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Senate Bill 2 (as enacted)  
House Bills 4001 and 4002 (as enacted)  
Sponsor: Senator Peter J. Lucido (S.B. 2)  
Representative Jason Wentworth (H.B. 4001)  
Representative David LaGrand (H.B. 4002)  
Senate Committee: Judiciary and Public Safety  
House Committee: Judiciary

**PUBLIC ACT 7 of 2019**  
**PUBLIC ACTS 8 & 9 of 2019**

Date Completed: 8-23-19

### **RATIONALE**

Generally, asset forfeiture is a legal process that allows law enforcement officers to seize property that is suspected to be connected to criminal activity. Criminal asset forfeiture occurs when an individual's property is forfeited as part of his or her sentencing following a conviction. In contrast, in a civil asset forfeiture proceeding, the government files a civil action against the property, not the individual, so the property may be seized even if the person is not charged or convicted of a crime. Forfeiture laws vary by state, but each law generally allows the government to keep the seized cash and property, destroy the property, or sell it and keep the proceeds to fund community-based programs or to finance other services.

Recently, civil asset forfeiture laws have come under scrutiny in Michigan and across the country. According to the Institute for Justice, as of March 2019, three states (Nebraska, New Mexico, and North Carolina) have abolished civil asset forfeiture entirely in favor of a criminal forfeiture system, and an additional 16 states have passed legislation requiring a criminal conviction before some or all civil asset forfeiture proceedings may be initiated.

Currently, the Public Health Code allows law enforcement officers to seize property if they have probable cause to suspect that it has been used for or derived from a controlled substance violation. If property is seized, the government must notify the property owner of its intent to forfeit and dispose of the property. If the owner does not claim an interest in the property, the government must declare the property forfeited and dispose of it as provided in the Code. However, if the property owner objects to the forfeiture, the government must prove by clear and convincing evidence that the property forfeited is connected to a drug-related crime. If successful, the State may retain the property, or sell it and give the proceeds to the law enforcement agency that seized the property.

Some people believed that Michigan's current civil asset forfeiture process did not go far enough to protect individuals' personal property rights and their right to due process. It was suggested that forfeiture of property valued at less than \$50,000 should not be allowed unless the defendant is convicted of a crime or signs a plea agreement.

### **CONTENT**

**Senate Bill 2 amended Article 7 (Controlled Substances) the Public Health Code to do the following:**

- Specify that property seized for a violation of Article 7 is not subject to forfeiture or disposition unless certain circumstances apply, such as the property owner is convicted of a violation of Article 7 or executes a signed form relinquishing ownership of the property.**

- **Require a prosecuting attorney or, if applicable, the Attorney General, to review the seizure of the property and approve its forfeiture, if a person relinquishes ownership of the property.**
- **Specify that the bill does not apply to forfeiture proceedings in which the aggregate fair market value of the property exceeds \$50,000.**

**House Bill 4001 amended Article 7 of the Public Health Code to do the following:**

- **Require, under certain circumstances, a civil forfeiture case under the Code to be stayed while applicable criminal proceedings are pending, and to proceed after the defendant is convicted or enters a guilty plea to the criminal offense involved, or if other conditions apply.**
- **Require a plaintiff, at a forfeiture hearing, to prove that the property is subject to forfeiture or, if a person other than the defendant is claiming an interest in the property, that the person has prior knowledge of or consented to the commission of the crime.**
- **Require property to be returned to an owner within 14 days under certain circumstances, including if the plaintiff fails to meet his or her burden of proof, a warrant is not issued within 90 days of a seizure, or the person charged with the crime is acquitted.**
- **Allow a party to a forfeiture proceeding to seek an extension of the prescribed time periods for good cause.**

**House Bill 4002 amended Article 7 of the Code to do the following:**

- **Require a local unit of government or the State, as applicable, to notify a person, if charges have been filed against him or her, that property has been seized.**
- **Allow a person claiming an interest in certain property that is seized without process to file a written claim expressing any objection to forfeiture.**
- **Require the State Court Administrative Office (SCAO) to develop and make available forms for relinquishing ownership of property, and forms to assert an ownership interest in seized property valued at less than \$50,000.**

The bills took effect on August 7, 2019.

