

JARRETT SKORUP & DAN KOROBKIN

# CIVIL FORFEITURE IN MICHIGAN



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# Civil Forfeiture in Michigan: A Review and Recommendations for Reforms

By Jarrett Skorup and Dan Korobkin



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In 2008, Jacque Sutton was a 21-year-old college student from Mt. Clemens, Michigan who attended a monthly “Funk Night” party at an art gallery in Detroit. It was alleged that the gallery did not possess a proper license to hold such an event. Police raided the facility, seizing and impounding 44 vehicles parked outside on the street.



One of these cars was Sutton's, and though he was never convicted of a crime (tickets for “loitering” by him and others were waived), he still had to pay nearly \$1,000 to get his 1989 Ford Mustang GT back from law enforcement.

How could something like this happen? Because of Michigan’s loose civil forfeiture laws.

“It’s like legalized stealing,” Sutton said. “According to the law, I did nothing wrong — but they’re allowed to take my property anyway. It doesn’t make sense.”\*

## Introduction

The Constitution of the United States says that a state may not “deprive any person of life, liberty, or property, without due process of law.”<sup>1</sup> But all over the country law enforcement agencies are using the practice of civil forfeiture to seize money and property from people who will never be convicted of a crime, and in many cases, never even charged with a crime.<sup>2</sup> This is a particularly big problem in Michigan, where forfeiture laws have been rated as among the worst in the nation.<sup>3</sup>

Civil forfeiture enables the government to take ownership of private property by claiming that the property was involved in illegal activity. Unlike criminal forfeiture proceedings, however, civil forfeiture does not require the owner of the property to be convicted of a crime in order for assets to be transferred to the government. Civil forfeiture also employs a lower standard of proof for prosecutors to establish guilt, making it easier for the government to demonstrate that the property was “guilty” and eligible to be forfeited to the state.<sup>4</sup>

Further, local police agencies in Michigan directly benefit from civil forfeiture, as they typically retain the proceeds from forfeited property.<sup>†</sup> This arrangement creates an incentive for law enforcement to seize property, because they can use the revenue to pad their budgets

\* Source: “CAID Raid Resources” (American Civil Liberties Union), <http://perma.cc/4SHB-8XRQ>; George Hunter and Doug Guthrie, “Police Property Seizures Ensnare Even the Innocent,” *The Detroit News*, Nov. 12, 2009, <http://perma.cc/G7US-XAW9>; Jarrett Skorup, “Bill Would Limit Asset Forfeiture in Michigan Without Criminal Conviction,” *Michigan Capitol Confidential* (Mackinac Center for Public Policy, Dec. 20, 2013), <http://perma.cc/5RGE-PUWF>.

† MCL § 333.7524(1). For some forfeitures, after restitution is paid, 75 percent of the funds may be used by law enforcement while 25 percent is required to implement policies aimed at protecting the rights of crime victims. See MCL § 600.4708(1)f.

— a scheme dubbed “policing for profit.” Some police departments may even become dependent on this revenue.<sup>5</sup>

There are several options policymakers should consider to improve Michigan’s civil forfeiture laws and protect the rights of individuals:

- (1) Eliminate civil forfeiture and only allow criminal forfeiture. This would mean that the government could seize and take possession of property only in criminal proceedings and would require a criminal conviction of an individual before property can be forfeited;
- (2) Increase transparency reporting requirements for property that is forfeited under current forfeiture laws;
- (3) Reduce “policing for profit” by redirecting proceeds from forfeited property away from local police agencies.

Appendix A contains model legislation developed by the Institute for Justice that would achieve these reforms.

## **What is Forfeiture?**

Forfeiture is a tool used by law enforcement agencies to confiscate money or property they suspect is involved in illegal activity. Forfeiture has a long history in the United States and other parts of the world, but for most of its existence, its use was limited.<sup>6</sup> Widespread use of civil forfeiture began with the rise of modern drug laws and more permissive court interpretations of what constitutes a connection to illegal activities.<sup>7</sup>

There are three main types of property that are subject to forfeiture: contraband, proceeds from criminal activity and tools used in the act of committing a crime.<sup>8</sup> Contraband is property that is illegal to own, such as illicit drugs or certain types of weapons. Proceeds are typically goods or money derived from illegal activities, such as cash stolen from a bank. Tools are items used during the commission of a crime and “associated” with illegal activity, such as a legally owned gun used to rob a convenience store.

Forfeiture is not the same thing as law enforcement seizing property. Police can seize property if they have probable cause to believe that the property is subject to forfeiture or if the property is needed as evidence as part of a criminal investigation.<sup>9</sup> Seizure is when the police take possession of property; forfeiture is when the government takes ownership of property.

There are two main types of forfeiture: civil and criminal, both of which are described in more detail below. It is important to distinguish between civil and criminal forfeiture and to remember that this paper discusses only the problems associated with civil forfeiture, not criminal forfeiture or police seizure. Further, reforming civil forfeiture would not affect the ability of police to seize property that is needed as evidence in a criminal case.



