, he or she would have to pay the full amount of the check that had been dishonored, plus the greater of \$100 or twice the amount of the dishonored check, and costs of \$250. However, before trial and if the maker of the check and the payee or the payee's agent agreed, the maker could pay the full amount of the check, a \$35 processing fee, and reasonable costs (as agreed upon by the parties) not to exceed \$250.

Retail fraud; criminal penalties. Currently, first-degree retail fraud means shoplifting or tag-switching involving a "theft" of \$100 or more, while second-degree retail fraud applies to values of less than \$100. Under the bill, first-degree retail fraud would be applied to offenses involving \$1,000 or more. Maximum penalties for the offense, which is now a two-year felony subject to a fine of up to \$1,000, would be increased to five years in prison and/or a fine of \$10,000 or three times the value involved, whichever was greater.

Second-degree retail fraud, which would apply to offenses involving \$200 to \$1,000, would be a one-year misdemeanor, rather than the 93-day misdemeanor it now is, and the maximum fine would be increased from \$100 to \$2,000 or three times the value involved, whichever was greater.

The offense of third-degree retail fraud would be created, to apply to offenses involving less than \$200. Third-degree retail fraud would be a 93-day misdemeanor also punishable by a fine of up to \$500 or three times the value involved, whichever was greater.

In addition, provisions for repeat offenders would be added similar to those in the larceny sections. Second degree retail fraud would be elevated to first degree if the offender had previously been convicted of committing or attempting first or second degree retail fraud, larceny in a building, larceny, or false pretenses. However, prior convictions for false pretenses or larceny involving amounts less than \$200 would be sufficient to elevate the offense.

Third degree retail fraud would be elevated to second degree if the offender had been previously convicted of committing or attempting first or second degree retail fraud, larceny in a building, larceny, or false pretenses, or of violating a local ordinance substantially similar to one of those crimes.

Currently, an offender cannot be prosecuted under first or second degree retail fraud and under the felony provisions for false pretenses, larceny, or larceny in a building. The bill would still bar concurrent prosecutions for first degree retail fraud and 10-year felony larceny or 10-year felony false pretenses. However, for both second and third degree retail fraud only concurrent prosecution for larceny in a building would be barred. In addition, the bill would include a provision regarding the prosecutor's responsibilities when seeking enhanced penalties for repeat offenses that is identical to those included in the provisions for larceny offenses and bad check offenses.

Finally, the retail fraud provisions would also include a provision for aggregating values of the differences in price, or money or property stolen, or obtained as part of a scheme or course of conduct over a twelve-month period to increase the level of the offense.

Retail fraud; civil remedies. The currently-available civil remedy for retail fraud is a civil penalty of ten times the value involved, but not less than \$40 or more than \$100. The bill would revise this to no less than \$75 and no more than \$200. In addition to allowable costs for a defendant's failure to respond to a written demand, the bill would also allow reasonable attorney fees.

A written demand for payment would no longer have to be delivered in person or by certified mail, but

instead could be sent by first class mail. In addition, instead of allowing the offender thirty days from when he or she received the demand notice, the offender would be required to act within thirty days after the demand notice was mailed in order to avoid further civil liability. Further, the demand notice form would be rewritten to make it clearer and to comport with the changes in the law. Also, what is currently a separate notice form for cases involving retail fraud committed by minor children would be combined with the regular form.

Finally, under current law a merchant must file a police report with the prosecuting or municipal attorney in order to recover any amount for which a person might be civilly liable. The bill would require the report to be filed with the local law enforcement agency with jurisdiction over the place where the crime occurred.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills would likely decrease state costs by reducing the number of felons sentenced to state prisons. However, enhanced penalties for repeat offenders could offset these savings to an unknown degree through increased sentence lengths. (4-29-97)

ARGUMENTS:

For:

The bills would address the changes that inflation has wrought on criminal law, turning larceny offenses that once were misdemeanors into felonies. However, if this is to be done, then merchants, who already are plagued by shoplifters and bad check passers, would need improvements in civil remedies--improvements that the bills would make -- that would help to free merchants from dependence on criminal prosecution. With regard to criminal prosecutions, however, the bills would do more than merely raise the misdemeanor/felony threshold. The four-tier penalty structure would offer stiffer penalties for the most egregious offenses, and allow strong misdemeanor penalties for offenses that may technically be prosecutable as felonies under current law, but which typically are pled down to misdemeanors. By making even the lesser misdemeanor offenses 93-day misdemeanors, the bills would ensure that these offenders were fingerprinted and had criminal records maintained on them; the bill thus would enable repeat violators (at least those who were prosecuted for statutory violations) to be identified. By retaining

current statutory distinctions between the various types of larcenies, the bills would preserve the body of interpretive case law (which provides, for instance, fuller explanations of the elements of an offense) that has developed on each affected section of the penal code. The bills would update and standardize criminal sanctions for theft and improve civil remedies for victims of retail fraud and bad checks.

Against:

Criticisms of the bills could come from a number of perspectives. For instance, some may find the bills' approach in retaining current distinctions between various types of larcenies to be unnecessarily cumbersome, preferring instead to simply repeal existing laws and replace them with a simplified penalty structure applying to all larcenies. Others may prefer that the bills do more in the way of allowing stolen amounts to be aggregated, so that an ongoing course of conduct (for example, going on a buying spree with a stolen credit card number) can be appropriately punished. Further concerns may be raised by the fact that the bills do not affect the crimes of "theft" of utility service or fraudulent use of a telephone credit card or someone else's phone number to obtain telephone service. One of the main aims of the legislation is to provide a consistent and coherent penalty structure for larceny offenses; to the degree that some larceny offenses are eliminated from this four-tier structure, this aim is thwarted.

Response:

Utility companies need to maintain their current \$500 misdemeanor/felony threshold so that its value as a deterrent can be maintained. Utilities point out that those who might steal utility service are well aware at what point a misdemeanor becomes a felony, and that a relatively low threshold serves to keep theft levels down. To raise the threshold to \$1,000, argue utilities, would be to invite thefts of up to \$1,000. A similar argument is raised by the phone companies.

POSITIONS:

The Michigan Retailers Association supports the bills. (4-30-97)

The Michigan Bankers Association supports the bills. (4-30-97)

The Michigan Grocers Association supports the bills. (4-30-97)

The Prosecuting Attorneys Association of Michigan supports the bills. (4-30-97)

Analyst: W. Flory

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