**Senate Bill 2**

**Forfeiture, Disposition of Property**

Under the bill, except as otherwise provided, property may be seized as provided in Section 7522 for a violation of Article 7 of the Code, but is not subject to forfeiture under Section 7521 or disposition under Section 7524 (see **BACKGROUND** for more information on those sections) unless a criminal proceeding involving or relating to the property has been completed and the defendant pleads guilty to or is convicted of a violation of Article 7.

A criminal conviction or guilty plea is not required if one or more of the following apply:

- No person claims any interest in the property or the owner of the property withdraws his or her claim in the property.
- The owner of the property waives the criminal conviction or plea requirement (described above) and elects to proceed with the civil asset forfeiture proceeding.
- A criminal charge has been filed and one or both of the following apply: a) the defendant is outside the State and cannot reasonably be extradited or brought back to the State for prosecution, or b) law enforcement authorities have made reasonable efforts to locate and arrest the defendant, but the defendant has not been located.

If a person withdraws his or her claim to property, the prosecuting attorney for the county in which the property was seized or, if the Attorney General is actively handling a case involving or relating

to the property, the Attorney General, must review the seizure and approve the forfeiture of the property before it may be forfeited.

These provisions do not prohibit the immediate destruction of property that may not be 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 provisions described above apply to forfeiture proceedings that are pending on, or initiated on or after, the bill's effective date.

Those provisions do not apply to forfeiture proceedings in which the aggregate fair market value of the property seized exceeds \$50,000, excluding the value of contraband.

#### **House Bill 4001**

Under the bill, if Section 7521a (which Senate Bill 1 adds) applies to a forfeiture case under Article 7, the seized property is subject to forfeiture under Section 7521, and a person has filed a claim to property or an objection to forfeiture, a civil asset forfeiture action must be stayed while applicable criminal proceedings are pending. The action must proceed after the defendant is convicted of, or enters a guilty plea to, the offense involved, or one or more events described in Section 7521a applies.

At the forfeiture hearing, the plaintiff must prove one or both of the following, as applicable:

- The property is subject to forfeiture under Section 7521 (please see **BACKGROUND** for property subject to forfeiture).
- If a person, other than the person who has been convicted of a violation of Article 7 or entered into a plea agreement in connection with a violation of Article 7, claims an ownership or security interest in the property, that the person claiming the interest had prior knowledge of or consented to the commission of the crime.

If the plaintiff fails to meet his or her burden of proof, property seized under Section 7522 must be returned to the owner within 14 days from the date the court issues a dispositive order.

Except as otherwise provided, property must be returned to the owner within 14 days after any of the following occur:

- A warrant is not issued against a person for the commission of a crime within 90 days after the property is seized.
- All charges against the person relating to the commission of a crime are dismissed.
- The person charged with committing a crime is acquitted.
- In the case of multiple defendants, all individuals charged with committing a crime are acquitted.
- Entry of a court order for the return of the property.

A party to a forfeiture proceeding may seek an extension of the time periods described above for good cause. The court may grant a motion for an extension for good cause shown.

#### **House Bill 4002**

Section 7523 of the Code specifies that if property is seized under Section 7522, forfeiture proceedings must be instituted promptly. Under the bill, this requirement is subject to Section 7521a (which Senate Bill 2 added).

Section 7523 also prescribes the procedure to be used if property is seized without process under Section 7522, and the total value of the property seized does not exceed \$50,000. The procedure

requires the local unit of government that seized the property or, if the property was seized by the State, the State, to notify the property owner that the property has been seized, and that the local unit of government or, if applicable, the State, intended to forfeit and dispose of the property by delivering a written notice to the owner or by sending the notice by certified mail. If the owner's name and address is not reasonably ascertainable, or delivery of the notice cannot be reasonably accomplished, the notice must be published in a newspaper of general circulation in the county in which the property was seized, for 10 successive publishing days.