### ***Criminal Forfeiture***

Criminal forfeiture is when property (typically one of the three types described above) is forfeited to the state because it has been established beyond a reasonable doubt that it was directly involved with or resulted from illegal activity perpetrated by an individual who has been convicted of a crime.

According to the U.S. Department of Justice:

Criminal forfeiture is an action brought as a part of the criminal prosecution of a defendant. It is an *in personam* (against the person) action and requires that the government indict (charge) the property used or derived from the crime along with the defendant. If the jury finds the property forfeitable, the court issues an order of forfeiture.<sup>10</sup>

Criminal forfeiture is a single-track process where the suspect and their property enter the legal system together. Before property may be forfeited, the owner's guilt must first be established beyond a reasonable doubt. If a property owner is found not guilty, he is set free and his property is returned. If he is found guilty, the property owner is sentenced, and the same jury is then asked to determine if his property is the proceeds or instrument of the crime he was convicted of. If the jury determines that the property was the proceeds or instrument of the crime, the property may be forfeited.<sup>11</sup>

Under these circumstances, criminal forfeiture is generally accepted based on the idea that no one should be able to keep the fruits of an illegal act. This paper does not recommend making any changes to Michigan's criminal forfeiture laws.

### ***Civil Forfeiture***

Civil forfeiture allows prosecutors to transfer ownership of assets from citizens to the state outside of a criminal legal process. As explained by the U.S. Department of Justice: "Civil judicial forfeiture is an *in rem* (against the property) action brought in court against the property. The property is the defendant and no criminal charge against the owner is necessary."<sup>12</sup>

In other words, the "defendant" in a civil asset forfeiture case is the seized property, not the owner of the property. While criminal suspects have legal rights such as a right to a speedy trial, a court-appointed attorney if they are indigent, and Miranda warnings, no such protections are provided to property alleged to be associated with criminal activity. This makes it easier for law enforcement to acquire forfeited assets through civil forfeiture compared to criminal forfeiture, because the civil forfeiture procedure does not require a conviction of a person or even a criminal charge against a person.

The standard for the government to establish guilt are different in criminal and civil proceedings. In criminal proceedings, the government must establish guilt "beyond a reasonable doubt" before a person can be convicted.<sup>13</sup> But in order for property to be forfeited in civil courts in Michigan, the state only has to show that property was involved in

a crime “by a preponderance of the evidence.”<sup>14</sup> This lower standard makes it easier for the state to obtain property in civil proceedings compared to criminal proceedings.

## **Civil Forfeiture Under Michigan Law**

In order for property to be forfeited, it must first be seized by law enforcement who suspect it is connected in some way to a crime. After being seized, the property enters the civil court system, where it will be forfeited to the state unless the property owner objects in writing within 20 or 28 days.<sup>15</sup> If the property owner files a claim and challenges the forfeiture, the state must prove by a preponderance of the evidence “that the property is the proceeds of a crime, the substituted proceeds of a crime, or an instrumentality of a crime.”<sup>16</sup>

Some forfeiture cases in Michigan proceed under the state’s nuisance laws. Under these statutes, law enforcement, in the interest of the “public good,” can seize property thought to be involved in creating a nuisance.<sup>17</sup> According to state law, this includes buildings, boats, aircraft, vehicles or other real estate alleged to be used for “lewdness, assignation, prostitution, or gambling,” or used for the manufacture, transporting or sale of controlled substances.<sup>18</sup>

For controlled substances, state law says that, “Any money that is found in close proximity to any property that is subject to forfeiture ... is presumed to be subject to forfeiture. This presumption may be rebutted by clear and convincing evidence.”<sup>19</sup>

These loose standards of what constitutes a “nuisance” — assignation (typically planning a meeting with a prostitute) and lewdness — can be defined very broadly. This makes it easier for law enforcement to seize and take possession of property from people who may not be engaged in any illegal activity or whose property is not truly involved in the commission of any crime.

Unlike criminal forfeiture, civil forfeiture uses a two-track system in Michigan. Suspected criminals are processed in one track — the criminal justice system. Property suspected of being involved in a crime is processed in another — the civil justice system. These two tracks are independent, which allows for the seemingly contradictory judicial outcome in which property owners can be acquitted of any wrongdoing in criminal court (if they are even prosecuted), but still have their property found “guilty” in civil court and forfeited to the state.

Many civil forfeiture cases in Michigan never make it before a judge. The situation is similar in other states: In Minnesota, 97 percent of forfeiture cases related to DUIs and 95 percent related to illicit drugs were processed administratively, meaning no one legally challenged the state’s taking of property and there was no judicial hearing.<sup>20</sup>

The lack of judicial oversight in civil forfeiture cases is often the result of property owners recognizing that the cost of mounting a legal challenge exceeds their financial resources and often exceeds the value of the property itself. For example, the average proceeds per forfeiture in Minnesota was \$1,408 in 2013.<sup>21</sup> It makes little sense to challenge a forfeiture in court if the cost of doing so, usually in the form of hiring an attorney, exceeds the value of the property at stake, or if it would be financially crippling for a person of modest means.

