

SESSION OF 2024

SUPPLEMENTAL NOTE ON SENATE BILL NO. 458

As Recommended by Senate Committee on
Judiciary

Brief*

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

Conduct Giving Rise to Forfeiture (Section 1)

The bill would remove certain offenses from the list of conduct and offenses giving rise to forfeiture under the Act, whether or not there is a prosecution or conviction related to the offense. Currently, all violations involving controlled substances in Article 57 of the Criminal Code may give rise to forfeiture under the Act. The bill would remove offenses related to possession and other crimes associated with personal use of controlled substances.

Exemptions to Forfeiture – Proportionality Determination (Section 2)

The bill would remove language related to the court's duty to limit the scope of a proposed forfeiture to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct prior to final judgment in a judicial forfeiture proceeding. The bill would instead direct the court to determine whether the proposed forfeiture is unconstitutionally excessive pursuant to new provisions

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

created in Section 6 of the bill, if the court has not made this determination earlier in the proceeding.

Seizure of Property – Seizing Agency Requirements and Limitations (Section 3)

Currently, the Act provides that the seizing agency must forward to the appropriate county or district attorney a written request for forfeiture within 45 days. The bill would reduce this period from 45 days to 14 days.

Upon the expiration of 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 would provide 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 would require 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 would specify nothing in this section would affect time limitations related to initiating or filing a forfeiture proceeding pursuant to continuing law.

The bill would also prohibit any law enforcement agency from requesting federal adoption of a seizure pursuant to the Act. Current law provides that nothing in the Act shall prevent such a request.

The bill would also prevent 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.

Commencement of Forfeiture Proceedings – Probable Cause Affidavit (Section 4)

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

The bill would amend 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. Current law provides a lien may be filed 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 (Section 5)

The bill would require, 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 would be required to include a copy of the claim and documents showing the date the claim was mailed and received.

Forfeiture Proceedings (Sections 6 – 8)

Forfeiture Proceedings, Generally (Section 6)

In law governing the procedure for judicial forfeiture proceedings, the bill would remove existing language providing for a probable cause hearing upon request of an owner or interest holder of seized property to reflect the changes made in Section 4 with respect to requiring a judge determine probable cause supports the forfeiture proceeding at the time of commencing the action.

The bill would state 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 would specify 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 would add language allowing a person whose property has been seized to petition the court to determine whether the forfeiture is unconstitutionally excessive. The plaintiff's attorney would 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 could consider, but not be limited to:

- 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 to the property owner's net worth.

The bill would require 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 could lift the automatic stay of discovery with good cause shown. Current law provides the court require the stay only upon a motion.

In Rem Proceedings (Section 7)

The bill would amend law governing *in rem* forfeiture proceedings to require the plaintiff's attorney 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.]

The bill would also add a provision to this section allowing an owner or interest holder of property seized (claimant) to demand a jury trial in an action *in rem*.

In Personam Proceedings (Section 8)

The bill would add a provision allowing a claimant to demand a jury trial in an action *in personam*. [Note: An action *in personam* is a legal term meaning an action filed against a person.]

***Judicial Disposition of Property – Fees and Costs
(Section 9)***

The bill would allow, rather than require, 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 would require 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 would 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 (Section 10)

The bill would amend law governing the disposition of forfeited property to allow a law enforcement agency to transfer the custody or ownership to any federal agency only if the property was seized and forfeited pursuant to federal law. [Note: Continuing law provides a law enforcement agency may also retain the property for official use or transfer custody or ownership to a local or state agency; destroy or use contraband for investigative or training purposes; or sell property not required to be destroyed and is not harmful to the public.]

Current law provides that moneys in certain specified forfeiture funds may only be used for 12 special law enforcement purposes, described in continuing law. The bill would add 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.

The bill would make a technical amendment to remove expired language in this section.

Repository and Reporting Requirements (Section 11)

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

Speaker of the House of Representatives, and the House and Senate Committees on Judiciary.

The bill would also make technical amendments to remove expired language in this section.

