



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

House Bill 4367 (Substitute H-3)
 Sponsor: Representative Frank M. Fitzgerald
 House Committee: Judiciary and Civil Rights
 Senate Committee: Judiciary

Date Completed: 5-23-95

SUMMARY OF HOUSE BILL 4367 (Substitute H-3) as passed by the House:

The bill would amend the Michigan Penal Code to add Chapter 25A regarding criminal enterprises. The bill would do all of the following:

- Specify penalties for engaging in a pattern of racketeering activity, and define key terms relating to a continuing criminal enterprise.
- Require that a prosecuting attorney apply to the Attorney General for authority to proceed as a "prosecuting agency" under the bill for a particular case.
- Subject property used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity to criminal forfeiture; establish a procedure for the seizure of this property; allow a person who claimed an interest in the property to petition for a hearing; and specify the court's jurisdictional authority in these cases.
- Subject property that was the proceeds, the substituted proceeds, or an instrumentality of racketeering to civil *in rem* forfeiture; establish a procedure for the seizure of this property; require notification of the seizure; and specify the burden of proof in a civil *in rem* forfeiture proceeding.
- Provide for the disposal of property forfeited criminally or pursuant to a civil *in rem* proceeding.
- Make other provisions pertaining to testimony at a civil *in rem* forfeiture

proceeding, the effect of a criminal proceeding on a civil *in rem* forfeiture proceeding, and the scope of the bill.

The bill would take effect on June 1, 1995.

Definitions

The bill would define "enterprise" as "an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity", including illicit as well as licit enterprises.

"Racketeering" would mean "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain" that was chargeable or indictable under Michigan law or a substantially similar Federal law, or if it occurred in another state, under a substantially similar statute in that state, involving any of the following:

- Unlicensed sale or distribution of cigarettes (MCL 205.428 or former MCL 205.509).
- Felonious disposal of hazardous waste that knowingly places another person in imminent danger of death or serious bodily injury (MCL 324.11151(3) or former MCL 299.548(3)).
- A violation of the Public Health Code's controlled substances or androgenic anabolic steroids provisions (MCL 333.7401-333.7461 and 333.17766a).
- 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).
- 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 horse races (MCL 750.330-750.332).
- Dealing in stolen, embezzled, or converted property (MCL 750.535, 750.535a, and 750.536a).
- Money laundering (MCL 750.411k).

A "pattern of racketeering activity" would be at least two incidents of racketeering that had the same or a substantially similar purpose, result, participant, victim, or method of commission, or were otherwise related and were not isolated acts. The incidents would have to "amount to or pose a threat of continued criminal activity", at least one of the incidents would have to have occurred on or after the bill's effective date, and the last incident would have to have occurred within 10 years after any prior incident, excluding periods of imprisonment.

"Prosecuting agency" would mean the Attorney General, or his or her designee, or a prosecuting attorney, or his or her designee, authorized by the Attorney General to proceed as a prosecuting agency under the bill.

Prohibitions and Penalties

A person employed by or associated with an enterprise could not knowingly conduct or participate in the enterprise's affairs through a pattern of racketeering activity. The bill also would make it unlawful for a person knowingly to acquire or maintain an interest in or control of an enterprise or real or personal property through a pattern of racketeering activity. In addition, a person who knowingly received proceeds derived from a pattern of racketeering activity could not use or invest those proceeds, or any proceeds derived from the use or investment of those proceeds, in the acquisition of an interest in property or the establishment or operation of an enterprise.

