

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 889 Contraband Forfeiture
SPONSOR(S): Criminal Justice Subcommittee; Metz and Caldwell
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 2 N, As CS	Keegan	White
2) Appropriations Committee	22 Y, 3 N	Smith	Leznoff
3) Judiciary Committee	17 Y, 0 N, As CS	Keegan	Havlicak

SUMMARY ANALYSIS

Sections 932.701-932.706, F.S., comprise the Florida Contraband Forfeiture Act (hereafter the "Act"), which provides for the seizure and civil forfeiture of property used in violation of the Act. The forfeiture procedure advances primarily by a two-step process: the seizure or other initial restraint on the property is applied; and the forfeiture itself occurs once it is determined in court that the property can be legally forfeited.

The bill amends the requirements that apply to seizure, the review of seizures, and forfeiture procedures in a number of ways, as follows:

- Property seizure is unauthorized until the property owner is arrested for a criminal violation that renders the property a contraband article, or such a criminal violation occurs and one of the enumerated arrest exceptions applies. Once one of these two conditions is met, property may be seized if there is probable cause that property was used in violation of the Act.
- The seizing agency must petition the court for a finding that the seizure was lawful.
- The court shall order the seized property forfeited to the seizing agency upon proof beyond a reasonable doubt that the property was used in violation of the Act.
- Specified parties in seizing agencies must review forfeiture settlements, perform annual seizure reviews, and review seizures for legal sufficiency. Agencies must address deficiencies raised by a review and create written policies promoting releasing property.
- Law enforcement officer's employment and compensation may not depend on seizure quotas.
- Specified law enforcement officers must receive training on seizure and forfeiture.
- The percentage of proceeds that must be donated to specified causes increases from 15 percent to 25 percent for qualifying agencies that acquire at least \$15,000 through the Act during a fiscal year.
- Any law enforcement agency that does not comply with the reporting requirements is subject to a civil fine up to \$5,000.

The bill would have an indeterminate fiscal impact to local expenditures and state and local revenue.

This bill would have an insignificant fiscal impact to state expenditures.

The bill is effective July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Florida Contraband Forfeiture Act

Sections 932.701-932.706, F.S., comprise the Florida Contraband Forfeiture Act (hereafter the "Act"), which provides for the seizure and civil forfeiture of property related to criminal and non-criminal violations of law. Contraband and other property may be seized when utilized during or for the purpose of violating the Act. Property constituting a "contraband article" includes:

- A controlled substance as defined in ch. 893, F.S., or a substance, device, paraphernalia, or currency or other means of exchange that was used, attempted, or intended to be used in violation of ch. 893, F.S.;¹
- Gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, attempted, or intended to be used in violation of Florida gambling laws;
- Equipment, liquid or solid, which was used, attempted, or intended to be used, in violation of Florida beverage or tobacco laws;
- Motor fuel upon which the motor fuel tax has not been paid;
- Personal property that was used or attempted to be used as an instrumentality in, or to aid or abet the commission of, any felony, or which is acquired by proceeds obtained from a violation of the Act;
- Real property that was used or attempted to be used as an instrumentality in, or to aid or abet the commission of, any felony, or which is acquired by proceeds from a violation of the Act;
- Any personal property in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c), F.S.;
- A motor vehicle offered for sale in violation of s. 320.28, F.S.;
- A motor vehicle used in the course of committing a violation of s. 322.34(9)(a), F.S.;
- Photographs, films, or other recorded images, recorded in violation of s. 810.145, F.S., and possessed for amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person;
- Real property which is acquired by the proceeds of Medicaid fraud under ss. 409.920, F.S., or 409.9201, F.S.;
- Personal property in the possession of, or belonging to, any person which is acquired by the proceeds of Medicaid fraud under ss. 409.920, F.S., or 409.9201, F.S.; and
- Personal property that is used or attempted to be used as an instrumentality in the commission of, or in aiding and abetting in the commission of, a person's third or subsequent violation of s. 509.144, F.S.²

Under the Act, any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of the Act or in, upon, or by the means of which a violation of the Act has or is taking place, may be seized.³ The following criminal and noncriminal acts are specifically prohibited under the Act:

- To transport, carry, or convey any contraband article in, upon, or by means of any vessel, motor vehicle, or aircraft.
- To conceal or possess any contraband article.
- To use any vessel, motor vehicle, aircraft, other personal property, or real property to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
- To conceal, or possess, or use any contraband article as an instrumentality in the commission of or in aiding or abetting in the commission of any felony or violation of the Florida Contraband Forfeiture Act.

