

Legislative Analysis



UNIFORM FORFEITURE REPORTING ACT AND CIVIL ASSET FORFEITURE REVISIONS

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House Bill 4499 as enacted
Public Act 153 of 2015
Sponsor: Rep. Gary Glenn

House Bill 4500 as enacted
Public Act 149 of 2015
Sponsor: Rep. Jim Runestad

House Bill 4503 as enacted
Public Act 150 of 2015
Sponsor: Rep. Triston Cole

House Bill 4504 as enacted
Public Act 148 of 2015
Sponsor: Rep. Klint Kesto

House Committee: Judiciary
Senate Committee: Judiciary

Complete to 8-25-16

House Bill 4505 as enacted
Public Act 154 of 2015
Sponsor: Rep. Peter J. Lucido

House Bill 4506 as enacted
Public Act 151 of 2015
Sponsor: Rep. Jason M. Sheppard

House Bill 4507 as enacted
Public Act 152 of 2015
Sponsor: Rep. Brandt Iden

BRIEF SUMMARY: House Bill 4504 creates a new act to require annual reports to be submitted to the Department of State Police (MSP) by governmental entities regarding seized and forfeited property and to require that the MSP compile that information, issue an annual report to the legislature, and post the report on the department's website.

House Bills 4500, 4503, 4506, and 4507 similarly amend various statutes to require that a local government or state department or agency report all seizure and forfeiture activities to the MSP and to subject the reporting entity to an audit under House Bill 4504, if required.

House Bill 4499 raises the threshold for forfeiture of property in a nuisance abatement action to clear and convincing evidence.

House Bill 4505 raises the threshold for forfeiture of property related to a violation of the controlled substances statutes to clear and convincing evidence.

FISCAL IMPACT: The bills could result in increased costs to state and local units of governments. (See ***Fiscal Information***, below, for further 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, identity theft, certain nuisances (e.g., houses used for gambling or prostitution), or for certain listed crimes (e.g., racketeering, human trafficking, dogfighting). 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 used for prostitution 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. Proceeds from selling the forfeited property can be used by the seizing entity for law enforcement purposes or by a local government to defray the cost to abate nuisances.

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." The long recession and slow recovery, and decreased property tax revenue due to the housing crisis, have left many local governments struggling to provide basic services to residents. According to some, money from the sale of forfeited property can therefore be an incentive for aggressive seizure and forfeiture policies. 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.

Several states have recently revised their civil forfeiture statutes to beef up property protections for citizens, with one state, New Mexico, ending civil forfeiture altogether and allowing a jury to decide whether the seized property was an instrument of the crime. Other states, such as Minnesota, have instead opted to raise the burden of proof that property is connected with a crime before allowing it to be forfeited. Many feel that Michigan's civil asset forfeiture procedures should also be revised to require more transparency in forfeiture proceedings and to strengthen protections for its citizens.

THE CONTENT OF THE BILLS:

House Bill 4504

The bill creates the Uniform Forfeiture Reporting Act to require, before February 1 of each year, each reporting agency to submit to the Department of State Police (MSP) a report summarizing the agency's activities for the preceding calendar year regarding the forfeiture of property under the Public Health Code (controlled substance violations), Identity Theft Protection Act, and Revised Judicature Act (nuisance abatement and general forfeiture laws). "*Reporting agency*" would refer to a local government that seized property or had

property forfeited to it or to a state department or agency that effectuated a seizure or forfeiture. "*Local government*" would mean a village, city, township, or county.

Annual Report

The annual report must be made on a form as prescribed by the MSP and must contain the following information for proceedings commenced on or after February 1, 2016 (the bill's effective date):

- The number of forfeiture proceedings instituted and number concluded by the reporting agency in the circuit court, as well as the number pending at the end of the year.
- The number of forfeitures effectuated by the reporting agency without a forfeiture proceeding in the circuit court.
- The number of forfeiture proceedings subject to a consent judgment, settlement, or any other similar agreement involving the property owner and reporting agency.
- The number of public nuisance proceedings instituted by the reporting agency in the circuit court that concluded an order of abatement involving the forfeiture of property.
- An inventory of property received by the reporting agency according to categories listed in the bill (e.g., whether residential, industrial or commercial, or agricultural real property; money; weapons; motor vehicles; or other personal property of value).
- Each property inventoried must include a description as required in the bill, such as the date the property was seized, the estimated value of the property, the alleged violation or nuisance leading to the forfeiture and whether any person was charged and ultimately convicted of the violation, the final disposition of the property, the number of claimants to the property, and whether the forfeiture resulted from an adoptive seizure (see bill for a definition).
- Net proceeds of all property forfeited through actions instituted by the reporting agency for which it is required to account for and report to the state treasurer under either the Uniform System of Accounting Act or the Uniform Budgeting and Accounting Act.
- Certain statements pertaining to the use of money and net proceeds for forfeiture proceedings under the Public Health Code (regarding controlled substance violations) and proceedings under the Revised Judicature Act (nuisance and general forfeiture laws).