A commission of or conspiracy to commit any of the pattern of racketeering activity offenses would be a felony punishable by up to 20 years' imprisonment, a maximum fine of \$100,000, or both. A court also could order a person convicted of engaging in a pattern of racketeering activity to pay court costs and/or to pay the State or local law enforcement agency for reasonably incurred costs of the investigation and prosecution. The court would have to hold a hearing to determine the amount of any costs imposed on the convicted individual. The court's authority would include the authority to do any of the following:

- Order the convicted person to divest himself or herself of any direct or indirect interest in an enterprise.
- Impose reasonable restrictions on the person's future activities or investments, including prohibiting the person from engaging in the same type of endeavor as the enterprise.
- Order the dissolution or reorganization of an enterprise, upon finding that, for the prevention of future criminal activity, the public interest required dissolution or reorganization.
- Order the suspension or revocation of a license, permit, or approval granted to an enterprise by any agency of the State, a county, or another political subdivision, upon finding that, for the prevention of future criminal activity, the public interest required suspension or revocation.
- Order the surrender of the charter of a corporation organized under this State's laws or the revocation of a certificate authorizing a foreign corporation to do business in this State, upon a finding that the board of directors or a managerial agent

for the corporation authorized or engaged in racketeering and, for the prevention of future criminal activity, the public interest required the charter certificate to be surrendered or revoked.

Criminal Forfeiture

Property. A court would have to order a person convicted of engaging in a pattern of racketeering activity to forfeit criminally to the State any personal, real, or intangible property in which he or she had an interest and that was used in, intended for use in, derived from, or realized through the violation. Property that was an interest in, means of control over, or influence over the enterprise involved in the violation and proceeds derived from the violation would have to be included in the order for criminal forfeiture. A sentence ordering criminal forfeiture could not be entered unless the indictment or information alleged the extent of property subject to forfeiture. Property that was not reasonably foreseen to be subject to forfeiture at the time of the indictment or information also could be subject to criminal forfeiture, if the prosecuting agency had given prompt notice to the defendant when the property was discovered to be forfeitable. Reasonable attorney fees for representation in an action under the bill would not be subject to criminal forfeiture.

At sentencing and following a hearing, the court would have to determine the extent of the property subject to forfeiture, if any, and would have to enter an order of forfeiture. The court could base its determination on evidence in the trial record. If any of the property could not be located, had been sold to a bona fide purchaser, were placed beyond the court's jurisdiction, were substantially diminished in value by the defendant, or were commingled with other property that could not be divided without difficulty or injury to innocent persons, then the court would have to order the defendant to forfeit any other reachable property up to the value of the unreachable property. An order of criminal forfeiture would have to authorize an appropriate law enforcement agency to seize the criminally forfeited property upon terms and conditions determined proper by the court.

The bill specifies that its various criminal penalties would not be mutually exclusive and could not preclude the application of other criminal or civil remedies under any other provision of law.

Notice. Upon entry of an order of criminal forfeiture, a court would have to cause notice to be sent by certified mail to all persons known to have, or who appeared to have, an interest in the

property to be forfeited. In order to assist the court in determining whom to notify, the prosecuting agency would have to conduct a search of public records in which notice of liens and security interests were normally recorded. If a person's name and address were not reasonably ascertainable or if delivery could not reasonably be accomplished, then the notice would have to be published for 10 consecutive publishing days in a newspaper of general circulation in the county in which the prosecution occurred. Proof of written notice or publication would have to be filed with the court that entered the criminal forfeiture sentence.

Validity Hearing. A person, other than the defendant, who claimed an interest in property that was subject to criminal forfeiture could petition the court, within 21 days after receipt of the notice or after the date of publication in a newspaper, for a hearing to determine the claim's validity. The petition would have to be signed and sworn to by the petitioner and specify the nature and extent of the interest in the property, the date and circumstances of the acquisition, additional allegations in support of the claim, and the relief sought. The petitioner would have to give the prosecuting agency a copy of the petition.

"To the extent practicable and consistent with the interests of justice", the court would have to hold a validity hearing within 28 days after the petition was filed. The court could consolidate various petitions filed by third party claimants. At the hearing, the petitioner could testify and present evidence on his or her own behalf and could cross-examine witnesses. The prosecuting agency could present evidence and witnesses in rebuttal and in defense of the State's claim to property and could cross-examine witnesses. The court would have to consider the testimony presented at the hearing and relevant portions of the record of criminal judgment that resulted in the order of criminal forfeiture.