## Civil Forfeiture Under Federal Law

In addition to seizing and taking possession of property under state statute, law enforcement agencies can conduct similar proceedings under federal law. The “equitable sharing” program allows local law enforcement to hand over forfeiture cases to federal agencies or accept their assistance in forfeiture investigations.<sup>22</sup> The proceeds from such forfeitures are split between the federal and local or state agencies.<sup>23</sup> Even states without their own civil forfeiture laws, such as North Carolina, can team up with federal agencies and receive the proceeds of forfeited property.<sup>24</sup>

## The Case for Forfeiture

The modern legal basis for civil forfeiture is rooted in one particular court case which came out of Michigan. In the 1996 case *Bennis v. Michigan*, the U.S. Supreme Court ruled that neither the takings clause of the Fifth Amendment nor the due process clause of the 14th Amendment were violated by civil forfeiture. The court additionally found that the state did not have to prove that an innocent property owner consented or even knew about their property being associated with a crime in order for the state to have the power to take it.\*

In *Bennis*, a married couple from Royal Oak had joint ownership of a vehicle. The husband, John Bennis, was arrested for engaging in sexual activity with a prostitute while in the car. The state seized and subjected the car to forfeiture, but Tina Bennis, John’s spouse, sued the state to retrieve her right to half of the vehicle’s value.

The Supreme Court held that a property owner, even if completely unaware that the asset was involved in illegal activity, cannot use an “innocent owner defense” and has no constitutional right to a judicial process to recover the property.<sup>25</sup> In other words, as long as the government can prove the “guilt” of the property, the U.S. Constitution does not protect innocent owners of such property from having their assets forfeited.

Law enforcement agencies often attempt to justify forfeiture by stating that it allows them to more effectively fight crime and saves taxpayer money. For example, Michigan State Police director Col. Kriste Etue has said:

Michigan’s asset forfeiture program saves taxpayers money and deprives drug criminals of cash and property obtained through illegal activity. Michigan’s law enforcement community has done an outstanding job of stripping drug dealers of illicit gain and utilizing those proceeds to expand and enhance drug enforcement efforts to protect our citizens.<sup>26</sup>

Although Col. Etue’s statement above may be true with respect to some criminals who deal in

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\* *Bennis v. Michigan*, 517 U.S. 1163 (1996). It should be noted, however, that some states, including Michigan, statutorily require the state to prove that a property owner cannot use the “innocent owner defense” before property may be forfeited. Marian R. Williams et al., “Policing for Profit: The Abuse of Civil Asset Forfeiture” (Institute for Justice, March 2010), 23, <http://perma.cc/X378-SQLX>; MCL § 600.4705(1).

large amounts of cash and valuable property, civil forfeiture lacks the legal protections necessary to make sure that innocent people are not stripped of their property without due process of law.

## **The Incentive Problem With Civil Forfeiture**

Civil forfeiture provides a means for law enforcement agencies to take a person's private property without having to first prove that the person did anything illegal. Since these same agencies receive up to 100 percent of the proceeds from forfeited property, they have a powerful incentive to boost their budgets by seizing property.

In Michigan, law enforcement agencies have used forfeited cash and the proceeds from forfeited property to pad their budgets. Sgt. Dave Schreiner of Canton Township said this in a 2009 Detroit News article:

Police departments right now are looking for ways to generate revenue, and forfeiture is a way to offset the costs of doing business. You'll find that departments are doing more forfeitures than they used to because they've got to — they're running out of money and they've got to find it somewhere.<sup>27</sup>

In the same article, Romulus Police Chief Michael St. Andre noted that a 118 percent jump in forfeiture revenues was because "our forfeiture efforts have ramped up in the past few years."<sup>28</sup> Although he said generating revenue was not the primary cause of this increase, St. Andre added, "[I]t is nice when we're able to purchase things we need from arrests. I don't have to go to the city and ask for things like bulletproof vests or computers."<sup>29</sup>

Trenton Police Chief William Lilienthal echoed these sentiments: "Forfeitures are a way to help supplement your budgetary issues. You can't supplant your budget with them, but you can supplement it. If you need something, you can utilize those funds to purchase it."<sup>30</sup>

Law enforcement officers around the nation have noted similar stories. Retired Maryland State Police Narcotics Commander Maj. Neil Franklin has changed his view on forfeiture and now opposes the practice. He said his units used forfeiture to enhance their budget and finance operations, even though these revenues came from taking property from people who had done nothing illegal.<sup>31</sup>

## **How Michigan Compares to Other States**

Michigan's civil forfeiture laws are among the worst in the country. In a 2010 study, "Policing For Profit: The Abuse of Civil Asset Forfeiture," the Institute for Justice gave Michigan's civil forfeiture laws and use a D-minus.<sup>32</sup> IJ is a public interest law firm that represents clients fighting civil forfeiture losses. The study compared states based on their standard of proof required for conviction, where the burden of proof lies, who receives the proceeds, how much law enforcement agencies participate in federal equitable sharing takings, and a few other areas. The D-minus ranking ties Michigan for last among the states with Georgia, Texas, Virginia and West Virginia.<sup>33</sup>