Background

Following the February 15, 2023, hearing on 2023 HB 2380 concerning various reforms to the Act, Representatives Owens and Patton requested the Kansas Judicial Council study that bill and the general topic of civil asset forfeiture during the 2023 Legislative Interim. The Judicial Council convened a Civil Asset Forfeiture Advisory Committee, which met several times in the summer and fall of 2023 to discuss possible reforms to the Act, including recommendations regarding 2023 HB 2380. Following its study, the Advisory Committee submitted its report and a draft of recommended legislation to the Judicial Council.

In addition, the Legislative Coordinating Council appointed a Special Committee on Civil Asset Forfeiture during the 2023 Legislative Interim to further consider the topic. The Special Committee met in December 2023 to consider the Advisory Committee's report, hear testimony from various stakeholders, and make recommendations for civil asset forfeiture reform measures to the 2024 Legislature.

Based on recommendations made by the Advisory Committee and Special Committee, SB 458 was introduced on February 6, 2024, by the Senate Committee on Judiciary at the request of Senator Warren.

[*Note:* HB 2606, introduced by the House Committee on Judiciary at the request of Representative Owens, contains many of the same provisions.]

Senate Committee on Judiciary

In the Senate Committee hearing, Senator Faust-Goudeau and representatives of Americans for Prosperity and Kansas Justice Institute testified as **proponents** of the bill. The proponents generally stated the bill's reforms will enhance due process rights of individuals while allowing forfeiture to remain an effective tool for law enforcement.

Written-only proponent testimony was provided by a former Johnson County Sheriff and a representative of the Kansas Catholic Conference.

Opponent testimony was provided by the Director of the KBI and representatives of Kansas Association of Chiefs of Police, Kansas Peace Officers Association, Kansas Racing and Gaming Association (KRGC), Kansas Sheriffs Association, and the Office of the Attorney General. The opponents generally expressed concern with provisions requiring jury trials in all forfeiture proceedings and prohibiting agencies to request federal transfer or adoption of local or state forfeitures. The KRGC representative expressed concern the bill would have a negative impact on the KRGC's ability to combat illegal gambling in the state.

Written-only opponent testimony was provided by the Superintendent of the Kansas Highway Patrol (KHP) and representatives of the City of Overland Park and the City of Topeka.

No other testimony was provided.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, the KBI states the right to request a jury trial as well as prohibiting the request to have the federal government adopt state seizures could increase time spent on each case and increase expenditures to store seized

assets. Depending on the number and size of each forfeiture, the agency could need to lease storage space to keep personal property and potentially hire additional positions to manage and care for the property. However, the agency cannot estimate the fiscal effect enactment of the bill would have on agency expenditures.

The KHP states that prohibiting federal forfeiture would increase both staff time and resources to litigate at the state level. The Department of Justice (DOJ) currently carries the cost of administrative processing, storage, equitable sharing, and litigation. Because the bill would require forfeiture to be the state's responsibility, the KHP would have to hire outside litigators or hire additional in-house counsel. If the agency hired new attorney positions, it would cost \$126,190 for each position from agency fee funds. The agency cannot estimate the cost for storing seized assets. The KHP states the average expenditures from the forfeiture monies have been \$1.5 million over the last five years and are used to support the mission of the Special Operations Units. Since FY 2019, the agency has received \$6.0 million in revenues from state forfeiture and expended \$7.7 million. In addition, the agency receives \$100,000 to reimburse its Special Operations Units for overtime, fuel, training, and travel from the DOJ, which could also be lost. Absent the ability to use funding from seizures and the loss of reimbursement from the DOJ, the agency would be forced to look for other sources of funding to supplement the reduction in revenues to combat illegal activities.

According to the Office of Judicial Administration, the bill could require district court judges to address petitions received, conduct hearings, consider additional factors during hearings, and make findings. However, the agency cannot estimate the fiscal effect those activities would have on agency expenditures.

The Department of Wildlife and Parks states the bill would not have a fiscal effect upon its operating expenditures.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2025 Governor's Budget Report*.

The Kansas Association of Counties states the bill could have a fiscal effect on counties depending on the frequency with which asset forfeiture is used, but cannot estimate a precise fiscal effect. The League of Kansas Municipalities indicates the bill could increase expenditures if cities are required to assist with the implementation and enforcement of the bill, but is unable to estimate such increase.

Civil asset forfeiture; Kansas Standard Asset Seizure and Forfeiture Act