Under the bill, the local unit also must notify the owner if charges have been filed against the person for a crime. In addition to publishing in a newspaper, the local unit also must publish the notice on its or the Attorney General's public website.

Section 7523 specifies that unless all criminal proceedings involving or relating to the property have been completed, the seizing agency immediately must notify the prosecuting attorney for the county in which the property was seized or, the Attorney General, as applicable, of the seizure of the property and the intention to forfeit and dispose of it.

A person claiming an interest in property that is subject of a notice may, within 20 days after receiving it or of the date it was first published, file a written claim signed by the claimant with the local unit of government or the State expressing his or her interest in the property.

Under the bill, a person claiming an interest in the property also may file an objection to forfeiture. A claim or objection must be written, verified, and signed by the claimant, and must include a detailed description of the property and the property interest asserted. The verification must 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. A written claim must be made on a form developed by the SCAO.

The SCAO must develop and make available to law enforcement agencies, courts, and the public a form for asserting an ownership interest in property seized without process as provided under the bill. The form must require a claimant to provide a detailed description of the property, his or her ownership interest in the property, and a signed attestation that the claimant has a bona fide ownership interest in the property.

MCL 333.7521a (S.B. 2)  
MCL 333.7523a (H.B. 4001)  
MCL 333.7523 (H.B. 4002)

## **BACKGROUND**

Under Section 7521 of the Public Health Code, the following property is subject to forfeiture:

- A controlled substance that has been manufactured, distributed, used, possessed, or acquired in violation of Article 7.
- Raw material, product, or equipment that is used, or intended for use, in manufacturing, compounding, processing, or delivering a controlled substance in violation of Article 7.
- Property that is used or intended for use as a container for property described in either of the first two provisions.
- A conveyance, including an aircraft, vehicle, or vessel used or intended for use to transport property described in either of the first two provisions, for the purpose of sale or receipt, subject to several exceptions.
- Books, records, and research products and materials used, or intended for use, in violation of Article 7.
- Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance in violation of Article 7 that is traceable to the exchange, including money, negotiable instruments, or securities.
- Any other drug paraphernalia.

Section 7522 specifies that property that is subject to forfeiture under Article 7 or pursuant to Section 7521 may be seized upon process issued by the circuit court having jurisdiction over the property. Seizure without process may be made under any of the following circumstances:

- Incident to lawful arrest, pursuant to a search warrant, or pursuant to an inspection under an administrative inspection warrant.
- The property is the subject of a prior judgment in favor of the State in an injunction or forfeiture proceeding under Article 7.
- There is probable cause to believe that the property is directly or indirectly dangerous to health or safety.
- There is probable cause to believe that the property was used or is intended to be used in violation of Article 7.

Under Section 7524, when property is forfeited under Article 7, the local unit of government that seized the property may do any of the following, or if the property is seized by or in the custody of the State, the State may do any of the following:

- Retain the property for official use.
- Sell the property that is not required to be destroyed by law and that is not harmful to the public.
- Require the Michigan Board of Pharmacy to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Drug Enforcement Administration (within the United States Department of Justice) for disposition.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Under the bills, seized property is not subject to forfeiture unless the owner is convicted, signs a plea agreement, or relinquishes ownership of it. If the owner relinquishes the property, the prosecuting attorney or, if applicable, the Attorney General must review the seizure of the property and approve its forfeiture. Regardless of a law enforcement officer's or agency's intentions and motivations, requiring a conviction to forfeit seized property is more consistent with personal property and due process protections guaranteed under the Michigan and United States Constitutions.

Michigan law requires police to demonstrate by clear and convincing evidence that an asset is connected to a crime in order for forfeiture to occur; however, criminal convictions require a higher burden of proof: beyond a reasonable doubt. Formerly, an individual could be deprived of his or her property or assets even if there was insufficient evidence for a criminal conviction. This violated the presumption of innocence by punishing people before they had been found guilty of a crime. Every individual must be afforded the fundamental right to due process, and the bills are a fair compromise of protecting individuals' private property rights and allowing law enforcement officers and agencies to do their jobs.