Similarly, Michael Greibrok of FreedomWorks, a private nonprofit that advocates for limited government policies, gave Michigan a D on its civil forfeiture report card. Michigan received low marks for having a low burden of proof for the state to meet before it could subject property to forfeiture and for allowing local law enforcement agencies to receive all the proceeds from their own forfeitures.<sup>34</sup>

These low grades are warranted. Local and state law enforcement agencies in Michigan make good use of the federal “equitable sharing” program, which accounted for almost half of the reported proceeds from civil forfeiture in 2013.<sup>35</sup> As mentioned, Michigan law creates incentives for law enforcement agencies to expand their use of civil forfeiture by allowing them to keep all the proceeds from forfeitures.<sup>36</sup> Further, prosecuting attorneys in Michigan need only show by a “preponderance of the evidence” that the property in question was associated with a criminal activity.<sup>37</sup> This standard is typically met when more than 50 percent of the evidence indicates guilt.<sup>38</sup> This is lower than the “clear and convincing evidence” standard mandated in other states or the “beyond a reasonable doubt” standard required for a criminal conviction.<sup>39</sup>

Several states have raised this burden of proof and subsequently narrowed the circumstances under which police can use civil forfeiture. Some states have made other reforms, such as requiring any forfeiture proceeds to go to the state’s general fund rather than to the police departments seizing the assets.<sup>40</sup> Maine is one of those states, and its law enforcement agencies do not use the federal equitable sharing program as much as many other states, presumably because the beneficiaries of these proceeds are not the local law enforcement agencies that seize property.<sup>41</sup>

## **Real World Results**

As a result of civil forfeiture laws, innocent citizens all over the country have had their property seized and forfeited to the state. As noted in a report by the Heritage Foundation:

[B]etween 2006 and 2008, law enforcement agents in Tenaha, Texas, engaged in a systematic practice of seizing cash and property from innocent drivers with absolutely no evidence of wrongdoing. In Philadelphia, police seized the home of two sisters whose brother, who did not live there, showed up while trying to evade the cops. In Detroit, cops seized . . . cars owned by patrons of an art institute event—because the institute had failed to get a liquor license.<sup>42</sup>

Michigan has had its share of stories come to light of people having their property and money forfeited to police without being convicted of, or in some cases, even charged with a crime.\* Below are several examples.

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\* It should be noted that these are just examples that have been reported in the media. No doubt there are many other similar stories that have not been publicized.



In September 2014, Wally Kowalski had his bank account frozen and his power generator and tools seized by police. Kowalski has a doctorate in design engineering and lives in Van Buren County. He is a medical marijuana patient, who tries to grow the product legally under Michigan law. He was not arrested or charged with a crime until months after his bank account was frozen and his property seized.\*



In January 2013, federal agents seized \$35,000 from the bank account of the Dehko family who own a grocery store in Fraser. The family made frequent cash deposits at their bank, because their insurance policy only covered up to \$10,000. Federal law requires banks to report transactions above \$10,000 and law enforcement may have suspected that the family was intentionally attempting to avoid their transactions from being reported, which is illegal. The Dehkos were never charged with a crime. The Internal Revenue Service finally returned the money in November 2013 after critical national media coverage.<sup>43</sup>



In November 2013, Thomas Williams of St. Joseph County said he spent 10 hours in handcuffs while police searched his home and property. They took his car, television, cell phone and the cash he had on hand. As a result, he was stranded at his home for three days. Williams says he does not know why his assets are still frozen, and the Southwestern Enforcement Team, a drug-enforcement task force, took more than a year to charge him with a crime.†



In November 2012, the Cheung family, living just outside Detroit, had \$135,000 frozen in a bank account, presumably because they were making routine deposits of slightly less than \$10,000, similar to the Dekho situation. As a result, the Cheungs could not pay their property taxes or restaurant costs and got into financial trouble. No criminal charges were ever filed, but, fortunately, the money was eventually returned.<sup>44</sup>

\* He was eventually charged with manufacturing and distributing marijuana after news reports about his case were published. Anne Schieber, "Property Seized, Money Taken — But No Crime," Michigan Capitol Confidential (Mackinac Center for Public Policy, Dec. 3, 2014), <http://perma.cc/9D7C-WXC7>; Anne Schieber, "Man Who Speaks Out About Police Seizing His Property Without Charges Is Arrested Hours Later," Michigan Capitol Confidential (Mackinac Center for Public Policy, Dec. 6, 2014), <http://perma.cc/X2YU-RCXP>.

† As was the case with Wally Kowalski, it was only after news reports about Williams' case were published that Williams was officially charged with a crime. Anne Schieber, "Property Seized, Money Taken — But No Crime," Michigan Capitol Confidential (Mackinac Center for Public Policy, Dec. 3, 2014), <http://perma.cc/9D7C-WXC7>; L.L. Brasier, "Police Seize Property and Cash in Questionable Raids," Detroit Free Press, Feb. 23, 2015, <http://perma.cc/88C5-4QU5>.