¹ The totality of the facts presented by the State must clearly establish probable cause to believe that a nexus exists between the article seized and the narcotics activity. s. 932.701(2)(a)1., F.S.

² s. 932.701(2)(a), F.S.

³ s. 932.703(1), F.S.

- To acquire real or personal property by the use of proceeds obtained in violation of the Florida Contraband Forfeiture Act.⁴

The forfeiture procedure advances primarily by a two-step process: the seizure or other initial restraint on the property is applied; and the forfeiture itself occurs once it is determined in court that the property can be legally forfeited.⁵

Seizure

As mentioned above, the property specified in the Act may be seized and forfeited when the property has been used in violation of the Act, or in, upon, or by means of which a violation of the Act has or is taking place.⁶ Personal property may be seized when the violation occurs or after the violation, if the person entitled to be notified⁷ is notified at the time of the seizure or by certified mail.⁸ Real property can only be seized by the process of *lis pendens*⁹ after a violation of the Act has occurred, and prior to when the person entitled to notice has been given the opportunity to attend a pre-seizure adversarial hearing¹⁰ to determine the validity of the seizure.¹¹ As soon as a seizure takes place, all rights to, interest in, and title to contraband articles used in violation of the Act shall immediately vest¹² in the law enforcement agency that performed the seizure.¹³

Adversarial preliminary hearings are conducted before or after a seizure to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Act.¹⁴ If the court determines that probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband.¹⁵

Forfeiture Proceedings

The seizing agency must promptly proceed¹⁶ against the property by filing a complaint¹⁷ in the circuit court in the jurisdiction where the seizure or the offense occurred.¹⁸ Forfeiture proceedings must be decided by a jury trial unless the claimant waives that right.¹⁹ Unlike the probable cause standard used in adversarial preliminary hearings, property may not be forfeited unless the seizing agency proves by a preponderance of the evidence²⁰ that the owner either knew, or should have known that the property was being used or was likely to be used for criminal activity.²¹ Upon clear and convincing evidence that the contraband article was being used in violation of the Act, the court shall order the seized property

⁴ s. 932.702, F.S.

⁵ *Dept. of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991).

⁶ s. 932.703(1), F.S.

⁷ A person entitled to notice includes any owner, entity, bona fide lienholder, or person in possession of the property subject to forfeiture when seized, who is known to the seizing agency after a diligent search and inquiry. s. 932.701(2)(e), F.S.

⁸ s. 932.703(2)(a), F.S.

⁹ *Lis pendens* is Latin for "a suit pending." In modern usage it means a written notice that a lawsuit has been filed to decide the title to, or property interest in, real property. THE FREE DICTIONARY, *Lis Pendens*, <http://legal-dictionary.thefreedictionary.com/lis+pendens> (last visited Jan. 21, 2016).

¹⁰ Preseizure adversarial hearings are provided under s. 932.703(2)(c) and (d), F.S., discussed in further detail under the Forfeiture section, herein.

¹¹ s. 932.703(2)(b), F.S.

¹² "Vested" means "[a]ccrued; fixed; settled; absolute; having the character or giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. THE LAW DICTIONARY, *Vested*, <http://thelawdictionary.org/vested/> (last visited Jan. 11, 2016).

¹³ s. 932.703(c), F.S.

¹⁴ s. 932.703(2)(c), F.S.

¹⁵ *Id.*

¹⁶ s. 932.701(2)(c), F.S.

¹⁷ A "complaint" is a petition for forfeiture filed in the civil division of the circuit court by the seizing agency requesting the court to issue a judgment of forfeiture. s. 932.701(2)(d), F.S.

¹⁸ s. 932.704(4), F.S.

¹⁹ s. 932.704(3), F.S.; *Dept. of Law Enforcement v. Real Property*, 588 So. 2d 967.