The court would have to amend the order of criminal forfeiture to protect the rights of innocent parties, if it determined one or more of the following by a preponderance of the evidence:

- That the petitioner had a legal right, title, or interest in the property that was vested in him or her and not the defendant at the time the pattern of racketeering activity was committed.
- That the petitioner was a bona fide purchaser of the right, title, or interest and, at the time of the purchase, was reasonably without cause to believe that the property was subject to forfeiture.

- That the property was encumbered by a security interest and the holder of that security interest did not have prior actual knowledge of the racketeering activity.
- That the property was encumbered by an unpaid balance on a land contract and the contract's vendor did not have prior actual knowledge of the racketeering activity.

Court Jurisdiction. In a prosecution for a pattern of racketeering activity, the court would have the jurisdiction to enter restraining orders or injunctions, or to take other actions in connection with property subject to criminal forfeiture. Within 14 days after the entry of such an order, the prosecuting agency would have to notify by certified mail all persons known to have or appearing to have an interest in the property. The prosecuting agency would have to conduct a search of public records in which notices of liens and security interests normally were recorded in order to determine whom to notify.

Civil In Rem Forfeiture

All real, personal, or intangible property of a person convicted of a pattern of racketeering activity that was the proceeds, the substituted proceeds, or an instrumentality of racketeering would be subject to civil *in rem* forfeiture to a local unit of government or the State. ("*In rem*" is a term that designates an action against the property.) Real property that was the primary residence of the owner's spouse or dependent child would not be subject, unless the spouse had prior actual knowledge of, consented to, and participated in the commission of the offense. Real property that was the primary residence of a dependent minor child of the owner would not be subject to civil *in rem* forfeiture under the bill. Property would not be subject to civil forfeiture if the owner did not have prior actual knowledge of the commission of the racketeering activity, or if the owner served notice of the commission of the crime upon an appropriate law enforcement agency.

Forfeiture of property encumbered by a security interest would be subject to the interest of the holder of the security interest who had no prior actual knowledge of the racketeering activity, and forfeiture of property encumbered by an unpaid balance on a land contract would be subject to the interest of the land contract vendor, if the vendor had no prior actual knowledge of the racketeering. Reasonable attorney fees for representation in an action under the bill would not be subject to civil *in rem* forfeiture.

A civil forfeiture proceeding would be a proceeding against property subject to forfeiture, instituted by the filing of a petition by a prosecuting agency. A civil forfeiture action under the bill, related to an offense included in the definition of racketeering or an offense of engaging in a pattern of racketeering activity, would have to be commenced within six years after the last incident of racketeering that formed the basis for the action.

Seizure. Personal or intangible property subject to civil forfeiture could be seized pursuant to an order issued by the court that had jurisdiction over the property. Upon an *ex parte* application by the prosecuting agency (without notice to or representation of the other party), either before or after a civil *in rem* forfeiture proceeding was initiated, the court could determine *ex parte* whether there was probable cause to believe that personal or intangible property was subject to civil forfeiture and that notice to persons who had or claimed to have an interest in the property would cause the loss or destruction of the property. In making this determination, the court, as a matter of law, would have to determine that the property was an interest in, means of control over, or influence over an enterprise involved in a pattern of racketeering activity.

If the court found that probable cause to believe the property was forfeitable did not exist, the court would have to dismiss the prosecuting agency's application and, if a civil forfeiture proceeding had been initiated, dismiss the petition. If the court found probable cause to believe the property was subject to forfeiture, but not that prior notice would result in loss or destruction of the property, then the court would have to order service on persons known to have or claim an interest in the property before a further hearing on the issuance of a seizure order. If the court found probable cause to believe that property was subject to forfeiture and that prior notice would result in the property's loss or destruction, then the court would have to issue an order of seizure.

