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BILL ANALYSIS

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Senate Bill 124

Sponsor: Senator Rudy J. Nichols

Committee: Judiciary

Date Completed: 3-9-89

SUMMARY OF SENATE BILL 124 as introduced 2-8-89:

The bill would create the "Michigan Continuing Criminal Enterprise Act" within the Michigan Penal Code to do all of the following:

- Define "racketeering activity".
- Specify racketeering activity offenses, penalties for those offenses, and court jurisdiction for their prosecution.
- Specify procedures for the seizure and forfeiture of proceeds of racketeering offenses.
- Provide for the return or disposal of seized property.

Definition

The bill would define "racketeering activity" as the commission, attempted commission, aiding or abetting the commission, conspiring to commit, or the solicitation, coercion, or intimidation of another to commit any of the following:

- Unlicensed sale or distribution of cigarettes (MCL 205.509).
- A violation of the Public Health Code's controlled substances provisions (MCL 333.7401-333.7461).
- Welfare fraud (MCL 400.60), Medicaid fraud (MCL 400.604, 400.605, and 400.607), or securities fraud (MCL 451.809).
- The display or dissemination of obscene matter to minors (MCL 722.675 and 722.677), dealing in child sexually abusive activity or material (MCL 750.145c), or first or second degree obscenity (MCL 752.365 and 752.366).
- Arson (MCL 750.72-750.75), bribery (MCL 750.117-750.121, 750.124, and 750.125), or jury tampering (MCL 750.120a).
- A violation of the Penal Code's provisions relating to issuing, circulating, and disposing of bank bonds, bills, notes, and property (MCL 750.93-750.96).
- Embezzlement (MCL 750.174-750.176 and 750.180-750.182), extortion (MCL 750.213 and 750.214), or gambling (MCL 750.301-750.305a and 750.313).
- Forgery (MCL 750.248), counterfeiting (MCL 750.266), or securities fraud (MCL 750.271-750.274).

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- Murder (MCL 750.316 and 750.317), kidnapping (MCL 750.349, 750.349a, and 750.350), larceny (MCL 750.356-750.367c), or robbery (MCL 750.529-750.531).
- Perjury or subornation of perjury (MCL 750.422-750.425).
- Prostitution (MCL 750.452, 750.455, and 750.457-750.459).
- Illegal use of a financial transaction device (MCL 750.157n and 750.157p-750.157u).
- Using false pretenses with intent to defraud (MCL 750.218).
- Illegal racing of horses, or betting or publishing odds on such races (MCL 750.330-750.332).
- Dealing in stolen, embezzled, or converted property (MCL 750.535, 750.535a, and 750.536a).

Racketeering Activity

A person who received income derived from a "pattern of racketeering activity" could not use or invest any of the income or its proceeds in acquiring interest in, or establishing or operating, an "enterprise". ("Pattern of racketeering activity" would mean at least two acts of racketeering activity, as defined above, one of which occurred after the bill's effective date and the last of which occurred within 10 years, excluding prison time, after the commission of a prior act of racketeering. An "enterprise" would be "an individual, partnership, corporation, association, or other legal entity, or a group of individuals associated in fact although not a legal entity".) Purchases of securities for investment, and without the intention of controlling the issuer, would not be illegal under the bill if the securities held in a pattern of racketeering activity after such a purchase did not amount to 1% of the outstanding securities of any one class, and did not confer the power to elect one of more of the issuer's directors.

A person could not acquire or maintain, directly or indirectly, an interest in or control of an enterprise through a pattern of racketeering activity. A person employed by or associated with an enterprise would be prohibited from conducting or participating in the conduct, directly or indirectly, of the enterprise's affairs through a pattern of racketeering activity. (Conspiring to violate any of those provisions also would be prohibited.) The violations would be felonies punishable by imprisonment for up to 20 years and/or a maximum fine of \$50,000.

Prosecution for these violations could occur in any county in which the principal place of business was located, or in any county in which conduct that constituted, or was requisite to the completion of the racketeering activity, occurred. A violation also could be prosecuted in any county in which the defendant conducted or participated in the enterprise's affairs, acquired or maintained an interest in or control of the enterprise, or invested proceeds in an enterprise in violation of the bill. The charge or charges could be prosecuted by the prosecuting attorney for a county that had jurisdiction or by the Attorney General, when the Attorney General was authorized by law to prosecute each of the specific criminal acts included in the alleged pattern of racketeering activity.

Seizure and Forfeiture

Seizure. All personal property and real property that was the proceeds,

substitute proceeds, or an instrumentality of a racketeering activity, except real property that was the primary residence of the spouse or dependent child of the owner, would be subject to seizure by and forfeiture to a local unit of government. (If the spouse or dependent child had prior knowledge of, and had consented to, the commission of the crime, however, the real property would be subject to seizure and forfeiture.) If the property owner had no prior knowledge of, or had not consented to, the commission of the crime, then the property would not be subject to seizure and forfeiture. Property also would not be subject to seizure or forfeiture if the owner served written notice of the commission of a crime or racketeering activity upon a law enforcement agency, and served a written notice to quit upon the person who committed the crime or racketeering activity.

The forfeiture of property that was encumbered by a security interest would be subject to a holder of interest who had no prior knowledge of, or had not consented to, the commission of the crime or racketeering activity. Forfeiture of property encumbered by an unpaid balance on a land contract would be subject to the interest of a vendor, if the vendor had no prior knowledge of, or had not consented to, the commission of the crime or racketeering activity.

