

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 202

(Senator Kelley, *et al.*)

Judicial Proceedings

Judiciary

Financial Crimes - Seizure and Forfeiture of Property

This bill authorizes seizure and forfeiture of property obtained for or used in connection with certain financial crimes by a State or local law enforcement authority. The bill specifies that “victim” includes a business that loses money as a result of a financial crime.

The bill takes effect June 1, 2009, has prospective application, and may not be applied to any offense committed before June 1, 2009.

Fiscal Summary

State Effect: Potential minimal general fund revenue increase from the proceeds of forfeited property for the State Police. It is expected that the bill’s provisions can be implemented with existing resources.

Local Effect: Potential minimal revenue increase from the proceeds of forfeited property. Potential minimal increase in local expenditures to implement the provisions of the bill.

Small Business Effect: None.

Analysis

Bill Summary: The bill’s definition of “financial crimes” encompasses the following offenses: (1) theft and theft-related crimes; (2) identity fraud and other fraud-related crimes; and (3) fraudulent practices, misleading filings, and unlawful representations under the Maryland Securities Act. A State or local law enforcement agency may seize the following items that were used or intended to be used in connection with a financial crime:

- property obtained by or through, or derived directly or indirectly from, a financial crime;
- property received as an inducement to commit a financial crime;
- property used or intended to be used to commit or facilitate a violation of the financial crimes law; and
- proceeds from any property subject to the bill's provisions.

Property or an interest in property is not subject to forfeiture if the owner establishes by a preponderance of the evidence that the violation was committed without the owner's actual knowledge.

Real property used as the principal family residence is subject to forfeiture only if one of the owners was convicted of a violation of the financial crimes law. However, a court may order forfeiture of real property used as the principal family residence without a conviction for a financial crime if the owner fails to appear for a required court appearance and fails to surrender to the court within 180 days after the required court appearance. Real property used as the principal family residence by a husband and wife and held as tenants by the entirety may not be forfeited unless the property was used in connection with a violation of the financial crimes law, or a conspiracy to commit such a violation, and both the husband and wife are convicted of the requisite violation.

A State or local law enforcement agency may seize the property specified in the bill's provisions on process issued by a court of competent jurisdiction and property may be seized without a warrant if the seizure is incident to an arrest, or search under a search warrant, or if the seizure is made with probable cause to believe that the property was used or was intended to be used for the purpose of a financial crime, and as otherwise specified.

The chief law enforcement officer of the seizing authority for a motor vehicle must recommend to the appropriate forfeiting authority in writing that the vehicle be forfeited, only if the seizing officer: (1) determines the names and addresses of all registered owners and secured parties; (2) personally reviews the facts and circumstances of the seizure; and (3) personally determines and represents in writing that the totality of the case justifies the seizure and forfeiture of the motor vehicle.

Circumstances to be considered in deciding whether seizure and forfeiture are justified include: (1) the extensive criminal record of the violator; (2) a previous conviction for a financial crime; (3) evidence that the motor vehicle was acquired by use of proceeds from a violation of the financial crimes law; (4) circumstances of the arrest; and (5) the way in which the motor vehicle was used. A sworn affidavit from the chief law enforcement officer that the officer followed these procedures is admissible as evidence. However,

the chief law enforcement officer is not subject to subpoena and may not otherwise be compelled to testify at a forfeiture proceeding if the officer who seized the vehicle appears and testifies at the proceeding. The forfeiting authority must surrender the motor vehicle upon the owner's request if the authority independently determines that seizure and forfeiture are not justified. The court may determine whether the seizing or forfeiting authority abused its discretion or was clearly erroneous in recommending forfeiture or in not surrendering a motor vehicle upon the owner's request.

Real property forfeiture proceedings may be brought where the criminal charges are pending, the owner resides, or the real property is located. If forfeiture proceedings are brought in a jurisdiction other than where the real property is located, a notice of pending litigation containing specified information must be filed in that jurisdiction. If the owner of real property that is the principal family residence is convicted of a financial crime and the owner appeals, the court must stay the real property forfeiture proceedings during the appeal.

Generally, a complaint seeking forfeiture for a violation of the financial crimes law must be filed within 90 days after the earlier of a conviction of the criminal charge which led to initiation of the forfeiture proceedings or final disposition of those criminal charges. In the case of seized money, if the State or a political subdivision does not file proceedings about money within the 90-day period, the money seized must be returned to the owner on request by the owner. If the owner fails to ask for the return of the money within one year after the final disposition of criminal proceedings the money reverts to the State or locality, depending on which authority seized the money.

A complaint seeking forfeiture must contain the 10 elements as specified in the bill for controlled dangerous substance seizures. Within 20 days of complaint filing, notice must be delivered by certified mail.

Except as otherwise provided, there is a rebuttable presumption that the seized property is subject to forfeiture as proceeds if the State establishes by clear and convincing evidence that the person has violated the financial crimes law, the property was acquired by the person during the violation or within a reasonable time thereafter, and there was no other likely source for the property. A claimant of the property has the burden to rebut the presumption.