In 2004, Krista Vaughn was giving her friend and Red Cross co-worker Amanda Odom a ride home from work. After dropping Odom off at a bank in Detroit, Vaughn circled the block before picking her back up. While she was waiting for Vaughn, an officer with Wayne County Sheriff's Morality Unit accused Odom of making eye contact with nearby motorists, supposedly for solicitation of prostitution. On this suspicion, police issued Odom a ticket and seized Vaughn's 2002 Chrysler Sebring. Odom's ticket was eventually dropped and neither woman was charged with any crime, but police still charged Vaughn \$1,400 to get her vehicle back.<sup>45</sup> Vaughn reluctantly paid the fee, because she believed it would be less expensive than trying to fight the case legally.



In 1993, Judy Enright of Ann Arbor had her art seized by U.S. Fish and Wildlife officials while it was on display at an art fair. She used feathers she found in her own backyard for this piece of art. However, according to the Federal Migratory Bird Act of 1918, it is illegal to sell certain types of bird feathers, a fact the federal officials used to justify their seizure of the art. Enright was never charged with a crime.<sup>46</sup>



In 1992, the home of James Fouch and those of his two sons were raided by federal officials on suspicion that the family was engaging in loan fraud. Property worth over a combined \$500,000 was seized and auctioned off within 21 months. The family's business — a credit union — was liquidated. No criminal charges were ever filed against any member of the Fouch family.<sup>47</sup>



In 1988, Joseph Haji, suspected of possessing illegal drugs, had his Detroit grocery market searched by police. They did not find any drugs, but drug-sniffing dogs responded to a few \$1 bills in the cash register. That was enough for law enforcement to seize \$4,384 in cash that was on hand in the store. Haji was never charged with a crime, and the police kept all the money.<sup>48</sup>



For more stories, videos, and insight visit our Civil Forfeiture webpage at [Mackinac.org/Forfeiture](http://Mackinac.org/Forfeiture).

## **Available Data on Forfeiture**

In 2013 the U.S. Department of Justice’s Asset Forfeiture Fund took in \$2.01 billion.<sup>49</sup> This was actually a significant decrease from 2012 when the fund received \$4.17 billion, but a large portion of this difference can be attributed to the assets seized by federal agents as part of the Bernie Madoff scandal.<sup>50</sup> Since 2008, local and state police agencies have received another \$3 billion in forfeiture cases through the federal “equitable sharing” program.<sup>51</sup>

From 2009 to 2013, Michigan law enforcement agencies reported \$123.5 million in forfeiture proceeds.<sup>52</sup> According to the Institute for Justice, documents obtained via Freedom of Information Act inquiries showed at least another \$149 million in proceeds for Michigan law enforcement agencies from 2001 to 2008, an average of \$18.7 million per year.<sup>53</sup> That means more than \$270 million has been seized from Michigan residents since 2001. But, it is important to note, this figure only includes forfeitures related to drug crimes.<sup>54</sup> The total value of property forfeited from private individuals to the state is likely larger, but unfortunately unknown.<sup>55</sup> Additionally, based on the state’s forfeiture reporting data, there is no way to distinguish whether property was forfeited in connection with a criminal conviction.<sup>56</sup>

## **Recommendations**

Michigan should change its current civil forfeiture laws to do a better job protecting the rights of its citizens and ensure that innocent people do not have their assets turned over to the government. The following are three recommendations that policymakers should consider, listed in order of importance.

First, Michigan should end civil forfeiture and only allow property to be forfeited through the state’s criminal forfeiture process. Prosecutors should be required to obtain a conviction of a suspect in criminal court as a prerequisite to the forfeiture of property. The state of North Carolina uses such a policy — someone’s property may not be forfeited to the state unless that person has been convicted of a crime.<sup>57</sup> Minnesota passed reforms to its civil forfeiture law in 2014 that require the state to get a criminal conviction before property can be forfeited.<sup>58</sup> Nevada and Montana made similar reforms in 2015.<sup>59</sup>

New Mexico banned civil forfeiture with a bill passed unanimously by the state House and Senate in 2015.<sup>60</sup> This new criminal forfeiture law in New Mexico protects innocent citizens by ending the two-track process and requiring all asset forfeiture cases to be processed in the criminal justice system. Just like in North Carolina, Minnesota, Nevada and Montana, a person must first be convicted of a crime before his property can be forfeited, and the same judge and jury (in criminal court) must determine if the property should be forfeited.<sup>61</sup>

The New Mexico law also includes an “anti-circumvention provision,” which limits local law enforcement’s ability to skirt these rules by teaming up with federal officials.<sup>62</sup> It provides a strong innocent owner defense, which shifts the burden of proof to the government to prove that all the owners of property knew or consented to the use of the property by the suspected



criminal before their share of the property can be forfeited.<sup>63</sup> In other words, referring back to the *Bennis* case, Tina Bennis would have never had her share of the family car forfeited to the state if she lived in New Mexico, because she claimed not to have consented or known of her husband's illegal activity involving the vehicle.

