

BILL

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO FORFEITURE; REVISING PROCEDURES RELATED TO THE
RETURN OF SEIZED PROPERTY FOR DEFENDANTS' USE IN HIRING LEGAL
COUNSEL; REVISING CERTAIN DEADLINES IN FORFEITURE PROCEEDINGS;
LIMITING FACTORS CONSIDERED TO ESTABLISH THE VALUE OF FORFEITED
PROPERTY; REMOVING ABANDONED PROPERTY FROM PROCEDURES RELATED
TO FORFEITED PROPERTY; PROVIDING THAT INNOCENT OWNERS AND
SECURED PARTIES DO NOT NEED ACTUAL KNOWLEDGE OF THE CRIME
RELATED TO SEIZED PROPERTY; REVISING DISTRIBUTIONS OF PROCEEDS
FROM THE SALE OF FORFEITED PROPERTY AND FORFEITED CURRENCY;
MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 31-27-2 NMSA 1978 (being Laws 2002,
Chapter 4, Section 2, as amended) is amended to read:

"31-27-2. PURPOSE OF ACT--APPLICABILITY--NO ADDITIONAL
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1 REMEDIES.--

2 A. The purposes of the Forfeiture Act are to:

3 (1) make uniform the standards and procedures
4 for the seizure and forfeiture of property subject to
5 forfeiture;

6 (2) protect the constitutional rights of
7 persons whose property is subject to forfeiture and of innocent
8 owners holding interests in property subject to forfeiture;

9 (3) deter criminal activity by reducing its
10 economic incentives;

11 (4) increase the pecuniary loss from criminal
12 activity;

13 (5) protect against the wrongful forfeiture of
14 property; and

15 (6) ensure that only criminal forfeiture is
16 allowed in this state.

17 B. The Forfeiture Act:

18 (1) applies to all seizures, forfeitures and
19 dispositions of property subject to forfeiture [~~pursuant to~~
20 ~~laws that specifically apply the Forfeiture Act~~] in this state;
21 and

22 (2) does not apply to contraband, which is
23 subject to seizure pursuant to applicable state laws, but is
24 not subject to forfeiture pursuant to the Forfeiture Act."

25 SECTION 2. Section 31-27-3 NMSA 1978 (being Laws 2002,

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Chapter 4, Section 3, as amended) is amended to read:

"31-27-3. DEFINITIONS.--As used in the Forfeiture Act:

A. "abandoned property":

(1) means personal property the rights to which and the control of which an owner has intentionally relinquished and that is not otherwise subject to the Uniform Unclaimed Property Act; and

(2) does not mean real property;

~~[B. "actual knowledge" means a direct and clear awareness of information, a fact or a condition;~~

~~G.]~~ B. "contraband" means goods that may not be lawfully imported, exported or possessed, including drugs that are listed in Schedule I, II, III, IV or V of the Controlled Substances Act and that are possessed without a valid prescription;

~~[D.]~~ C. "conveyance" means a device used for transportation and:

(1) includes a motor vehicle, trailer, snowmobile, airplane, vessel and any equipment attached to the conveyance; but

(2) does not include property that is stolen or taken in violation of a law;

~~[E.]~~ D. "conviction" or "convicted" means that a person has been found guilty of a crime in a trial court whether by a plea of guilty or nolo contendere or otherwise and

.205027.2

whether the sentence is deferred or suspended;

~~[F.]~~ E. "crime" means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

~~[G.]~~ F. "instrumentality" means all property that is otherwise lawful to possess that is used in the furtherance or commission of an offense to which forfeiture applies and includes land, a building, a container, a conveyance, equipment, materials, a product, a computer, computer software, a telecommunications device, a firearm, ammunition, a tool, money, a security and a negotiable instrument and other devices used for exchange of property;

~~[H.]~~ G. "law enforcement agency" means the employer of a law enforcement officer ~~[that]~~ who is authorized to seize or has seized property pursuant to the Forfeiture Act;

~~[I.]~~ H. "law enforcement officer" ~~[means]~~:

(1) means a state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes; but

(2) does not mean a correctional officer;

~~[J.]~~ I. "owner" means a person who has a legal or equitable ownership interest in property;

~~[K.]~~ J. "property" means tangible or intangible personal property or real property;

1 [~~L.~~] K. "property subject to forfeiture" means
2 property or an instrumentality [~~described and~~] declared to be
3 subject to forfeiture [~~by the Forfeiture Act or a state law~~
4 ~~outside of the Forfeiture Act~~]; and

5 [~~M.~~] L. "secured party" means a person with a
6 security or other protected interest in property, whether the
7 interest arose by mortgage, security agreement, lien, lease or
8 otherwise; the purpose of which interest is to secure the
9 payment of a debt or protect a potential debt owed to the
10 secured party."

