

HOUSE BILL REPORT

HB 1269

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to seizure and forfeiture procedures and reporting.

Brief Description: Concerning seizure and forfeiture procedures and reporting.

Sponsors: Representatives Shea, Goodman and McCaslin.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/29/19, 2/22/19 [DPS].

Brief Summary of Substitute Bill

- Creates a new chapter governing civil asset forfeiture, which is applicable to seizures under a variety of statutes and which, among other things:
 - explicitly provides that the burden of proof is on the seizing agency;
 - allows prevailing claimants to recover attorneys' fees;
 - requires that, when ordered to return property, the seizing agency return it in the same or substantially similar condition as when seized; and
 - makes all seizing agencies subject to detailed reporting requirements.
- Makes similar changes to the Uniform Controlled Substances Act.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Jinkins, Chair; Thai, Vice Chair; Dufault, Assistant Ranking Minority Member; Goodman, Graham, Hansen, Kilduff, Kirby, Orwall, Shea, Valdez, Walen and Ybarra.

Minority Report: Without recommendation. Signed by 1 member: Representative Irwin, Ranking Minority Member.

Minority Report: Do not pass. Signed by 1 member: Representative Klippert.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Cece Clynch (786-7195).

Background:

Forfeiture Generally.

When authorized by statute, a law enforcement agency may seize possession of property for the purpose of forfeiting a person's right to own or possess that property. Generally, civil asset forfeiture is permitted when the property itself is illegal, was used to facilitate a crime, is an actual proceed of a crime, or was purchased from proceeds traceable to criminal activity.

Civil asset forfeiture is permitted under a variety of statutes, including in the case of drug crimes, crimes committed with a firearm, and human sex trafficking and sexual exploitation crimes. The seizing agency must comply with specific statutory process requirements, which operate separately from a criminal proceeding. With one exception, these statutes do not require the property owner to be convicted of the alleged crime for the property to be forfeited.

Many of the statutes' procedures and requirements are similar, but not identical, to those found in the Uniform Controlled Substances Act (UCSA).

Uniform Controlled Substances Act.

Property Subject to Forfeiture. Under the UCSA, no property right exists in the controlled substances themselves, anything used to manufacture or pay for them, or proceeds traceable to the sale or exchange of controlled substances. Conveyances, such as vehicles used to facilitate distribution of controlled substances, and other personal property, such as money furnished or intended to be furnished in exchange for a controlled substance or acquired via an exchange in violation of the UCSA, are subject to forfeiture, unless the owner establishes that the act or omission was committed or omitted without his or her knowledge or consent. Real property that is being used with the knowledge of the owner in connection with a crime, or which has been acquired in whole or in part with proceeds of a crime, is subject to forfeiture.

Seizure Process. Upon seizure by a law enforcement agency, the agency must serve notice of seizure and possible forfeiture upon the owner within 15 days. If no person notifies the seizing agency in writing of a claim of ownership or right to possession within 45 days of service of notice in the case of personal property, and 90 days in the case of real property, the property is deemed forfeited by default.

Hearing Process. A person who timely notifies the seizing agency in writing of a claim of ownership or right to possession is entitled to a hearing. The hearing is before the chief law enforcement officer of the seizing agency, or an administrative law judge if the seizure is by a state agency; however, the person asserting a claim or right may remove the matter to a court of competent jurisdiction. The burden of proof is on the law enforcement agency to establish by a preponderance of the evidence that the property is subject to forfeiture. Claimants who prevail are entitled to reasonable attorneys' fees. In addition, in a court hearing between two or more claimants to the property, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

Disposition of Forfeited Property. If property is forfeited, the seizing agency may sell, or retain for official use, anything not required by law to be destroyed. A seizing agency must remit to the State Treasurer 10 percent of the net proceeds of any property forfeited during the preceding calendar year for deposit in the State General Fund. The remaining net proceeds are retained by the seizing agency exclusively for the expansion and improvement of controlled substances-related law enforcement, but must not supplant existing funding sources.

