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FISCAL IMPACT REPORT

ORIGINAL DATE 02/13/11

SPONSOR Cravens LAST UPDATED _____ HB _____

SHORT TITLE Seizure of Vehicle for Certain DWI Offenders SB 307

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
TRD		\$17.5 to \$39.5		\$17.5 to \$39.5	Nonrecurring	General Fund
DPS		\$770.0	\$770.0	\$154.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 3, SB 127, SB 306, SB 308 SB 197 & HB 49

Conflicts with HB 263, SB 216, and SB 195

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General's Office (AGO)
 Department of Public Safety (DPS)
 Department of Transportation (DOT)
 Public Defender Department (PDD)
 Taxation & Revenue Department (TRD)

SUMMARY

Synopsis of Bill

Senate Bill 307 requires that a person who is arrested for driving while their driver's license is revoked based on a DWI or a violation of the Implied Consent Act, will have the vehicle that person is driving be seized upon arrest. If the person arrested is the owner, the vehicle would be subject to Forfeiture pursuant to the Forfeiture Act.

If the person arrested is not the owner, the owner may obtain the vehicle upon submission of an affidavit affirming that the owner will not allow a person without a valid driver's license to operate that vehicle. If that affidavit is violated, the vehicle shall be subject to forfeiture.

The bill also limits the mandatory immobilization of a vehicle to convictions for driving on suspended license or on a revoked license for other reasons than DWI or implied consent violation.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. As discussed below, the number of cases could be large and would require possibly more employees as well as other resources to process the increase in criminal and civil cases. The costs at this time are unknown.

The Motor Vehicle Division (MVD) will need to develop an affidavit the owner will fill out and it will also need to develop a form the owner can provide that will allow the vehicle to be released. Implementation of the requirement that MVD keep the affidavit with the vehicle's registration records, and make that information readily available to law enforcement, will require modification of MVD's records systems. Implementation of this bill will have a medium to high impact for TRD including modifying:

- existing mainframe (30 hrs);
- CICS application to allow adding affidavit to record (160 hrs); and
- CICS application to display the affidavit status (160 hours).

Other tasks that might be required include modifying:

- MVD Mainframe Batch to accept the record (320 hrs);
- MVD 2.0 Modify SQL server tables for affidavit record display (40 hrs);
and
- MVD 2.0 to display affidavit record (80 hrs).

The total number of hours is 350 to 790 hours. At \$50/hour the cost will be \$17,500 to \$39,500.

DPS has personnel executing numerous arrests under 66-5-39/66-8-122G annually; this bill poses a significant impact on DPS's ability to facilitate the forfeiture process. It is estimated DPS Legal Division states they will need three additional FTE's to facilitate the finalization of the forfeiture process at the headquarters level and at least one FTE per each of the 12 districts in order to manage the tracking and document distribution that would be required in order to follow this bill's requirements.

SIGNIFICANT ISSUES

The Forfeiture Act has many statutory requirements which will be, if many cases are filed, a large burden on the courts. First, the Act requires that a civil forfeiture complaint be filed. Second, it says that the district courts have jurisdiction over forfeiture and that the case must be brought in the same proceeding as the criminal matter and to the same trier of fact. The problem here is that a driving on a revoked license case is normally charged in magistrate court and is

often prosecuted by a law enforcement officer. Since that forfeiture must be filed in district court, every driving on revoked license case in which law enforcement wants vehicle forfeiture, must be charged in district court as well and the district attorney's office must enter as the prosecutor since law enforcement officers cannot prosecute cases in district court. There could be a very large number of cases filed in the district courts which would have dual tracks: one of criminal for the charge itself, and the other civil for the forfeiture. The issues must be bifurcated so there would be twice the number of hearings. Though the number of criminal cases in magistrate courts would decrease in the same number as filed in district courts, the number doubles with the forfeiture filing. This is a cumbersome and time consuming process for the courts.

DPS provided the following:

This bill has the potential to significantly increase the obligated time an officer spends associated with the arrest of an individual for a revoked driver's license; inevitably increasing monetary compensation for the officers involved. As 66-5-39 is currently acted upon, those individuals who are arrested for this violation merely have their vehicle towed and/or allow the vehicle to be driven by another licensed driver. There is limited obligated time involved with this process. However, if enacted this bill would require the vehicle to be towed to a secured storage facility under the direct operation of the law enforcement agency so as to avoid incurring significant storage fees while the case is adjudicated. This requires the officer to remain at the scene until the towing company arrives and follow the vehicle to the agencies designated storage area. Additionally, all tow bills of this nature feasibly fall within the responsibility of the law enforcement agency as the vehicle would be subject to forfeiture; increasing operational costs to each agency respectively. This too will be exacerbated by New Mexico's rural areas and communities where great distances are associated with towing companies charged with services of this nature.

Furthermore; for those scenarios where potential forfeiture comes into play, vehicles seized pending this process would have to be stored at secured locations. This would be difficult at best for most DPS facilities throughout the state as many facilities do not maintain 24 hour manned offices. Additionally, no facility other than the Santa Fe Headquarters facility has storage areas capable of securing more than a few vehicles at any one time. As such, to properly facilitate the forfeiture process, all vehicles seized under this statute would have to be transferred to the headquarters facility in Santa Fe. This too would encumber significant obligated man hours as well as fuel associated with the transportation of the vehicles.