11 SECTION 3. Section 31-27-4.1 NMSA 1978 (being Laws 2015,
12 Chapter 152, Section 5) is amended to read:

13 "31-27-4.1. RECEIPT FOR SEIZED PROPERTY--REPLEVIN
14 HEARING.--

15 A. When a law enforcement officer seizes property
16 that is subject to forfeiture, the officer shall provide an
17 itemized receipt to the person possessing the property or, in
18 the absence of a person to whom the receipt could be given,
19 shall leave the receipt in the place where the property was
20 found, if possible.

21 B. Following the seizure of property, the defendant
22 in the related criminal matter or another person who claims an
23 interest in the seized property may, at any time before [~~sixty~~
24 ~~days prior to a related criminal trial~~] the one-hundred-
25 twentieth day following the seizure of the property, claim an

1 interest in the seized property by a motion [~~to~~] requesting the
2 court to issue a writ of replevin. A motion filed pursuant to
3 this section shall include facts to support the person's
4 alleged interest in the seized property.

5 C. A person who makes a timely motion pursuant to
6 this section shall have a right to a hearing on the motion
7 before the resolution of any related criminal matter or
8 forfeiture proceeding and within thirty days of the date on
9 which the motion is filed.

10 D. At least ten days before a hearing on a motion
11 filed pursuant to this section, the state shall file an answer
12 or responsive motion that shows probable cause for the seizure.

13 E. A court shall grant a claimant's motion if the
14 court finds that:

15 (1) it is likely that the final judgment will
16 require the state to return the property that was seized
17 without a court order to the claimant;

18 (2) the property is not reasonably required to
19 be held for investigatory reasons; or

20 (3) the property is the only reasonable means
21 for a defendant to pay for legal representation in a related
22 criminal or forfeiture proceeding and the defendant made a
23 prima facie showing that the property was not stolen.

24 F. In its discretion, the court may order the
25 return of funds or property sufficient for a defendant to

1 obtain legal counsel but less than the total amount seized [~~and~~
2 ~~it may~~]. If the court makes such an order, it shall require an
3 accounting. An accounting report held before the resolution of
4 the relevant criminal and forfeiture proceedings shall be held
5 in camera. If the court finds in the state's favor in both the
6 criminal and forfeiture proceedings, the court shall:

7 (1) hear arguments by the parties as to what
8 portion of the funds or property should be paid to the
9 defendant's counsel and what portion should be forfeited; and

10 (2) issue an order on how the funds or
11 property shall be distributed.

12 G. In lieu of ordering the issuance of [~~the~~] a writ
13 of replevin, a court may order:

14 (1) the state to give security or written
15 assurance for satisfaction of any judgment, including damages,
16 that may be rendered in a related forfeiture action; or

17 (2) any other relief the court deems to be
18 just."

19 SECTION 4. Section 31-27-6 NMSA 1978 (being Laws 2002,
20 Chapter 4, Section 6, as amended) is amended to read:

21 "31-27-6. FORFEITURE PROCEEDINGS--DETERMINATION--
22 SUBSTITUTION OF PROPERTY--CONSTITUTIONALITY--APPEAL.--

23 A. A person who claims an interest in seized
24 property shall file an answer to the complaint of forfeiture
25 within thirty days of the date of service of the complaint.

1 The answer shall include facts to support the claimant's
2 alleged interest in the property.

3 B. The district courts have jurisdiction over
4 forfeiture proceedings, and venue for a forfeiture proceeding
5 is in the same court in which venue lies for the criminal
6 matter related to the seized property.