Personal or intangible property subject to civil *in rem* forfeiture could be seized without process if any of the following applied:

- The seizure was incident to a lawful arrest or pursuant to a valid search warrant.
- The seizure was pursuant to an inspection under a valid administrative inspection warrant.
- There was probable cause to believe that the property was dangerous to health or safety.

- There were exigent circumstances that would preclude the obtaining of a court order, and there was probable cause to believe that the property was subject to civil *in rem* forfeiture under the bill.
- The property was the subject of a prior judgment in favor of the State in a forfeiture proceeding.

Real property could not be seized without notice and a hearing.

Personal or intangible property seized under the bill would not be subject to other actions to recover personal property, but would be considered to be in the seizing agency's custody subject only to the bill, or to an order and judgment of the court that had jurisdiction over the civil *in rem* forfeiture proceedings. When property was seized, the seizing agency could place it under seal and/or remove it to a place designated by the court.

A prosecuting agency could apply *ex parte* for an order to authorize the filing of a lien notice against real property subject to civil forfeiture under the bill. The application would have to include a sworn affidavit that specified probable cause for a civil forfeiture action. An order authorizing the lien filing could be issued upon a showing of probable cause to believe that the property was subject to civil forfeiture under the bill.

Property that belonged to the victim of a crime would have to be returned to him or her unless the property were contraband; its ownership were disputed, until the dispute was resolved; or it were required to be retained as evidence pursuant to the Crime Victim's Rights Act (MCL 780.754).

Notice of Seizure. Within 14 days after the seizure of personal or intangible property or the filing of a lien notice against real property, the prosecuting agency would have to notify each of the following of the seizure and intent to forfeit and dispose of the property:

- A person charged with a crime and each person with a known ownership in the property.
- Each mortgagee, holder of a security interest, or lien holder that appeared on the certificate of title or was on file with the Secretary of State or appropriate register of deeds, if the property were real property, a mobile home, motor vehicle, watercraft, or other personal property.
- Each holder of a preferred ship mortgage of record in the appropriate Federal office, if

the property were a watercraft more than 28 feet long or a watercraft that had a capacity of at least five net tons.

- Each person whose security interest was recorded with the appropriate office pursuant to the Federal Aviation Act, if the property were an aircraft, aircraft engine, or aircraft propeller, or a part thereof.
- Each person known to have or appearing to have an ownership interest in the property.
- Each victim of the crime.

The 14-day notice period would not be jurisdictional. The prosecuting agency could move for an extension of the notice period for good cause shown. The required notice would have to be written and delivered to the person or sent by certified mail. If a person's name and address were not reasonably ascertainable or if delivery could not reasonably be accomplished, then the notice would have to be published for 10 consecutive publishing days in a newspaper of general circulation in the county in which the seizure of personal or intangible property occurred or real property was located. Proof of written notice or publication would have to be filed with the court having jurisdiction over the seizure or forfeiture.

If personal or intangible property were seized, the seizing agency immediately would have to notify the prosecuting agency of the seizure and the intent to forfeit and dispose of the property. A person who claimed an interest in proceeds or property subject to forfeiture could file with the prosecuting agency a verified claim stating his or her interest in the property or proceeds. A claim would have to be filed within 21 days after receipt of actual notice of seizure or within 28 days after the completion of a notice by publication. If no claim were filed within that period, the prosecuting agency would have to declare the property forfeited and dispose of it according to the bill. If a claim were filed, the prosecuting agency would have to institute a civil *in rem* forfeiture action within seven days after the filing period expired.