Recordkeeping Requirements. When property is forfeited, seizing agencies must keep, and retain for at least seven years, a record indicating:

- (a) the identity of the prior owner;
- (b) a description of the property;
- (c) the disposition of the property;
- (d) the value of the property at the time of seizure; and
- (e) the amount of proceeds realized from disposition.

Quarterly reports detailing the above must be filed by each seizing agency. By January 31 of each year, each seizing agency must remit, for deposit into the State General Fund, an amount equal to 10 percent of any property forfeited during the preceding calendar year.

Service Members' Civil Relief Act.

The Washington Service Members' Civil Relief Act (SCRA) contains certain rights for service members and their dependents whose financial and legal obligations may be adversely impacted by active military duty. It applies to any judicial or administrative proceeding commenced in any court or agency in the state in which a service member or his or her dependent is a party. The SCRA also contains provisions restricting contract fines and penalties, restructuring interest rates on certain business loans, and tolling statutes of limitations during military service periods.

Summary of Substitute Bill:

Forfeiture Generally.

A new chapter is created with respect to civil asset forfeiture proceedings. The entirety of the new chapter is applicable to seizures under statutes regarding the following:

- sexual exploitation of children;
- indecent exposure and prostitution;
- money laundering;
- theft of metal;
- driving while under the influence;
- fish and wildlife violations; and
- felony forfeiture (which, unlike the above statutes, requires conviction of the owner).

Commencement of Forfeiture Proceedings. Except with respect to contraband items, which shall be seized and summarily forfeited, proceedings for forfeiture are deemed commenced by the seizure. Upon seizure by a law enforcement agency, the agency must serve notice of

seizure and possible forfeiture upon the owner within 15 days. If no person notifies the seizing agency in writing of a claim of ownership or right to possession within 60 days of service of notice in the case of personal property, and 120 days in the case of real property, the property is deemed forfeited by default.

The Service Members' Civil Relief Act (SCRA) is applicable to civil asset proceedings.

Hearing Process. A person who timely notifies the seizing agency in writing of a claim of ownership or right to possession is entitled to a hearing. The hearing is before a hearing officer who is not in the direct chain of command of the chief law enforcement officer of the seizing agency, or an administrative law judge if the seizure is by a state agency; however, the person asserting a claim or right may remove the matter to a court of competent jurisdiction. In all cases, the burden of proof is on the law enforcement agency to establish by a preponderance of the evidence that the property is subject to forfeiture. No personal or real property may be forfeited to the extent of the interest of an owner by reason of any act or omission committed or omitted without the owner's knowledge or consent.

Upon a determination by a court or hearing officer that the claimant is the present lawful owner or is lawfully entitled to possession, the seizing agency must promptly return seized items in the same or substantially similar condition as when they were seized. Claimants who prevail are entitled to reasonable attorneys' fees.

Disposition of Forfeited Property and Proceeds. If property is forfeited and after satisfaction of victim restitution, if required, the seizing agency may sell, retain for official use, request another entity to take custody of, or forward to an appropriate entity, anything not required by law to be destroyed. By January 31 of each year, each seizing agency must remit to the State Treasurer (Treasurer) 10 percent of the proceeds of any property forfeited during the previous calendar year. These moneys are to be deposited into the State General Fund. Forfeited property and net proceeds not required to be paid to the Treasurer shall be retained by the seizing agency exclusively for the expansion and improvement of related enforcement activities. They may not be used to supplant preexisting funding sources.

Uniform Controlled Substances Act.

The Uniform Controlled Substances Act (UCSA) is amended to:

- strike language regarding forfeiture of conveyances and personal property that requires the owner, in order to avoid forfeiture, to establish that the commission or omission was without the owner's knowledge or consent;
- require that when property is ordered to be returned to a claimant, it shall be returned in the same or substantially similar condition as when seized;
- strike the provision governing recovery of costs and reasonable attorneys' fees in a court hearing between two or more claimants;
- strike the current reporting requirements, and make the UCSA subject to the reporting requirements found in the new chapter; and
- provide that the protections afforded by the SCRA are applicable to proceedings under the UCSA.

Reporting Requirements Applicable to All Seizing Agencies.

