

FORFEITURE ACT REVISIONS

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House Bill 5233 (Substitute H-1)

Sponsor: Rep. Klint Kesto

Committee: Criminal Justice

Complete to 3-27-14

A SUMMARY OF HOUSE BILL 5233 AS REPORTED BY COMMITTEE 3-19-14

House Bill 5233 would make numerous revisions to the Omnibus Forfeiture Act to:

- Allow seizure and forfeiture for home invasion and felony criminal sexual conduct offenses, in addition to currently listed crimes such as human trafficking.
- Subject the property of "willfully blind" property owners to seizure and forfeiture.
- Establish parity of treatment for real and personal property.
- Void transfers of property connected to a crime that is subject to forfeiture.
- Extend various procedural time frames, including those for a seizing entity to file a notice of intent to forfeit and dispose of the property.
- Allow a court to order forfeiture of reachable property if the person sold the property subject to forfeiture, placed it beyond the court's jurisdiction, damaged the property to lower its value, or commingled it with other property that couldn't be easily divided or that would harm innocent persons.

House Bill 5233 is part of a multi-bill package of legislation that addresses the crime of human trafficking and adopts recommendations made by the Michigan Commission on Human Trafficking in its *2013 Report on Human Trafficking*.

House Bill 5233 amends Chapter 47 of the Revised Judicature Act, known as the Omnibus Forfeiture Act (MCL 4701 et al.). The bill is tie-barred to House Bill 5234 and would take effect 90 days after enactment. The Omnibus Forfeiture Act provides for the forfeiture to the government of property used in connection with certain crimes. The bill would make numerous revisions to do the following:

General revisions to Chapter 47:

- ❖ Include the following as crimes for which property could be seized and forfeited: home invasion; first-, second-, or third-degree criminal sexual conduct; and assault with intent to commit first-, second-, or third-degree criminal sexual conduct. (Human trafficking is already a listed crime.)
- ❖ Allow real and personal property that are the proceeds of a crime, substituted proceeds of a crime, or an instrumentality of a crime, to be subject to seizure and forfeiture (with some exceptions).

- ❖ Include human trafficking as one of the listed crimes for which all property used to conceal the crime or identity of a trafficker is subject to forfeiture.
- ❖ Subject a "willfully blind" property owner to seizure and forfeiture under the act. Currently, the act provides an exemption from seizure and forfeiture of property if the owner had no prior knowledge of the crime, did not give consent, provides written notice of the crime to law enforcement, and serves written notice to quit upon the person who committed the crime. Under the bill, this exemption would not apply to a "willfully blind" property owner. Further, for the exemption to attach, the property owner would have to provide the notices to law enforcement and to the person who committed the crime *upon learning of the commission of the crime*.
- ❖ Define "willful blindness" to mean the intentional disregard of objective fact that would lead a reasonable person to conclude that the property was derived from unlawful activity or would be used for an unlawful purpose.
- ❖ Revise how the forfeiture of substituted proceeds of a crime is computed. Currently, the substituted proceeds are limited to the value of the proceeds of the crime plus the amount by which any restitution or damages owed to the victim exceeds the value of the proceeds of the crime. To this amount, the bill would add the amount by which any reasonable expenses of the forfeiture proceedings and sale exceeds the value of the proceeds of the crime. This would include, but not be limited to, expenses for maintaining custody of the property, as well as advertising and prosecution costs. (The act defines "substituted proceeds of a crime" to mean any property obtained or any gain realized by the sale or exchange of proceeds of a crime.)
- ❖ If a court orders the seizing agency to file a lien against a vehicle and return it to the owner for use during the forfeiture proceeding, the court would also have to require the owner to post a bond in an amount equal to the value of the vehicle.
- ❖ In a forfeiture proceeding in which a claimant prevails, the property would be returned to the owner within seven days *after the court issues a dispositive order*.
- ❖ Include the reasonable costs of prosecution in the list of expenses for which payment could be made from money seized and forfeited or from the proceeds of property that was forfeited and sold.
- ❖ If property included in the order of forfeiture cannot be located or has been sold to a bona fide purchaser for value, placed beyond the jurisdiction of the court, substantially diminished in value by the conduct of the defendant, or commingled with other property that cannot be divided without difficulty or undue injury to innocent persons, allow a court to order forfeiture of any other reachable property of the owner up to the value of the property that is unreachable. This provision

would apply against an owner that is also the person convicted of the crime underlying the forfeiture action

Transfers of property subject to forfeiture:

- ❖ Unless the person to whom property subject to forfeiture was transferred could establish certain claims (such as purchasing the property in good faith), require the transfer to be voided [proposed Section 4703(7)].
- ❖ Allow the transferee to petition the court to return the property or discharge the lien on the grounds the ownership or security interest was acquired by a transfer that is not void under Section 4703(7).
- ❖ At the hearing on the above motion, require the government to show probable cause that the transferee acquired the interest by a transfer void under Section 4703(7). Prior written notice of illegal use of the property to the interest holder would constitute prima facie evidence of knowledge of the crime.
- ❖ At the forfeiture proceeding, require the plaintiff (the seizing agency) to prove by a preponderance of the evidence that a person (other than the person convicted of the crime) who claims an ownership or security interest in the property acquired that property by transfer subsequent to the criminal conduct giving rise to the forfeiture. If the plaintiff carries that burden of proof, the burden of proof would then shift to the claimant to prove by a preponderance of the evidence that the transfer was not void under Section 4703(7).
- ❖ Require payment from money seized and forfeited or from the proceeds of the sale of forfeited property to go to a party having an outstanding security interest and who did not acquire that interest in the money or property as the result of a transfer under Section 4703(7).