²⁰ "Preponderance of the evidence" is a legal standard that means the evidence presented in court is more convincing of a point or position than other evidence that is presented to the contrary. THE LAW DICTIONARY, *Preponderance of Evidence*, <http://thelawdictionary.org/preponderance-of-evidence/> (last visited Jan. 11, 2016).

²¹ s. 932.703(6)(a), F.S.

forfeited to the seizing agency.²² Once this occurs, the right, title, and interest in and to such property shall be perfected in the seizing agency, subject only to the rights of bona fide lienholders.²³

Use and Disposition of Forfeited Assets

Once a seizing agency has been awarded a final judgment granting forfeiture of property, the agency may do any of the following:

- Retain the property for agency use;
- Sell the property at public auction or by sealed bid to the highest bidder, except for real property, which must be sold in a commercially reasonable manner; or
- Salvage, trade, or transfer the property to any public or nonprofit organization.²⁴

When the forfeited property has a lien attached to it that is preserved by the court,²⁵ the agency must either sell the property and apply the proceeds toward satisfying the lien, or satisfy the lien before disposing of the property in one of the ways described above.²⁶

Should the seizing agency choose to sell forfeited property, the proceeds may not be used to meet normal operating expenses of the agency.²⁷ Rather, the proceeds must be distributed with the following priority:

- Satisfaction of any liens preserved by the court during forfeiture proceedings.
- Payment of the cost incurred to the seizing agency for storage, maintenance, security and forfeiture of the property.
- Payment of the court costs incurred from the forfeiture proceeding.
- For the 2015-2016 fiscal year only, the funds in a special law enforcement trust fund established by a municipality may be used to reimburse the general fund of the municipality for advances from the general fund to the special law enforcement trust fund prior to October 1, 2001.²⁸

When the seizing agency is a county or municipal agency, the remaining proceeds from a sale of forfeited goods shall be deposited into a special law enforcement trust fund that may be used only for specific expenses.²⁹ The funds may be expended in accordance with the following requirements:

- The funds may only be used for school resource officer, crime prevention, safe neighborhood programs, drug abuse education, drug prevention programs, or other approved law enforcement purposes.³⁰
- The funds may not be used to meet normal operating needs of the law enforcement agency.³¹
- Any local law enforcement agency that acquires at least \$15,000 through the Act within one fiscal year must donate at least 15 percent of the proceeds for the support of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer programs.³²

Effect of the Bill

The bill restricts the methods by which a seizing agency may seize and forfeit property. Pre-conditions must be met before a property seizure may occur, as follows:

- The owner of the property must be arrested for a criminal violation that renders the property a contraband article; or
- A criminal violation must occur and one of the following arrest exceptions must apply:
 - The owner of the property cannot be identified after a diligent search;
 - The owner of the property is a fugitive from justice or deceased;

²² s. 932.704(8), F.S.

²³ *Id.*

²⁴ s. 932.7055, F.S.

²⁵ s. 932.703(6)(b), F.S.

²⁶ s. 932.7055(3)(a) and (b), F.S.

²⁷ s. 932.7055(5)(a), F.S.

²⁸ s. 932.7055(4), F.S.

²⁹ s. 932.7055(5)(a), F.S.

³⁰ s. 932.7055(5)(c)1., F.S.

³¹ s. 932.7055(5)(c)2., F.S.

³² s. 932.7055(5)(c)3., F.S.

- An individual who does not own the property is arrested for the criminal violation that renders the property a contraband article, and the owner of the property had actual knowledge of the criminal activity;
- The owner of the property agrees to be a confidential informant; or
- The property is a monetary instrument.³³

If either pre-condition exists, the property may be seized if it has been used in any violation of the Act, regardless of whether the violation of the Act is connected to the criminal violation.

Within 10 days of the seizure, the agency must petition the court for a finding that one of the pre-conditions has been complied with and there is probable cause to believe that the property was used in violation of the Act. If the court finds that the seizure was lawful, the agency can hold the property pending the completion of proceedings under the Act. If the court finds that the seizure was unlawful, the seizure and any restraint on the property must be released within five days of the court finding. If the owner of the property or another aggrieved party files a petition for an adversarial preliminary hearing and the court finds that probable cause does not exist, the seizing agency is liable for reasonable attorney fees and costs, up to \$2,000.