Forfeited property must be disposed of in the order provided in the bill. The governing body where the property was seized must sell the forfeited property at public auction. Proceeds must first be used to pay all the proper expenses of forfeiture proceedings and the sale including seizure and maintenance expenses, advertising, and court costs. Secondly, remaining proceeds must be distributed for court-ordered restitution to the person or persons whose identity was stolen to pay for identifiable losses as defined in

the bill. Third, any remaining proceeds are distributed to other victims to pay for identifiable losses. Any remaining proceeds must then be distributed to the State general fund.

Current Law

Theft and Fraud: “Theft” is generally defined as the illegal taking of another’s property without the owner’s consent, with the intent to permanently deprive the owner of its use. This also includes willfully or knowingly obtaining or exerting unauthorized control over property. “Fraud” generally involves an act using deceit, such as intentional distortion of the truth or misrepresentation or concealment of a material fact, to gain an unfair advantage in order to secure something or deprive another of a right. Titles 7 and 8 of the Criminal Law Article prohibit a number of offenses related to theft and fraud, respectively.

Seizure and Forfeiture Provisions: The only properties subject to summary forfeiture pursuant to a violation of the controlled dangerous substances law are controlled dangerous substances and plants from which they are derived. A Schedule I substance must be seized and summarily forfeited to the State if the substance is: (1) possessed, transferred, sold, or offered for sale in violation of the law; or (2) possessed by the State and its owner is not known. A plant may be seized and summarily forfeited if it is one from which a Schedule I or Schedule II substance may be derived and it: (1) has been planted or cultivated in violation of the law; (2) has an unknown owner or cultivator; or (3) is a wild growth.

The complaint seeking forfeiture must contain:

- a description of the property seized;
- the date and place of the seizure;
- the name of the owner, if known;
- the name of the person in possession, if known;
- the name of each lienholder, if known or reasonably subject to discovery;
- an allegation that the property is subject to forfeiture;
- if seeking forfeiture of a lien holder’s interest in property, an allegation that the lien was created with actual knowledge that the property was being or was to be used in violation of the controlled dangerous substances law;
- a statement of the facts and circumstances surrounding the seizure;
- a statement setting forth the specific grounds for forfeiture; and
- an oath or affirmation that the contents of the complaint are true to the best of the affiant’s knowledge, information, and belief.

Within 20 days after the filing of the complaint, copies of the summons and complaint must be sent by certified mail requesting “restricted delivery – show to whom, date, address of delivery” and first class mail to all known owners and lien holders whose identities are reasonably subject to discovery, including all real property owners and lien holders shown in the records required by law for notice or perfection of the lien.

Notice of the proceedings must be given by posting at the courthouse, on the land if the property is real property, and in a newspaper for three consecutive weeks. If the owner does not timely file an answer to the complaint, the court may order forfeiture of the property without a hearing. Otherwise, a hearing must be held. Subsequent to a full hearing, a court may order that the property be released, forfeited to the appropriate governing body, or released within five days to the first priority lienholder if the property is subject to a valid lien and the lienholder did not have actual knowledge of the property’s unlawful use.

A “seizing authority” means a law enforcement unit in the State that is authorized to investigate violations of the controlled dangerous substances law and that has seized property pursuant to State law.

Background: The bill applies to property obtained through the commission of a variety of fraud offenses, including identity fraud. Although the Task Force to Study Identity Theft did not have adequate time to come to agreement on the details of specific legislation, the task force was in agreement that legislation should be enacted to authorize a court to order forfeiture of all property obtained by an identity fraud criminal. The task force unanimously recommended that forfeiture legislation allow for due process and fully protect lien holders while allowing for at least part of the proceeds from forfeited property to be distributed to victims of identity fraud.

The task force found that since identity fraud offenders are not required to forfeit the proceeds of their crimes, they are able to keep the cash obtained from their crimes or retain the valuables and convert them to cash. After convicted offenders have completed their sentences, they are able to return to society with an advanced financial position. Thus, not only can those offenders who are not apprehended benefit from committing this crime, even those who are convicted can benefit financially. In contrast, victims are left to repair what is left of their finances, often spending additional time and money to do so.

Local Fiscal Effect: Montgomery County advises that the bill will not have a significant impact on the sheriff’s office. Garrett County advises that the bill will have a minimal fiscal impact on the county.

Additional Information

Prior Introductions: SB 846 of 2008 passed the Senate and received an unfavorable report from the House Judiciary Committee. SB 306 of 2007 passed the Senate and was heard by the House Judiciary Committee, where no further action was taken. HB 1051 of 2007 was heard by the House Judiciary Committee, but no further action was taken. SB 517 and HB 692 of 2006 both received unfavorable reports from the Senate Judicial Proceedings and House Judiciary committees, respectively.

Cross File: None.

Information Source(s): Garrett County, Howard County, City of Havre de Grace, Judiciary (Administrative Office of the Courts), State's Attorneys' Association, Department of State Police, Department of General Services, Department of Natural Resources, Motor Vehicle Administration, National Conference of State Legislatures, Federal Trade Commission, Department of Legislative Services

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