Burden of Proof. At a civil *in rem* forfeiture proceeding, the court would have to act as trier of fact. The prosecuting agency would have the burden of proving by a preponderance of the evidence that the property was subject to civil forfeiture and that the person claiming an ownership or security interest had actual prior knowledge of an offense listed in the bill's definition of racketeering. If the prosecuting agency met that burden of proof, the property would have to be disposed of pursuant to the bill. If, however, the prosecuting agency failed to meet

that burden, the property would have to be returned to the owner within 28 days after entry of a written order to return the property, unless an appellate court stayed the order. In addition, the prosecuting agency would have to reimburse the owner for reasonable attorney fees and damages related to towing costs, storage fees and expenses, foreclosure costs, and other similar expenses.

Within seven days after the return of seized property or the discharge of a lien filed against property, the prosecuting agency would have to give notice of the return to all parties who received notice of the seizure or filing of a lien notice. The same notice provisions would apply as when the property was seized.

Disposal of Forfeited Property

When property was forfeited under the bill, either criminally or through a civil action, the unit of government that seized or filed a lien against the property could sell property that was not required by law to be destroyed and was not harmful to the public. Money received from sales and any money, security, negotiable instrument, or other thing of value forfeited could be disposed of in the following order of priority:

- To pay any outstanding security interest or unpaid land contract balance of a secured party or land contract vendor who had no prior actual knowledge of, and had not consented to, the crime.
- To satisfy any restitution order for the crime.
- To the extent that claims were not covered by an order of restitution, to pay the claim of persons who were shown to be victims of the crime.
- To pay any valid outstanding lien against property that was imposed by a governmental unit.
- To pay the "proper expenses" of the forfeiture and sale proceedings. (This would include, but not be limited to, expenses incurred during the seizure process and expenses for advertising, court costs, and maintaining custody of the property.)

Any remaining balance would have to be distributed by the court that had jurisdiction over the forfeiture proceedings to the unit or units of government that were "substantially involved" in the forfeiture. This money would have to be used to enhance enforcement of criminal laws.

In selling real property, the court that entered an order of forfeiture, on a motion of the unit of government to which the property was forfeited, could appoint a receiver to dispose of the forfeited real property. A receiver would be entitled to reasonable compensation, and would have to list the forfeited real property for sale, make the necessary arrangements for its maintenance and preservation, accept offers to purchase the property, and execute instruments to transfer title to the property.

Other Provisions

Legitimate Activities. The bill would not permit the termination, suspension, or interruption of an enterprise's legitimate activities, or interruption of an enterprise's legitimate activities that were unrelated to any felonious or racketeering activity that was the object of a criminal or civil proceeding under the bill and that, if the activity were terminated, suspended, or interrupted, could harm innocent employees or members of the enterprise.

First Amendment. The bill specifies that a prosecuting agency could not seize materials presumptively protected by the First Amendment to the Constitution of the United States in a manner that violated that constitutional provision.

Testimony. A defendant convicted in any criminal proceeding could not deny the "essential allegations" of the criminal offense in any subsequent civil action. A person's testimony at a civil *in rem* forfeiture proceeding would not be admissible against him or her in a criminal proceeding, other than one for perjury, except for the purposes of impeachment. Testimony given at a civil forfeiture proceeding would not waive the person's constitutional right against self-incrimination.

Proceedings. If a civil *in rem* forfeiture proceeding had commenced, the dismissal of a criminal case or an acquittal on a criminal charge brought against a person who claimed an interest in property subject to forfeiture in the civil action would not preclude or adversely affect the continued forfeiture litigation against the property.

Scope. The bill specifies that, except as expressly provided, it would not create a cause of action between two or more individuals and that it would not preclude a prosecuting agency from pursuing forfeiture proceedings under any other Michigan law.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government.

The new prison penalty created in the bill could increase costs for the Department of Corrections to the extent that the sentence imposed under the bill would exceed the sentence of the underlying felony for which the offender otherwise would be sentenced. If, for example, because of this bill, five offenders were sentenced each year for an additional five years' imprisonment, costs after five years would increase by approximately \$375,000 annually. There are no data currently available that might indicate how many increased sentences could result because of the bill.

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

Fiscal Analyst: M. Hansen
L. Nacionales-Tafoya