Revision of various deadlines:

- ❖ For giving notice of the seizure of property and intent to forfeit (from 7 to 56 days).
- ❖ For a defendant's attorney to examine seized money (from 60 to 56 days).
- ❖ For a court to hear a motion that the property was illegally seized (from 30 to 28 days after the motion is filed).
- ❖ For issuing a warrant for the commission of a crime after the property was seized or a lien filed against real property (from 7 days to 56 days). Before the 56 days expires, the prosecuting attorney, attorney general, or city or township attorney of the seizing entity could petition the court ex parte for an additional 56 days to either complete its investigation and issue charges or return the property. An

extension would have to be granted to the extent necessary upon the court's determination that there is good cause shown for the extension.

- ❖ For giving notice of seizure or filing of lien and intent to begin forfeiture proceedings for property less than \$100,000 in value (from 7 to 28 days after conviction of a crime).
- ❖ For when a person claiming an interest in property may file a claim with the seizing entity (from 21 days to 28 days after notice given of the pending forfeiture). Also, allow the person to include any objection to forfeiture in the claim. The objection would have to be written, verified, and signed by the claimant, include a description of the property interest asserted, and be notarized with a certification as specified in the bill.
- ❖ For when a civil action for forfeiture must be instituted by the seizing agency after a claim is filed by a person claiming an interest (from 7 to 28 days after the 28-day filing period described above expires).
- ❖ For instituting a civil action for forfeiture of property valued at more than \$100,000 or for real property (from 7 days to 28 days after conviction of a crime).

FISCAL IMPACT:

It is not known how many orders or injunctions will be granted and violated, and it is not known how many persons will continue to use buildings/places that have been ordered to be closed. Imprisonment in the county jail would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Increases in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

BRIEF DISCUSSION OF THE ISSUES:

Human trafficking is not only one of the fastest growing crimes in the nation, it is also the second largest money crime—meaning that human trafficking leads to huge profits for perpetrators. Recently, to provide a greater deterrent, numerous bills have been introduced that increase the criminal penalties for various human trafficking-related conduct. House Bill 5233 takes a different approach: to create a deterrent by removing the main incentive of the crime—the profits. The bill would revise provisions within the Omnibus Forfeiture Act to make it harder for a perpetrator, or even a landlord who turns a blind eye, to keep, hide, or transfer real property (homes, land) or personal property (jewelry, cash, cars, boats, etc.) connected in any way to the commission of a human trafficking crime. The bill also expands the list of crimes subject to forfeiture to include crimes related to human trafficking such as rape and home invasion.

Several procedural times frames would be revised by the bill. These revisions acknowledge that many law enforcement agencies, including county prosecutor offices, are operating under budget constraints with reduced staffing levels and so allow additional time needed for investigating and processing crimes as intricate as human trafficking. Even with the proposed amendments, the act would still provide sufficient due process rights for defendants and protections for innocent partners. Further, though property may be seized at the time of an arrest or upon execution of a search warrant, the order of forfeiture is only imposed if the defendant is convicted of one or more of the crimes subject to forfeiture.

Opponents of expanded forfeiture laws say the expanded time frames for notices, etc., mean that a person's property can be taken away and a notice of intent to seek forfeiture does not have to be filed for 56 days—almost two months later—instead of the current time frame of one week. That is a long time for an innocent person to be without the use of a car, house, furniture, and other property all the while wondering if the seizing entity will return it or decide to seek forfeiture. Moreover, these revisions pertain to all forfeiture proceedings, not just ones involving human trafficking. And this at time when a national debate is ongoing regarding the use of forfeiture laws by law enforcement agencies as a way of providing a revenue stream to replace dwindling appropriations. Some feel therefore that a moratorium on expanding forfeiture laws should be instituted while the problem is studied and appropriate safeguards from undue seizures/forfeitures firmly in place.

POSITIONS:

A representative of the Office of Attorney General testified in support of the bill. (3-19-14)

A representative of the Wayne County Prosecutor's Office testified in support of the bill. (3-19-14)

The Macomb County Sheriff submitted written testimony in support of the bill. (3-19-14)

The Michigan Catholic Conference indicated support for the bill. (3-19-14)

The Oakland County Sheriff indicated support for the bill. (3-19-14)

A representative of the ACLU-Michigan testified in opposition to the bill. (3-19-14)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ 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.