7 C. The forfeiture proceeding shall begin after the
8 conclusion of the trial for the related criminal matter in an
9 ancillary proceeding that relates to a defendant's property
10 before the same judge and jury, if applicable, and the court,
11 and the jury, if applicable, may consider the forfeiture of
12 property seized from other persons at the same time or in a
13 later proceeding. If the criminal defendant in the related
14 criminal matter is represented by the public defender
15 department, the chief public defender or the district public
16 defender may authorize department representation of the
17 defendant in the forfeiture proceeding.

18 D. Discovery conducted in an ancillary forfeiture
19 proceeding is subject to the rules of criminal procedure.

20 E. An ancillary forfeiture proceeding that relates
21 to the forfeiture of property valued at less than twenty
22 thousand dollars (\$20,000) shall be held before a judge only.

23 F. If the state fails to prove, by clear and
24 convincing evidence, that a person whose property is alleged to
25 be subject to forfeiture is an owner of the property:

1 (1) the forfeiture proceeding shall be
2 dismissed and the property shall be delivered to the owner,
3 unless the owner's possession of the property is illegal; and

4 (2) the owner shall not be subject to any
5 charges by the state for storage of the property or expenses
6 incurred in the preservation of the property.

7 G. The court shall enter a judgment of forfeiture
8 and the seized property shall be forfeited to the state if the
9 state proves by clear and convincing evidence that:

10 (1) the seized property is subject to
11 forfeiture;

12 (2) the criminal prosecution of the owner of
13 the seized property resulted in a conviction; and

14 (3) the value of the property to be forfeited
15 does not unreasonably exceed:

16 (a) the pecuniary gain derived or sought
17 to be derived by the crime;

18 (b) the pecuniary loss caused or sought
19 to be caused by the crime; or

20 (c) the value of the convicted owner's
21 interest in the property.

22 H. A court shall not accept a plea agreement or
23 other arrangement by which a defendant contributes or donates
24 property to a person, charity or other organization in full or
25 partial fulfillment of responsibility established in the

1 court's proceeding.

2 I. Following a person's conviction, the state may
3 make a motion for forfeiture of substitute property owned by
4 the person that is equal to but does not exceed the value of
5 the property that is subject to forfeiture but that the state
6 is unable to seize. The court shall order the forfeiture of
7 substitute property only if the state proves by a preponderance
8 of the evidence that the person intentionally transferred, sold
9 or deposited property with a third party to avoid the court's
10 jurisdiction and the forfeiture of the property.

11 J. A person is not jointly and severally liable for
12 orders for forfeiture of another person's property. When
13 ownership of property is unclear, a court may order each person
14 to forfeit the person's property on a pro rata basis or by
15 another means the court deems equitable.

16 K. ~~[At any time]~~ Within thirty days following the
17 conclusion of a forfeiture proceeding, the person whose
18 property was forfeited may petition the court to determine
19 whether the forfeiture was unconstitutionally excessive
20 pursuant to the state or federal constitution.

21 L. At a non-jury hearing on the petition, the
22 petitioner has the burden of establishing by a preponderance of
23 the evidence that the forfeiture was grossly disproportional to
24 the seriousness of the criminal offense for which the person
25 was convicted.

1 M. In determining whether the forfeiture is
2 unconstitutionally excessive, the court may consider all
3 relevant factors, including:

4 (1) the seriousness of the criminal offense
5 and its impact on the community, the duration of the criminal
6 activity and the harm caused by the defendant;

7 (2) the extent to which the defendant
8 participated in the offense;

9 (3) the extent to which the property was used
10 in committing the offense;

11 (4) the sentence imposed for the commission of
12 the crime that relates to the property that is subject to
13 forfeiture; and

14 (5) whether the criminal offense was completed
15 or attempted.

16 N. In determining the value of the property subject
17 to forfeiture, the court may consider relevant factors,
18 including the ~~[(1)]~~ fair market value of the property

19 ~~[(2)] value of the property to the defendant,~~
20 ~~including hardship that the defendant will suffer if the~~
21 ~~forfeiture is realized; and~~

22 ~~(3)]~~ and the hardship from the loss of a
23 primary residence, motor vehicle or other property to the
24 defendant's family members or others if the property is
25 forfeited.

1 O. The court shall not consider the value of the
2 property to the state when it determines whether the forfeiture
3 of the property is constitutionally excessive.

4 P. A party to a forfeiture proceeding may appeal a
5 district court's decision regarding the seizure, forfeiture and
6 distribution of property pursuant to the Forfeiture Act."