After a lawful seizure occurs, the seizing agency must promptly file a petition to forfeit the property. The seizing agency must pay a filing fee of \$1,000 and a bond of \$1,500 to the clerk of court at the time the petition is filed. The bond is payable to the aggrieved party if the court does not award the forfeiture to the seizing agency. If 90 or more days have elapsed since the seizure of the property and the owner of the property cannot be located, the property may be deemed contraband and subject to forfeiture. The court shall order the forfeiture of the property when the seizing agency proves beyond a reasonable doubt that the seized property was being used in violation of the Act.

The bill amends the reporting and review requirements that apply to property seizure and forfeiture, as follows:

- The head of the seizing agency or a subordinate must review all forfeiture settlements.
- Seizing agencies must review the seizures annually, at a minimum.
- If a review reveals deficiencies, the seizing agency must take prompt action to comply with the Act.
- The employment, salary, promotion, or other compensation of a law enforcement officer may not depend on seizure quotas.
- A supervisor must promptly review the probable cause supporting a seizure. The legal counsel for the seizing agency must be notified of all seizures as soon as possible and must review the seizure for legal sufficiency.
- Seizing agencies shall adopt and implement written policies and procedures promoting the prompt release of seized property in specified circumstances and review each claim of interest in seized property.
- The settlement of any forfeiture action must be consistent with the Act and the seizing agency's policy.
- Law enforcement officers that perform property seizures must receive training and continuing education as required by the Act, and each seizing agency must retain records of compliance.

The bill increases the percentage of proceeds that must be donated from 15 percent to 25 percent for local law enforcement agencies that acquire at least \$15,000 through the Act within one fiscal year.

The bill requires law enforcement agencies to submit reports to the Florida Department of Law Enforcement (FDLE) as follows:

- All law enforcement agencies must submit annual reports to FDLE regarding whether the agency has seized or forfeited property under the Act.

³³ The term "monetary instrument" means coin or currency of the United States or any other country; a traveler's check; a personal check; a bank check; a cashier's check; a money order; a bank draft of any country; an investment security or negotiable instrument in bearer form or in other form such that title passes upon delivery; a prepaid or stored value card or other device that is the equivalent of money and can be used to obtain cash, property, or services; or gold, silver, or platinum bullion or coins.

- All law enforcement agencies that received or expended forfeited property or proceeds of forfeited property must submit an annual report by October 10 documenting the receipts and expenditures.
- The report must specify the type, approximate value, court case number, type of offense, disposition of property received, and amount of any proceeds received or expended.

Any law enforcement agency that does not comply with the reporting requirements is subject to a civil fine up to \$5,000. The fine will not apply to agencies that substantially comply with the requirements within 60 days of receipt of the notice of noncompliance from FDLE.

The bill requires FDLE to submit an annual report to the Office of Program Policy Analysis and Government Accountability (OPPAGA) compiling the data in the annual reports submitted by the law enforcement agencies.

The bill corrects statutory references and reenacts a section of statute to reflect the changes made by the bill.

B. SECTION DIRECTORY:

Section 1. Amends s. 932.701, F.S., relating to short title; definitions.

Section 2. Amends s. 932.703, F.S., relating to forfeiture of contraband article; exceptions.

Section 3. Amends s. 932.704, F.S., relating to forfeiture proceedings.

Section 4. Amends s. 932.7055, F.S., relating to disposition of liens and forfeited property.

Section 5. Creates s. 932.7061, F.S., relating to reporting seized property for forfeiture.

Section 6. Creates s. 732.7062, F.S., relating to penalty for noncompliance with reporting.

Section 7. Amends s. 322.34, F.S., relating to driving while license suspended, revoked, canceled, or disqualified.

Section 8. Amends s. 323.001, F.S., relating to wrecker operator storage facilities; vehicle holds.

Section 9. Amends s. 328.07, F.S., relating to hull identification number required.

Section 10. Amends s. 817.625, F.S., relating to use of scanning device or reencoder to defraud.