**Response:** Safeguards already existed under Michigan law to protect individuals' due process rights. Law enforcement officers must have probable cause in order to seize property or money, and must prove by clear and convincing evidence (previously the standard was a preponderance of the evidence) that the property was part of or derived from a crime before it can be forfeited.

### **Opposing Argument**

Civil asset forfeiture is an important tool for combating drug-related crimes, which is even more necessary as the opioid crisis worsens. Asset forfeiture is one of the most effective methods for taking resources away from drug trafficking organizations and preventing them from profiting from criminal activity. The bills will impede its effectiveness, and may allow criminals to keep the proceeds from their illegal activities. For example, if the police raid a drug house after a dealer has sold off his supply, the only evidence of the crime may be the money. If a prosecutor did not have enough other evidence to get a conviction because the drugs were gone, the money from the drug sale must be returned.

### **Opposing Argument**

Proceeds from forfeiture are used to help fund law enforcement operations, and many police departments rely on asset forfeiture because of budget cuts. According to the 2018 Asset Forfeiture Report compiled by the Michigan State Police, asset forfeiture funds are used to "enhance law enforcement by providing resources for equipment, personnel, vehicles, training, and supplies". Seized assets also allow law enforcement agencies to contribute to nonprofit organizations that assist in citizen crime-solving. Losing any kind of financial resources may be detrimental to these agencies and the programs they administer. If police departments and law enforcement agencies lose financial resources, they will have to seek appropriations from the Legislature to continue funding valuable crime-fighting programs.

**Response:** Asset forfeiture is an important and valuable tool that helps prevent people from profiting from criminal activity. However, the civil asset forfeiture process should protect innocent property owners and discourage law enforcement agencies from "policing for profit". According to testimony presented before the Senate Committee on Judiciary and Public Safety, nationwide and in Michigan, there are reports that law enforcement agencies have abused broad civil forfeiture laws to fund their operations, and that some seizures of personal property have been made in error. Often, many small business owners carry large sums of cash to the bank or other business locations, or to make large supply purchases. Former law created an incentive for law enforcement agencies and officers to "police for profit", and exposed individuals or small businesses to possible seizure and forfeiture of their money or property by overzealous law enforcement officers seeking to increase their departments' funding.

Legislative Analyst: Stephen Jackson

### **FISCAL IMPACT**

Collectively, the bills will have an indeterminate negative impact on the Michigan State Police (MSP) and local law enforcement agencies, and a minimal impact on the State Court Administrative Office. The bills add restrictions as to when law enforcement agencies may seize cash and property related to crimes under the Public Health Code, specifically controlled substance violations. Chiefly, the bills restrict forfeiture of property for controlled substance violations to those instances in which a conviction eventually follows, either by trial or plea agreement.

According to the 2018 Asset Forfeiture Report compiled by the MSP, over \$13.1 million in cash and property was awarded to law enforcement agencies across Michigan for calendar year 2017. This includes awards to MSP and local law enforcement agencies. This amount covers 6,662 forfeitures, of which 5,558, or 83%, were made because of violations of the Public Health Code. Of those 6,662 forfeitures, 2,368 concerned instances in which formal charges were brought and a conviction eventually followed, 2,876 concerned instances in which charges were brought but a conviction is still pending. The remaining 1,418 (21%) concerned forfeiture instances that did not result in a conviction, or a conviction was not verified by the reporting data. The bills prohibit forfeiture of property without a corresponding conviction. It cannot be determined what percentage of property or cash went to the MSP or local law enforcement agencies. Also, additional data indicating the amount of money seized under the Code are not available, but it is likely the bills will reduce revenue from forfeiture by several million dollars statewide.

Additionally, House Bill 4002 requires the SCAO to create and make available two forms: one for the owner of seized property to relinquish that property, and one for claimants to assert an ownership interest in seized property valued at less than \$50,000. The cost for creating and distributing these forms likely will be nominal.

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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.