General reporting requirements are included in the new chapter and made applicable to all seizures by seizing agencies, regardless of whether the seizure was made pursuant to the new chapter, other state statutes, or was conducted in collaboration with a federal agency under federal law. Seizing agencies must keep records about property seized and forfeited, including information regarding multiple specific data points such as date of seizure, type of property, crime for which the suspect was charged, and whether there was a conviction. Seizing agencies must file an annual report that includes these records with the Treasurer and provide annual updates; if an agency has made no seizures during the previous year it must file a report to that effect.

The Treasurer must establish and maintain a searchable public website that includes these records, as well as regarding the expenditure of forfeiture proceeds, that includes:

- the total amount of funds expended in each of eight categories (such as prevention programs, witness protection, expert witnesses, salaries, travel, and operating expenses), which resulted from property seized, forfeited, and reported; and
- the total value of seized and forfeited property held by the agency at the end of the reporting period.

Seizing agencies must report expenditure information to the Treasurer annually by March 1.

One hundred and twenty days after the close of each fiscal year, the Treasurer must submit a report summarizing forfeiture activity in the state to the Speaker of the House of Representatives, the President of the Senate, the Attorney General, and the Governor. The aggregate report must be made available on the Treasurer's website. In the report, the Treasurer may include recommendations to improve statutes, rules, and policies to facilitate seizure, forfeiture, and expenditure processes and reporting that are fair to crime victims, innocent property owners, secured interest holders, citizens, law enforcement, and taxpayers.

An agency failing to file a report as required is first issued a written warning, and any subsequent delinquency is subject to a civil penalty payable to the State General Fund of \$500 or the equivalent of one-quarter of the forfeiture proceeds received during the reporting period, whichever is greater. In addition, the Treasurer is precluded from making any expenditures from the forfeiture fund for that agency until the report is filed.

The Treasurer may recover its costs by charging a fee to seizing agencies filing reports. Agencies may use forfeiture proceeds to pay the costs of compilation, reporting data, and fees.

The data and reports are public information under the Public Records Act.

Application.

The act applies to seizures occurring on or after January 1, 2020.

Substitute Bill Compared to Original Bill:

The substitute bill retains the original bill with the following changes:

- The definition of "seizing agency" is clarified to make clear that such agencies are law enforcement agencies.

- Language is reinserted in current law that allows a prevailing party in a proceeding between two or more claimants to the property to recover costs and reasonable attorneys' fees.
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Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect January 1, 2020, except for section 6, relating to authorizing the State Treasurer to adopt rules necessary to implement the new chapter, which takes effect July 28, 2019.

Staff Summary of Public Testimony:

(In support) This bill is the result of many discussions focused upon making sure that due process is provided. There are four key points with respect to this legislation: (1) the burden of proof is on the seizing agency; (2) prevailing parties are made whole with attorneys' fees; (3) reporting is mandatory; and (4) any property seized and ordered to be returned must be returned in the same or substantially similar condition as when seized. The "nuclear option" was considered during the discussions. There is certainly a problem with seizures at the federal level. The reporting requirements in this bill will permit everyone to see the data on seizures in Washington. Allowing prevailing parties to recover attorneys' fees is important.

(Opposed) This bill does not reflect all of the agreements that were made. There is a benefit to consolidation, and the expansion of attorneys' fees, extension of timelines, and the reporting requirements are acceptable. But, there are other provisions which are not, including provisions that allow the State Treasurer to charge reporting agencies, the presumption that a federal seizure was the act of a local agency, and the requirement that property be returned in substantially similar condition. This latter requirement leads to the question of whether the seizing agency must change the oil or tires or charge the battery of a vehicle. With respect to marijuana plants, it raises the question whether the seizing agency must maintain, water, and trim the plants. Changes in the bill are necessary. Several terms are undefined, and connections are missing.

Persons Testifying: (In support) Representative Shea, prime sponsor; Representative Goodman; and Neil Beaver, Washington Defenders Association and Association of Washington Criminal Defense Lawyers.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; and Michele Walker, Kent Prosecutor's Office.

Persons Signed In To Testify But Not Testifying: None.