Second, the state should require more transparency of law enforcement's current use of forfeiture. The current reporting requirements are weak and do not provide enough information about how much civil forfeiture is being used by law enforcement.\* In the most recent forfeiture report, the Michigan State Police acknowledge that the report "is not considered to be inclusive of all asset forfeitures within Michigan" and that "many asset forfeiture proceedings involve multiple agencies and a portion may have been inadvertently left out due to a misunderstanding of which agency would report the asset forfeiture."<sup>64</sup> Michigan taxpayers should be able to get all the facts about all the forfeiture proceedings once an investigation is complete.

Lastly, the Legislature should reduce the incentives faced by police and prosecutors to abuse civil forfeiture to pad their budgets. Current law allows forfeiture proceeds to be sent back to law enforcement agencies and into police budgets. This should be changed to require that money and the proceeds from auctioned assets go to a separate government department. Some states, such as Maine, send the money to the state's general fund or a fund used for public education.

Though Maine allows for civil forfeiture, its law removes the direct monetary incentive for law enforcement by requiring assets to go to the state's general fund.<sup>65</sup> Michigan should follow suit or require funds to go to the local city council or county commissioners to determine how the money would be spent. Another option would be to mandate that forfeiture proceeds go to Michigan's long-time underfunded teacher and state employee retirement systems. Maine achieves the highest grade among the states on the Institute for Justice's national report card.<sup>66</sup>

Appendix A contains model legislation developed by the Institute for Justice that would achieve these reforms.

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\* At the time of this writing, a package of bills to improve Michigan's civil forfeiture reporting requirements had passed the state House by a vote of 107 to 2. Anne Schieber, "Bills Aiming to Protect Property from Overzealous Forfeiture Clear First Hurdle," Michigan Capitol Confidential (Mackinac Center for Public Policy, June 5, 2015), <http://perma.cc/Z4X8-Q92V>.

## **Conclusion**

Civil forfeiture is a little-known and poorly understood tool that allows the government to circumvent some of our most important rights. Michigan has loose laws that create bad incentives for law enforcement agencies to seize money and property from innocent people while denying important due process protections.

Michigan should change its current laws to limit abuse, increase transparency, and protect important property rights.

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## **Appendix A: The Institute for Justice's Model Legislation**

### **FORFEITURE OF PROPERTY**

**Definitions.** As used in this chapter, the terms defined in this section have the following meanings:

- I. “Abandoned property” means personal property left by an owner who intentionally relinquishes all rights to its control. Real property may not be abandoned.
- II. “Actual knowledge” means direct and clear awareness of information, a fact, or a condition.
- III. “Contraband” means goods that are unlawful to import, export, or possess, including scheduled drugs without a valid prescription.
- IV. “Constructive knowledge” means knowledge that is imputed to family or household members of the defendant if, three or more times for the same or specified in statute as a similar offense in the ten years prior to the alleged offense, the defendant admitted guilt or was adjudicated guilty.
- V. “Conveyance” means a device used for transportation and includes a motor vehicle, trailer, snowmobile, airplane, and vessel, and any equipment attached to it. The term does not include property that is stolen or taken in violation of the law.
- VI. “Instrumentality” means property otherwise lawful to possess that is used in the furtherance or commission of an offense of a law subject to forfeiture. An “instrumentality” includes land, buildings, containers, a conveyance, equipment, materials, products, a computer, computer software, a telecommunications device, a firearm, ammunition, a tool, money, securities, and negotiable instruments and other means of exchange.
- VII. “Law enforcement agency” means any non-federal police force, or other local, county, or state agency that has the authority under state law to engage in seizure and forfeiture.
- VIII. “Law subject to forfeiture” means a state law that carries a felony penalty and that explicitly includes forfeiture as a punishment or sanction for the offense.

**Purpose.** This chapter’s purpose is to:

- I. Deter criminal activity by reducing its economic incentives;
- II. Increase the pecuniary loss from criminal activity;
- III. Protect against the wrongful forfeiture of property; and
- IV. Ensure that only criminal forfeiture is allowed in this state.

**Criminal Forfeiture; Property Subject to Forfeiture.** When a person is convicted of violating a law subject to forfeiture, the court, consistent with this chapter, may order the person to forfeit:

- I. Property the person derived from the commission of the crime;

- II. Property directly traceable to property derived from the commission of the crime; and
- III. Instrumentalities the person used in the commission of the crime.

**Exemption.** Homesteaded real property, a motor vehicle of less than \$10,000 in market value, and U.S. currency totaling \$200 or less are exempt from forfeiture.

**Contraband.** No property right exists in contraband. Contraband is subject to seizure and shall be disposed of according to state law. Contraband is not subject to forfeiture under this chapter.