The last three bullet points above apply only to proceedings that have been finalized for purposes of appeal.

A null report must be filed by a reporting agency that did not engage in any forfeitures during the reporting period. Forfeiture proceeds could be used to pay the reasonable costs associated with compiling, analyzing, and reporting data under the bill. Records of a reporting agency regarding the forfeiture of any property required to be reported under the bill must be audited in accordance with the Uniform System of Accounting Act or the Uniform Budgeting and Accounting Act.

Department of State Police Report

The bill requires the MSP to compile the information reported to it and, beginning January 1, 2017, file an annual report of its findings with the Secretary of the Senate and the Clerk of the House of Representatives, as well as posting a copy on its departmental website. The report, which must be filed no later than July 1 of each year, must identify any state departments or agencies or local units of government that failed to properly report the required information to the MSP.

Repealer

The bill repeals Section 7524a of the Public Health Code (MCL 333.7524a), which requires annual reports by a local government having forfeiture proceedings pertaining to controlled substance violations in the preceding calendar year.

The bill took effect February 1, 2016, and was tie-barred to House Bills 4503, 4506, and 4507.

House Bills 4500, 4503, 4506, and 4507

The bills each add a new section to various acts to specify that beginning February 1, 2016, each reporting agency must report all seizure and forfeiture activities to the Department of State Police as required by the Uniform Forfeiture Reporting Act (created by House Bill 4504).

House Bill 4500 amends the Identity Theft Protection Act (MCL 445.79d). The bill was tie-barred to House Bill 4504 and took effect January 18, 2016.

House Bill 4503 amends Chapter 47 of the Revised Judicature Act, known as the Omnibus Forfeiture Act (MCL 600.4710). The bill was tie-barred to House Bills 4504, 4506, and 4507 and took effect January 18, 2016.

House Bill 4506 amends Article 7 of the Public Health Code (MCL 333.7524b). The bill was tie-barred to House Bills 4503, 4504, and 4507 and took effect February 1, 2016.

House Bill 4507 amends Chapter 38 of the Revised Judicature Act, entitled "Public Nuisances" (MCL 600.3841). The bill was tie-barred to House Bills 4503, 4504, and 4506 and took effect January 18, 2016.

House Bill 4499 amends Chapter 38 of the Revised Judicature Act, entitled "Public Nuisances" (MCL 600.3815). Failure to remedy property declared to be a public nuisance can subject the property to seizure and forfeiture. First, however, the existence of a nuisance must be proved by a preponderance of the evidence and a judgment and order of abatement entered by the court.

The bill specifies that in an action under Chapter 38, if the plaintiff seeks abatement of a nuisance by forfeiture or sale of a vehicle, boat, aircraft, or other personal property, the plaintiff has the burden of proving by clear and convincing evidence that the object was used for or in furtherance of the activity or conduct that constituted the nuisance as described in Section 3801 (e.g., prostitution, gambling, controlled substance violations, among other specified unlawful activities).

The bill took effect January 18, 2016 and applies to an action commenced on or after that date.

House Bill 4505 amends Section 7521 of the Public Health Code (MCL 333.7521). Section 7521 lists the property subject to forfeiture for a violation of Article 7, entitled "Controlled Substances." The bill specifies that in a forfeiture action under Article 7, the plaintiff has the burden of proving a violation by clear and convincing evidence. The change applies to an action commenced on or after the bill's effective date of January 18, 2016.

FISCAL INFORMATION:

State Impact: The legislation would increase costs to the Michigan Department of State Police (MSP) to process, compile, and report the additional information required to be submitted under the bills. Under the controlled substances provisions of the Public Health Code, the MSP Grants and Community Services Division (GCSD) already compiles an annual report regarding drug forfeitures.¹ While these bills would continue to require an annual report, the information submitted to MSP-GCSD is more expansive, and also applies to seizures and forfeitures under Chapters 38 and 47 of the Revised Judicature Act. It would require additional staff time and resources to compile this information, increasing GF/GP expenditures for MSP-GCSD.

MSP would also be affected to the extent that it receives forfeiture funds and would be subject to the additional reporting requirements. House Bill 4504 provides that a reporting agency (including MSP's criminal investigation activities) could use forfeiture proceeds to pay for any reasonable costs associated with compiling, analyzing, and reporting data under the bill. Any increased costs paid from forfeiture funds to comply with the expanded reporting requirements necessarily reduces the amount of those funds that may be used for other things, including personnel costs, vehicles, equipment, informant fees, buy money, training, and prevention services—i.e., those categories of expenditures on which the bill requires a report.

Additionally, the bills require ("shall") that reporting agencies be audited regarding the seizure and forfeiture of property. This could require MSP to hire additional staff to conduct these audits, although the act permits ("may") local auditors to conduct an audit of these forfeitures. (MSP's use of forfeiture funds are already subject to audit by the Office of Auditor General.)