7 **SECTION 5.** Section 31-27-7 NMSA 1978 (being Laws 2002,
8 Chapter 4, Section 7, as amended) is amended to read:

9 "31-27-7. TITLE TO SEIZED PROPERTY--DISPOSITION OF
10 FORFEITED PROPERTY AND PROCEEDS.--

11 A. The state acquires provisional title to seized
12 property at the time the property was used or acquired in
13 connection with an offense that subjects the property to
14 forfeiture. Provisional title authorizes the state to hold and
15 protect the property. Title to the property shall vest with
16 the state when a trier of fact renders a final forfeiture
17 verdict and the title relates back to the time when the state
18 acquired provisional title; provided that the title is subject
19 to claims by third parties that are adjudicated pursuant to the
20 Forfeiture Act.

21 B. Unless possession of the property is illegal or
22 a different disposition is specifically provided for by law and
23 except as provided in this section, forfeited property that is
24 not currency shall be delivered [~~along with any abandoned~~
25 ~~property~~] to the state treasurer for disposition at a public

1 auction. Forfeited currency and all ~~[sale]~~ proceeds of the
2 sale of forfeited ~~[or abandoned]~~ property shall be distributed
3 by the state treasurer as follows:

4 (1) first, to reimburse the reasonable
5 expenses related to the storage, protection and transfer of the
6 property;

7 (2) second, to pay any reasonable expenses
8 incurred by the state treasurer's office to dispose of the
9 property;

10 (3) third, to reimburse law enforcement
11 agencies for reasonable costs incurred to prepare reports
12 required by the provisions of Subsection A of Section 31-27-9
13 NMSA 1978; and

14 (4) finally, any remaining balance shall be
15 deposited in the general fund.

16 ~~[G. Proceeds from the sale of forfeited property~~
17 ~~received by the state from another jurisdiction shall be~~
18 ~~deposited in the general fund.~~

19 ~~D.]~~ C. A property interest forfeited to the state
20 pursuant to the Forfeiture Act is subject to the interest of a
21 secured party unless, in the forfeiture proceeding, the state
22 proves by clear and convincing evidence that the secured party
23 ~~[had actual knowledge]~~ knew or should have known of the crime
24 that relates to the seizure of the property."

25 **SECTION 6.** Section 31-27-7.1 NMSA 1978 (being Laws 2015,
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Chapter 152, Section 9) is amended to read:

"31-27-7.1. INNOCENT OWNERS.--

A. The property of an innocent owner, as provided in this section, shall not be forfeited.

B. A person who claims to be an innocent owner has the burden of production to show that the person:

(1) holds a legal right, title or interest in the property seized; and

(2) held an ownership interest in the seized property at the time the illegal conduct that gave rise to the seizure of the property occurred or was a bona fide purchaser for fair value.

C. The state shall immediately return property to an established innocent owner who has an interest in homesteaded property, a motor vehicle valued at less than ten thousand dollars (\$10,000) or a conveyance that is encumbered by a security interest that was perfected pursuant to state law or that is subject to a lease or rental agreement, unless the secured party or lessor ~~[had actual knowledge]~~ knew or should have known of the criminal act upon which the forfeiture was based.

D. If a person establishes that the person is an innocent owner pursuant to Subsection B of this section ~~[31-27-7.1 MSA 1978]~~ and the state pursues a forfeiture proceeding with respect to that person's property, other than

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1 property described in Subsection D of Section 31-27-7 NMSA
2 1978, to successfully forfeit the property, the state shall
3 prove by clear and convincing evidence that the innocent owner
4 ~~[had actual knowledge]~~ knew or should have known of the
5 underlying crime giving rise to the forfeiture.

6 E. A person who acquired an ownership interest in
7 property subject to forfeiture after the commission of a crime
8 that gave rise to the forfeiture and who claims to be an
9 innocent owner has the burden of production to show that the
10 person has legal right, title or interest in the property
11 seized under this section.

12 F. If a person establishes that the person is an
13 innocent owner as provided in Subsection B of this section and
14 the state pursues a forfeiture proceeding against the person's
15 property, to successfully forfeit the property, the state shall
16 prove by clear and convincing evidence that at the time the
17 person acquired the property, the person:

18 (1) ~~[had actual knowledge]~~ knew or should have
19 known that the property was subject to forfeiture; or

20 (2) was not a bona fide purchaser who was
21 without notice of any defect in title and who gave valuable
22 consideration.