**Conviction Required; Standard of Proof.**

- I. Property may be forfeited if (a) the offense is of a state law subject to forfeiture, (b) the offense is established by proof of a criminal conviction, and (c) the state establishes that the property is forfeitable under sections 100:3 through 100:5 by clear and convincing evidence.
- II. Nothing herein prevents property from being forfeited by plea agreement approved by the presiding criminal court.

**Substitution of Assets.** Upon the state's motion following conviction, the court may order the forfeiture of substitute property owned by the defendant up to the value of unreachable property only if the state proves by a preponderance of the evidence that the defendant intentionally transferred, sold, or deposited property with a third party to avoid the court's jurisdiction.

**No Additional Remedies.** The state may not seek personal money judgments or other remedies not provided for in this chapter.

**No Joint-and-Severally Liability.** A defendant is not jointly and severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court may order each defendant to forfeit property on a pro rata basis or by another means the court finds equitable.

**Seizure of Personal Property with Process.** At the request of the state at any time, a court may issue an ex parte preliminary order to seize or secure personal property for which forfeiture is sought and to provide for its custody. Application, issuance, execution, and return are subject to state law.

**Seizure of Personal Property without Process.** Personal property subject to forfeiture may be seized at any time without a court order if:

- I. The seizure of personal property is incident to a lawful arrest or a search lawfully conducted;
- II. The personal property subject to seizure has been the subject of a prior judgment in favor of the state; or

III. The state has probable cause to believe that the delay occasioned by the necessity to obtain process would result in the removal or destruction of the personal property and that the personal property is forfeitable under this chapter.

**Seizure of Real Property with Process.**

I. Seizure of real property requires a court order. A court may issue an order to seize or secure real property for which forfeiture is sought only after proper notice to property owners and an opportunity for a contested hearing to determine the sufficiency of probable cause for the seizure.

II. Nothing in this paragraph prohibits the prosecuting authority from seeking a lis pendens or restraining order to hinder the sale or destruction of the real property.

III. Application, issuance, execution, and return of any order are subject to state law.

**Receipt.** When property is seized, the law enforcement officer shall give an itemized receipt to the person possessing the property; or in the absence of any person, leave a receipt in the place where the property was found, if reasonably possible.

**Title.**

I. At the time of seizure or entry of a restraining order, the state acquires provisional title to the seized property. Provisional title authorizes the state to hold and protect the property.

II. Title to the property vests with the state when the trier of fact renders a final forfeiture verdict and relates back to the time when the state acquired provisional title. However, this title is subject to claims by third parties adjudicated under this chapter.

**Pretrial Replevin Hearing.**

I. Following the seizure of property, a defendant or third party (claimant) has a right to a pretrial hearing to determine the validity of the seizure.

II. The claimant may claim at any time prior to 60 days before trial of the related criminal offense the right to possession of property by motion to the court to issue a writ of replevin.

III. The claimant shall file a motion establishing the validity of the alleged interest in the property.

IV. The court shall hear the motion no more than 30 days after the motion is filed.

V. The state shall file an answer showing probable cause for the seizure, or cross motions at least 10 days before the hearing.

VI. The court shall grant the motion if it finds that:

- (a) It is likely the final judgment will be that the state must return the property to the claimant;
- (b) the property is not reasonably required to be held for investigatory reasons; or
- (c) The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding. At the court's discretion under subparagraph (b), it may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized, and require an accounting.

VII. In lieu of ordering the issuance of the writ, the court may order the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in the action, or order other relief as may be just.

**Discovery.** Discovery is subject to the rules of criminal procedure.

**Trial Proceedings.** The litigation related to the forfeiture of property shall be held in a single proceeding following the trial of the related alleged offense. The litigation of whether property of less than \$10,000 in value shall be forfeited shall be held before only a judge.

**Proportionality Hearing.**

I. At any time following determination of forfeiture by the trier of fact, the defendant may petition the court to determine whether the forfeiture is unconstitutionally excessive under the state or federal constitution.

II. The defendant has the burden of establishing the forfeiture is grossly disproportional to the seriousness of the offense by a preponderance of the evidence at a hearing conducted by the court without a jury.

III. In determining whether the forfeiture of an instrumentality is unconstitutionally excessive, the court may consider all relevant factors, including, but not limited to:

- (a) The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused by the defendant;
- (b) The extent to which the defendant participated in the offense;
- (c) The extent to which the property was used in committing the offense;
- (d) The sentence imposed for committing the crime subject to forfeiture; and
- (e) Whether the offense was completed or attempted.

IV. In determining the value of the instrumentality subject to forfeiture, the court may consider all relevant factors, including, but not limited to:



- (a) The fair market value of the property;
- (b) The value of the property to the defendant including hardship to the defendant if the forfeiture is realized; and
- (c) The hardship from the loss of a primary residence, motor vehicle or other property to the defendant's family members or others if the property is forfeited.

V. The court may not consider the value of the instrumentality to the state in determining whether the forfeiture of an instrumentality is constitutionally excessive.

