

Civil Asset Forfeiture; SB 458

SB 458 amends several provisions of the Kansas Standard Asset Seizure and Forfeiture Act (Act).

Conduct Giving Rise to Forfeiture

The bill removes certain offenses from the list of conduct and offenses giving rise to forfeiture under the Act, regardless of whether there is a prosecution or conviction related to the offense. The bill would remove offenses related to possession of a controlled substance and other crimes associated with personal use of controlled substances.

Exemptions to Forfeiture—Proportionality Determination

The bill removes language related to the court's duty to limit the scope of a proposed forfeiture. The bill instead directs the court to determine whether the proposed forfeiture is unconstitutionally excessive pursuant to provisions created by the bill regarding forfeiture proceedings, if the court has not made this determination earlier in the proceeding. [*Note: Under prior law, if a court found the effect of the forfeiture was grossly disproportionate to the nature and severity of the owner's conduct prior to final judgment in a judicial forfeiture proceeding, it had a duty to limit the scope of the forfeiture.*]

Seizure of Property—Seizing Agency Requirements and Limitations

Time Limitations

The bill reduces the time period in which the seizing agency must forward a written request for forfeiture to the appropriate county or district attorney from 45 days to 14 days.

Upon the expiration of the 14-day time limitation described above, or upon notification the county or district attorney declines the request (whichever occurs first), a local seizing agency would have 14 days to request a state law enforcement agency adopt the forfeiture or engage a private attorney to represent the local seizing agency in the forfeiture proceeding. The bill provides the same 14-day time limitation for a state seizing agency to engage an assistant attorney general, or other approved attorney, to represent the state seizing agency in the forfeiture proceeding.

If a local or state seizing agency fails to meet the time limitations described above, the bill requires the seizing agency to return the seized property to the owner or interest holder within 30 days in the same manner as provided by KSA 22-2512. [*Note: KSA 22-2512 provides certain seized property, such as dangerous drugs or hazardous materials, must be destroyed or disposed of rather than returned.*]

The bill specifies nothing in this section will affect time limitations related to initiating or filing a forfeiture proceeding pursuant to the Act.

The bill also prevents the seizing agency from requesting, inducing, or otherwise coercing a person who asserted rights as an owner or interest holder of the property to waive, in writing, such property rights until forfeiture proceedings commence.

Federal Adoption

The bill authorizes a state or local law enforcement agency to request federal adoption of a seizure under the Act or otherwise transfer or refer seized property to a federal agency only if:

- The seizure by the agency occurs pursuant to a joint task force with federal law enforcement authorities;
- The seizure by the agency occurs pursuant to a joint investigation with federal law enforcement authorities as part of an ongoing federal investigation;
- The agency makes such request in conjunction with a request for federal authorities to adopt the criminal investigation related to the seizure;
- The property seized by the agency is subsequently seized pursuant to a federal seizure warrant, obtained from a federal court, to take custody of assets originally seized under state law;
- The property seized by the agency directly relates to a serious public safety concern; or
- The gross estimated value of the property seized by the agency is \$25,000 or more.

Commencement of Forfeiture Proceedings—Probable Cause Affidavit

The bill requires an affidavit describing probable cause supporting forfeiture to be filed in addition to the notice of pending forfeiture or judicial forfeiture action in order to commence forfeiture proceedings, and the forfeiture could proceed only after a judge has determined there is probable cause to believe the property is subject to forfeiture under the Act.

The bill requires, when notice of a pending forfeiture is mailed to an owner or interest holder, the notice to include the probable cause affidavit described above. Prior law required an affidavit describing essential facts supporting forfeiture to be provided with the notice.

The bill amends law relating to the filing of liens for the forfeiture of property to allow a plaintiff's attorney to file a lien only upon the commencement of a forfeiture proceeding, rather than upon the initiation of any civil or criminal proceeding relating to conduct giving rise to forfeiture under the Act.