Local Impact: Similarly to the state impact noted above, the bills would increase the costs of local government agencies, including courts, police departments, sheriff's departments, and prosecuting attorneys, to comply with the expanded reporting requirements.²

Again, HB 4504 provides that a reporting agency could use forfeiture proceeds to pay for any reasonable costs associated with compiling, analyzing and reporting data under the

¹ http://www.michigan.gov/msp/0,4643,7-123-1593_34040_34043-224991--,00.html.

² Section 4708 of the Revised Judicature Act (MCL 600.4708) already requires agencies receiving forfeiture funds to provide an annual report on the use of those funds to the Department of Technology, Management, and Budget. Although the bills do not delete this reporting requirement, it doesn't appear that that provision is enforced or complied with.

bill. Any increased costs paid from forfeiture funds to comply with the expanded reporting requirements necessarily reduces the amount of those funds that may be used for other things, including personnel costs, vehicles, equipment, informant fees, buy money, training, prevention services and other expenditures that further law enforcement efforts or crime victim support.³

MSP's 2013 controlled substance asset forfeiture report indicates that 286 of 691 agencies submitted information indicating they expended forfeiture proceeds. Another 349 agencies submitted a null report indicating they did not engage in seizure or forfeiture, and 56 agencies did not submit a report at all.⁴

HBs 4499 and 4505 could have a fiscal impact on the Department of State Police (MSP) and local law enforcement agencies to the extent that, by raising the burden of proof, the bills reduce the amount of assets forfeited to the MSP and local law enforcement agencies.

In addition, HBs 4499 and 4505 have an indeterminate fiscal impact on the Attorney General and local prosecutors. There could be an increased cost in prosecutions due to the higher burden of proof for the state and local governments, with a potential reduction in asset forfeiture impacting revenues of prosecuting offices. Due to the numerous factors involved, such as an unknown increase of cost in an unknown number of court cases, a potential cost cannot be calculated.

ARGUMENTS:

For:

Many agree that reform of the state's civil asset forfeiture laws is long overdue. As an example, in one well publicized instance from 2008, over 130 attendees of an event at a Detroit art museum were arrested and charged with loitering and more than 40 cars impounded; to redeem the vehicles, patrons were assessed a \$900 fee plus towing and storage. What prompted the raid by law enforcement? Apparently, event planners had neglected to obtain the proper liquor license in order to serve wine with the refreshments. Incidents such as these foster the belief that by allowing the seizing entity to retain the proceeds from forfeiture, the state's civil asset forfeiture laws actually create an incentive for abuses.

The bills address the issue in several ways. First, House Bill 4504 creates a new act to require seizing entities to file detailed reports on property seized and if it was subjected to forfeiture, as well as other information that will make the process more transparent and create public accountability.

Second, several bills raise the burden of proof from preponderance of the evidence (which requires only a 51/49 percent threshold that the property was used for or derived from

³ Section 4708 of the Revised Judicature Act (MCL 600.4708) specifies that local units receiving forfeiture proceeds shall allocate 75% of any remaining amount (after payment of various costs) for the enhanced enforcement of the criminal laws and 25% to implement the Crime Victim's Rights Act. Additionally, Section 7524 of the Public Health Code provides that forfeiture proceeds shall be used, after the payment of various costs, for "law enforcement purposes."

⁴ http://www.michigan.gov/documents/msp/2013_Asset_Forfeiture_Final_427690_7.pdf.

criminal activity or, in the case of nuisance abatement, that a nuisance exists) to clear and convincing evidence (meaning proof greater than 75 percent).

The bills are a step in the right direction in strengthening property rights and protecting against unwarranted governmental taking of property. Yet, the bills also retain an important tool used by law enforcement to deter criminal activity and to offset the costs of fighting crime and prosecuting criminals, thus relieving taxpayers of some of that burden.

Against:

Some concerns still remain. For example, property would still be subject to seizure and forfeiture in some instances even when a person was not charged with or convicted of a crime. Also, though in nuisance abatement cases the threshold would be raised from preponderance of the evidence that a nuisance existed to clear and convincing evidence, the threshold for padlocking a business for up to a year remains at the lower level. Some feel that this should be changed. Others feel that Michigan should follow the lead of states like New Mexico and structure forfeiture more like the criminal justice system; this would allow indigent persons to have court-appointed attorneys when suing the government for return of their property. As it is now, many middle- to low-income persons cannot afford the court fees or legal representation necessary to mount a successful case to get their property back.

Moreover, some feel that the legislation should be expanded to place forfeiture protections in the Michigan Medical Marihuana Act (MMMA). Newspaper articles and testimony presented to legislative committees cite several instances where qualified registered patients, some of whom were also caregivers, had their homes raided and property seized, including their children's bicycles and electronic devices, even though they were in full compliance with the MMMA and no criminal charges were brought.

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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.