### **Secured Interest.**

I. Property encumbered by a bona fide security interest is not subject to forfeiture. A person claiming a security interest must establish by a preponderance of the evidence the validity of the interest perfected under state code section XXX, or a lease or rental agreement.

II. The prosecuting authority shall summarily return to the person claiming a bona fide security interest unless the person consented to the criminal act upon which the forfeiture is based.

### **Innocent Owner.**

I. The property of an innocent owner may not be forfeited. The process for determining whether a person is an innocent owner is set out in this section.

II. A person who has an ownership interest in property subject to forfeiture existing at the time the illegal conduct giving rise to forfeiture occurred and who claims to be an innocent owner has the burden of production to show that the person has a legal right, title, or interest in the property seized under this chapter.

III. If paragraph II is satisfied and the state seeks to proceed with the forfeiture against the property, the state shall prove by a preponderance of the evidence that the person had actual or constructive knowledge of the underlying crime giving rise to the forfeiture.

IV. A person who acquired an ownership interest in property subject to forfeiture after the commission of a crime giving rise to the forfeiture and who claims to be an innocent owner has the burden of production to show that the person has legal right, title, or interest in the property seized under this chapter.

V. If paragraph IV is satisfied and the state seeks to proceed with the forfeiture against the property, the state shall prove by a preponderance of the evidence that at the time the person acquired the property the person:

- (a) had actual or constructive knowledge that the property was subject to forfeiture; or
- (b) was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

VI. If the state fails to meet its burden in paragraph III or V, the court shall find that the person is an innocent owner and shall order the state to relinquish all claims of title to the property.

**Appeal.** A party to forfeiture litigation may appeal the district court's decision regarding the seizure, forfeiture and distribution of property under this chapter.

**Disposition of Property and Proceeds.**

I. At any time when unclaimed property or contraband held for evidentiary purposes is no longer needed for that purpose, the court may order it be delivered to the state treasurer within 30 days, or, in the case of contraband, be destroyed within 30 days.

II. If the forfeiture is granted, the court may order the property be delivered to the state treasurer within 30 days.

III. Upon motion, the court may order that a portion of the currency seized or proceeds from public auction be used to pay reasonable non-personnel expenses of the seizure, storage, and maintenance of custody of any forfeited items.

IV. All abandoned property shall be delivered to the state treasurer within 30 days.

V. The state treasurer shall dispose of all non-currency forfeited and abandoned property at public auction. The auction proceeds and forfeited currency shall first be used to pay all outstanding recorded liens on the forfeited property, then to comply with an order of the court to pay reasonable non-personnel expenses, with all remaining funds to be deposited into the state's general fund.

**Prohibition on Retaining Property; Sale Restrictions.** No law enforcement agency may retain forfeited or abandoned property it for its own use or sell it directly or indirectly to any employee of the agency, to a person related to an employee by blood or marriage, or to another law enforcement agency.

**Reporting.**

I. On an annual basis, each law enforcement agency shall report the following information about seizures and forfeitures completed by the agency under state forfeiture law and federal forfeiture law:

- (1) The total number of seizures of currency;
- (2) The total number of seizures and the number of items in each class of property seized including vehicles, houses and other types of property seized.
- (3) The market value of each class of property seized including currency, vehicles, houses and other types of property seized.

(4) The total number of occurrences of each class of crime underlying the forfeitures including controlled substances, driving while intoxicated and other crimes.

II. The department of justice may require that information not specified in this section also be reported. The department shall develop standard forms, processes, and deadlines for electronic data entry for annual submission of forfeiture data by law enforcement agencies.

III. Each law enforcement agency shall file with the department the report required under paragraph I for the law enforcement agency and the corresponding prosecuting authority. The law enforcement agency shall file separate reports for forfeitures completed under state forfeiture law and federal forfeiture law. A null report shall be filed by a law enforcement agency that did not engage in seizures or forfeitures during the reporting period. The department shall compile the submissions and issue an aggregate report of all forfeitures in the state.

IV. By April 1 of each year, the department shall make available on its website the reports submitted by law enforcement agencies and its aggregate report.

#### **Return of Property, Damages, and Costs.**

I. The law enforcement agency that holds the property shall return property to the owner within a reasonable period of time not to exceed five days after:

- (a) The court finds that the owner had a bona fide security interest;
- (b) The court finds that the owner was an innocent owner;
- (c) The acquittal of or dismissal of the owner of the criminal charge that is the basis of the forfeiture proceedings; or
- (d) The disposal of the criminal charge that is the basis of the forfeiture proceedings by nolle prosequi.

II. The law enforcement agency that holds the property is responsible for any damages, storage fees and related costs applicable to property returned under paragraph I.

#### **Transfer of forfeitable property to federal government.**

I. Law enforcement agency or prosecuting authority shall not directly or indirectly transfer seized property to any federal law enforcement authority or other federal agency unless:

- (a) the value of the seized property exceeds \$50,000, excluding the potential value of the sale of contraband, or
- (b) the seized property is not forfeitable under state law and may only be forfeited under federal law.



## Endnotes

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