As it currently stands, law enforcement agencies throughout the state are having an extremely difficult time prosecuting offenders relating to 66-5-39/66-8-122G. The primary reasons for these issues are with our inability to obtain "certified" MVD Records pertaining to revoked or suspended licenses in a timely fashion as well as the burden of proving in court that the offender was either served with documentation pertaining to his/her driver's status and/or that the offender was "fully aware" of his/her driver's status. As such, the process of seizing, storing or transporting vehicles for long term storage may prove to be damaging financially over the long term in comparison to what funding is received by the state under forfeiture proceeds.

The means to accomplish these forfeitures, the Forfeiture Act, is a cumbersome and potentially unworkable process with which to deal with these cases. The Forfeiture Act was passed in the wake of the New Mexico Supreme Court Case, *State v. Nunez*. Nunez found that forfeitures under the Controlled Substances Act were punitive, rather than remedial in nature and required that the forfeiture action be carried out in the context of the criminal case in a bifurcated trial. These requirements are reflected in the Forfeiture Act.

In addition, the Forfeiture Act requires that "within thirty days of making seizure, the state shall file a complaint for forfeiture or return the property to the person from whom it was seized." The Act provides that state district courts have jurisdiction over forfeiture proceedings. Since the underlying offense is a misdemeanor and the Forfeiture Act contemplates that the underlying offense be a felony, it is unclear where the complaint should be should be filed or even if it can be filed in the district court.

If the state fails to prove, by clear and convincing evidence that the person charged with the crime for which the property is alleged to be property subject to forfeiture is the owner of the property: the forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless possession of the property is illegal and the owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

Clearly, the Forfeiture Act was enacted with the "punitive" nature of forfeitures in mind. However, the New Mexico courts have found forfeitures of vehicles in the DWI context to the "remedial" rather than punitive and have upheld municipal ordinances dealing with these vehicles. When compared to the municipal ordinances of Albuquerque and Santa Fe, whose provisions for forfeiture are more streamlined as well as being constitutionally sound, the use of the Forfeiture Act is problematic.

ADMINISTRATIVE IMPLICATIONS

MVD will need to track the affidavit submitted by the owner attesting that the person will not let any person drive the vehicle without a valid license. This information would need to be displayed on the vehicle records accessed by law enforcement, as it is the only way a law enforcement officer would know that the vehicle is subject to forfeiture.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill conflicts with HB 263, SB 216, and SB 195 as all four bills amend § 66-5-39. This bill's forfeiture provisions are different than those provided for in HB 263 and SB 308.

This bill also relates to the following:

- SB 3, Blood Tests for Intoxication and Drugs
- SB 127, Prohibit Certain DWI Plea Agreements
- SB 197, Use of Electronic Sobriety Monitoring Devices
- SB 306, Home Breathalyzer for Certain DWI Offenders
- HB 49, DWI as Drugs in Blood & Interlock for Alcohol

TECHNICAL ISSUES

TRD provided the following:

- Section 66-5-39 (Section 1 of the bill) has always contained conflicting language. The statute refers to a person's "driving privilege" being suspended or revoked and that the person knows the driver's "license" was suspended or revoked. On page 1, line 24, strike the word "license" and replace it with "driving privilege." The same change should be made on page 4, line 11. There have been magistrate and municipal courts that use the conflicting language to dismiss tickets because the person's license was already suspended or revoked.
- The existing language in Section 1 of the bill, Subsection D (page 4, lines 12 and 13) specifying that MVD "shall extend the period of suspension for an additional like period" is confusing and difficult to administer. Some suspensions are for indefinite time periods. For example, when a person does not pay a ticket, their driving privileges are suspended until the ticket is paid, perhaps three years later. The law would be clearer if it simply stated the specific length of the suspension period; a one year period would be consistent with Section 66-5-32.

OTHER SUBSTANTIVE ISSUES

Data provided by MVD indicates there were approximately 20,000 arrests in 2009. Of those 20,000, 18,300 were revoked administratively by MVD. There were 9,524 ignition interlock licenses issued in 2009. Therefore, 8,776 DWI offenders neither have an interlock license nor have an interlock installed in the vehicle they drive after license revocation.

Seizure, and possible forfeiture, of a vehicle driven by a convicted DWI offender serves as an additional DWI deterrent. There are currently only three local ordinances that provide for seizure and forfeiture vehicles of certain DWI offenders.

The National Highway Traffic Safety Administration (NHTSA) sponsored an evaluation of the New Mexico ignition interlock program. The report was released in 2010. According to the report, the statewide installation rate for interlocks was at 49%, which leaves over 50% of convicted offenders without an interlock. One portion of the study evaluated a strong mandate in Santa Fe County during a 2-year period where an alternative sanction to interlock was required for offenders who did not want an interlock or claimed no plan to drive. Santa Fe county courts received a 71% installation rate during a 2-year period by offering an alternative to the installation of an interlock for those who claimed "no vehicle" or "not driving".

The NHTSA report states that applying pressure on offenders to install interlocks by threatening a less desirable sanction might result in interlock installation by offenders who would be less likely to install them.

ALTERNATIVES

The AGO suggests the bill could include language to clarify and specifically state the purpose and intent of the legislature in regards to the civil forfeiture provisions.

DW/mew