Personal property could be seized pursuant to a court order of seizure issued upon a showing of probable cause that the property was subject to forfeiture. Personal property could be seized without process if any of the following applied:

- The property was the proceeds of a crime or an instrumentality of a crime and the seizure was incident to lawful arrest.
- The seizure was done pursuant to a valid search warrant or administrative inspection warrant.
- There was probable cause to believe that the property was dangerous to health and safety.
- There were exigent circumstances that precluded obtaining a court order, and there was probable cause to believe that the property was an instrumentality of a racketeering activity enterprise.
- The property was the subject of a prior judgment in favor of the State in a forfeiture proceeding.

The Attorney General or prosecuting attorney could apply ex parte (without notice to the opposite party) for an order to authorize the filing of lien against real property subject to forfeiture. Such an application would have to be supported by a sworn affidavit that set forth probable cause for a forfeiture action under the bill. An order authorizing the filing of a lien notice could be issued upon a showing of probable cause that the property was the proceeds or substitute proceeds of a racketeering activity enterprise.

Seized property that belonged to a crime victim would have to be returned promptly unless it was contraband, the ownership was disputed, or the property to be retained as evidence. Seized personal property would not be subject to any other action to recover personal property but would be considered to be in the custody of the seizing agency subject to the bill or to a court order. The seizing agency could place the property under seal or remove it to a location designated by the court.

Forfeiture. Within 21 days after personal property was seized or a lien notice was filed against real property, the seizing agency or, if the property were real property, the Attorney General or prosecuting attorney would have to give notice of the seizure and the intent to forfeit and dispose of the property. Notice would have to be given to each of the following:

- The person charged with a racketeering activity.
- Each person with a known ownership or security interest in the property.
- Each mortgagee, person holding a security interest, or person having a lien that appeared on the title or was on file with the Secretary of State or register of deeds.
- Each holder of a preferred ship mortgage of record in the appropriate public office pursuant to the Federal Ship Mortgage Act, if the property were a watercraft that was more than 28 feet long or had a capacity of at least five net tons.
- Each person whose security interest was recorded with the appropriate public office pursuant to the Federal Aviation Act, if the property were, or were part of, an aircraft, aircraft engine, or aircraft propeller.
- Each victim of the crime.

The notice would have to be written and delivered by certified mail. If the name or address were not "reasonably ascertainable" or delivery could not "reasonably be accomplished", the notice would have to be published in a newspaper of general circulation in the county in which the property was seized for 10 successive publishing days.

In the case of seized personal property, the seizing agency immediately would have to notify the prosecuting attorney or Attorney General (if he or she were actively handling a case related to the property) of the seizure and intent to forfeit and dispose of the property.

Return of Seized Property

A person who claimed an interest in seized property could move that the court return the property or discharge a lien on grounds that it was seized illegally, that it was not subject to forfeiture, or that the person had an ownership or security interest and had no prior knowledge of or had not consented to the commission of the racketeering activity. The court would have to hear such a motion within 30 days, except that it could adjourn the hearing, with the consent of all parties, until criminal proceedings were completed. (The hearing also could be adjourned at any time with the consent of the prosecutor, the petitioner, and the court.) The prosecuting attorney or Attorney General would have to establish both of the following at the hearing:

- Probable cause to believe that the property was subject to forfeiture and that the person who filed the motion had prior knowledge of, or consented to, the commission of the racketeering activity.
- That the property was seized legally, if the person who filed the motion claimed otherwise.

If the prosecutor's burden of proof were not met, the court would have to order

the return of the property or the discharge of the lien. A person's testimony at a hearing would not be admissible against him or her in a criminal procedure except in a perjury prosecution, and would not waive his or her right against self-incrimination. If no claim or motion were filed within 20 days, the unit of government or the State could declare the property forfeited and would have to dispose of it pursuant to the bill.

Seized property would have to be returned to its owner, or a lien filed against real property would have to be discharged, within seven days if any of the following occurred:

- A warrant was not issued for the commission of a racketeering activity within seven days after the seizure of property or the filing of a lien.
- All racketeering activity and related charges against the consenting legal owner were dismissed.
- The consenting legal owner was acquitted of racketeering activity.
- In the case of multiple defendants, all persons charged with racketeering activity were acquitted.
- A court order for the return of property or the discharge of a lien was entered.

Disposal of Forfeited Property

If property were forfeited under the bill, the unit of government that seized it could sell the property that was not required by law to be destroyed and was not harmful to public. Any money, negotiable instrument, security, or other thing of value that was forfeited could be disposed of in the following order of priority:

- To pay outstanding security interests of secured parties who had no prior knowledge of, or had not consented to, the commission of the crime.
- To satisfy an order of restitution in the crime's prosecution.
- To pay the claim of any person who showed that he or she was a victim of the crime to the extent that the claim was not covered by any ordered restitution.
- To pay any outstanding lien against the property that was imposed by a governmental unit.
- To pay the "proper" expenses of the forfeiture and sale proceedings.

The remaining balance would have to be distributed by the court to the units of government that were "substantially involved in effecting the forfeiture". Money so received by units of government would have to be used to enhance criminal law enforcement.

In the course of selling real property, the court, upon motion of the unit of government to which it was forfeited, could appoint a receiver to dispose of the property. Such a receiver would be entitled to reasonable compensation and would have the authority to do all of the following:

- List the property for sale.
- Make necessary arrangement for the property's maintenance and preservation.
- Accept offers to purchase the property.

-- Execute instruments to transfer title to the property.

Proposed MCL 750.570 - 750.580

Legislative Analyst: P. Affholter

FISCAL IMPACT

The fiscal impact of this bill on local or State law enforcement agencies would depend on the amount and value of the seized property available for forfeiture. It is impossible at this time to determine the dollar amount of these forfeitures.

Fines collected by the court under this bill would depend on the number of convictions.

Fiscal Analyst: F. Sanchez
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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.