23 G. If the state fails to meet its burdens as
24 provided in Subsections C and D of this section, the court
25 shall find that the person is an innocent owner and shall order

1 the state to relinquish all claims of title to the innocent
2 owner's property."

3 SECTION 7. Section 31-27-8 NMSA 1978 (being Laws 2002,
4 Chapter 4, Section 8, as amended) is amended to read:

5 "31-27-8. SAFEKEEPING OF SEIZED PROPERTY PENDING
6 DISPOSITION [~~SELLING OR RETAINING SEIZED PROPERTY~~
7 ~~PROHIBITED~~].--

8 A. Seized currency alleged to be subject to
9 forfeiture shall be deposited with the clerk of the district
10 court in an interest-bearing account.

11 B. Seized property other than currency or real
12 property, not required by federal or state law to be destroyed,
13 shall be:

- 14 (1) placed under seal; and
15 (2) removed to a place designated by the
16 district court; or
17 (3) held in the custody of a law enforcement
18 agency.

19 C. Seized property shall be kept by the custodian
20 in a manner to protect it from theft or damage and, if ordered
21 by the district court, insured against those risks.

22 [~~D. A law enforcement agency shall not retain~~
23 ~~forfeited or abandoned property.~~]"

24 SECTION 8. Section 31-27-9 NMSA 1978 (being Laws 2015,
25 Chapter 152, Section 11) is amended to read:

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1 "31-27-9. REPORTING.--

2 A. Every law enforcement agency shall prepare an
3 annual report of the agency's seizures and forfeitures
4 conducted pursuant to the Forfeiture Act, and seizures and
5 forfeitures conducted pursuant to federal forfeiture law, and
6 the report shall include:

7 (1) the total number of seizures of currency
8 and the total amount of currency seized in each seizure;

9 (2) the total number of seizures of property
10 and the number and types of items seized in each seizure;

11 (3) the market value of each item of property
12 seized; ~~and~~

13 (4) the total number of occurrences of each
14 class of crime that resulted in the agency's seizure of
15 property;

16 (5) the costs incurred by the agency for
17 storage, maintenance and transportation of seized property; and

18 (6) any costs incurred by the agency to
19 prepare its report in accordance with this subsection.

20 B. A law enforcement agency shall submit its annual
21 reports to the department of public safety and to the district
22 attorney's office in the agency's district. An agency that did
23 not engage in seizure or forfeiture pursuant to the Forfeiture
24 Act or federal forfeiture law, or both, shall report that fact
25 in its annual report.

.205027.2

1 C. The department of public safety shall compile
2 the reports submitted by each law enforcement agency and issue
3 an aggregate report of all forfeitures in the state.

4 D. By April 1 of each year, the department of
5 public safety shall publish on its [~~web site~~] website the
6 department's aggregate report and individual law enforcement
7 agency reports submitted for the previous year."

8 SECTION 9. Section 31-27-11 NMSA 1978 (being Laws 2015,
9 Chapter 152, Section 13) is amended to read:

10 "31-27-11. TRANSFER OF FORFEITABLE PROPERTY TO THE
11 FEDERAL GOVERNMENT.--

12 A. A law enforcement agency shall not directly or
13 indirectly transfer seized property to a federal law
14 enforcement authority or other federal agency unless:

15 (1) the value of the seized property exceeds
16 [~~fifty thousand dollars (\$50,000)~~] twenty-five thousand dollars
17 (\$25,000), excluding the potential value of the sale of
18 contraband; [~~and~~]

19 (2) the law enforcement agency determines that
20 the criminal conduct that gave rise to the seizure is
21 interstate in nature and sufficiently complex to justify the
22 transfer of the property; [~~or~~]

23 (3) the seized property may only be forfeited
24 under federal law; or

25 (4) the seized property is firearms,

1 ammunition or explosives.

2 B. The law enforcement agency shall not transfer
3 property to the federal government if the transfer would
4 circumvent the protections of the Forfeiture Act that would
5 otherwise be available to a putative interest holder in the
6 property."

7 **SECTION 10. EFFECTIVE DATE.**--The effective date of the
8 provisions of this act is July 1, 2017.

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