Notice of Claims Against Seized Property

The bill requires, after an owner or interest holder has filed a claim against property seized for forfeiture, the plaintiff's attorney to file a notice of receipt of the claim with the court, unless the claim was already filed. The filing must include a copy of the claim and documents showing the date the claim was mailed and received.

Forfeiture Proceedings

Forfeiture Proceedings, Generally

As described above, the bill requires a judge determine that probable cause supports the forfeiture proceeding at the time of commencing the action. Accordingly, the bill removes language allowing an owner or interest holder of seized property to request a probable cause hearing.

The bill states that an owner or interest holder may petition the court for determination, or reconsideration of its prior determination, that there is probable cause to support forfeiture at any time prior to final judgment.

If the court finds that there is no probable cause for forfeiture, the bill specifies that the court must order the release of the property to the custody of the applicant, as custodian for the court, or from a forfeiture lien pending the outcome of a judicial proceeding under the Act.

The bill adds provisions allowing a person whose property has been seized to petition the court to determine whether the forfeiture is unconstitutionally excessive. The plaintiff's attorney shall have the burden of establishing that the forfeiture is proportional to the seriousness of the offense giving rise to the forfeiture by clear and convincing evidence. In making this determination, the court may consider, but not shall not be limited to considering:

- The seriousness of the offense;
- The extent of participation in the offense by the person from whom the property was seized;
- The extent to which the property was used in committing the offense;
- The sentence imposed for committing the offense that gave rise to forfeiture;
- The effect of the forfeiture on the livelihood of the person from whom property was seized; and
- The fair market value of the property compared with the property owner's net worth.

The bill requires the court to automatically stay discovery against the person whose property was seized and against the seizing agency in the forfeiture proceeding during a related criminal proceeding alleging the same conduct. The court may lift the automatic stay of discovery with good cause shown, changed from upon a motion.

In Rem Proceedings—Burden of Proof

The bill amends law governing *in rem* forfeiture proceedings to require the plaintiff's attorney to prove by clear and convincing evidence, rather than preponderance of the evidence, that the interest in the property is subject to forfeiture. [Note: An action *in rem* is a legal term meaning an action filed against property.]

Judicial Disposition of Property—Fees and Costs

The bill allows a court to order a claimant who fails to establish that a substantial portion of the claimant's interest is exempt from forfeiture to pay reasonable fees, expenses, and costs to any other claimant establishing an exemption and to the seizing agency in connection with that claimant.

In addition, if a claimant prevails, and the court orders the return of at least half of the property's aggregate value, the bill requires the court to order the seizing agency to pay:

- Reasonable attorney fees and litigation costs to the claimant;
- Post-judgment interest; and
- Any interest actually paid from the date of seizure in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale.

When there are multiple claims to the same property, the bill does not make the seizing agency liable for attorney fees and costs associated with any claim if the seizing agency:

- Promptly recognizes the claim;
- Promptly returns the claimant's interest in the property if it can be divided without difficulty and there are no competing claims to that portion of the property;
- Does not cause the claimant to incur additional costs or fees; and
- Prevails in obtaining forfeiture with respect to one or more of the other claims.

Disposition of Forfeited Property—Federal Transfer and Special Law Enforcement Purpose

The bill amends law governing the disposition of forfeited property to allow a law enforcement agency to transfer the custody or ownership of forfeited property to any federal agency only if authorized pursuant to certain conditions created by the Act with respect to requests for federal adoption.

Under the Act, moneys in certain specified forfeiture funds may only be used for 12 special law enforcement purposes. The bill adds the payment of attorney fees, litigation costs, and interest ordered by a court to this list of purposes for which forfeiture funds may be used.

Repository and Reporting Requirements

The bill amends law pertaining to the role of the Kansas Bureau of Investigation (KBI) in reporting on law enforcement agency forfeiture activity to specify that in addition to information regarding law enforcement agencies not compliant with reporting requirements, KBI is required to provide each agency's forfeiture fund financial report that is submitted to the Kansas Asset Seizure and Forfeiture Repository to the President of the Senate, the Speaker of the House, and the House and Senate Committees on Judiciary.