Section 11. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The state could receive revenue from civil fines assessed upon law enforcement agencies, payable to the General Revenue Fund, if law enforcement agencies fail to comply with new forfeiture reporting requirements. The number of law enforcement agencies which may fail to comply cannot be accurately determined.

2. Expenditures:

This bill increases reporting requirements for FDLE and other state law enforcement agencies. According to the FDLE, 1 FTE would be needed for an additional Government Analyst position, at the expense of \$64,118 in the first year, and \$60,119 annually afterward.³⁴

This expense can be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Law enforcement agencies could lose funds which would be payable to the General Revenue Fund as civil fines, if law enforcement agencies fail to comply with new forfeiture reporting requirements.

The bill limits the circumstances in which a seizing agency may gain title to property through the Florida Contraband Forfeiture Act. In FY 2013-14, there were 4,210 seizures reported under the Act throughout the state.³⁵ Approximately 36% of the occurrences resulted in the owner's forfeiture of all seized assets, and 34% resulted in the partial forfeiture of assets, totaling \$18,871,997.³⁶ This bill could have a significant impact on certain law enforcement agencies which generate a large amount of revenue annually from forfeitures. The precise impact of the bill cannot be accurately determined at this time.

2. Expenditures:

Law enforcement agencies which fail to comply with the forfeiture reporting requirements in the bill would be assessed a civil fine of \$5,000 payable to the state General Revenue Fund. The number of law enforcement agencies which may fail to comply cannot be accurately determined.

This bill increases reporting requirements for local law enforcement agencies. To the extent that the increased reporting requirements expend additional resources, the bill may have a minimal fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18, of the Florida Constitution may apply because this bill requires county and municipal governments to develop policies and procedures governing asset forfeiture, and expands existing reporting requirements. This may result in an indeterminate positive fiscal impact; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments.

2. Other:

None.

³⁴ FDLE, "FDLE Legislative Bill Analysis: HB 889", January 22, 2016, On file with the House Appropriations Committee.

³⁵ OPPAGA. Civil Asset Forfeiture in Florida: Policies and Practices, November 2015, Tallahassee: OPPAGA, <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1510rpt.pdf>, Accessed: February 11, 2016.

³⁶ *Id.*

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2016, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all:

- Prohibits seizure of any property until the owner of the property has been arrested for a criminal violation that renders the property a contraband article.
- Permits seized property to be deemed a contraband article subject to forfeiture under the Act if at least 90 days has elapsed since the arrest of the property owner and the seizing agency is unable to locate the owner thereafter.
- Requires the court to order the seized property forfeited only upon clear and convincing evidence that:
 - The property has been used in violation of a criminal law that renders the property a contraband article;
 - The claimant is the owner of the property; and
 - The owner was prosecuted for the criminal violation that formed the basis for the forfeiture proceeding, and has been placed into a pretrial intervention program; been placed into a diversion program; been placed into a program for confidential informants, as defined in s. 914.28, F.S.; entered a plea of guilty; entered a plea of nolo contendere; or been found guilty at trial, regardless of adjudication of guilt.
- Requires the court to order the return of seized property to the owner within five days of making a finding that a perfected security interest applies to the property or that the criminal case that formed the basis for the forfeiture proceeding was discharged by acquittal, dismissal, or nolle prosequi.

On February 25, 2016, the Judiciary Committee adopted two amendments and reported the bill favorably as a committee substitute. Together the amendments require that:

- A pre-condition must exist prior to a property seizure. The pre-conditions require:
 - The owner of the property is arrested for a criminal violation that renders the property a contraband article, or
 - A criminal violation occurs that renders the property a contraband article and one of the enumerated arrest exceptions applies.
- Within 10 days of a seizure, the agency must petition the court for a finding that:
 - One of the preconditions is met; and
 - Probable cause exists to believe that the seized property was used in violation of the Act.
- When filing the petition, the seizing agency must pay a filing fee of \$1,000 and deposit a bond of \$1,500 with the clerk of the court.
- The court shall order the forfeiture of the property when proof beyond a reasonable doubt establishes that the seized property was being used in violation of the Act.
- The agency seeking forfeiture is responsible for paying for any damage to the property, storage fees, or maintenance costs.
- The cap on an agency's liability for attorney fees and costs is raised from \$1,000 to \$2,000.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.