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Summary: Asset Forfeiture and Private Property Protection Act

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

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**VERSIONS OF THIS BILL**

[3/7/2017](file:///p:\pprever\2017-18\3918_20170307.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 32 TO TITLE 17 SO AS TO ENACT THE “ASSET FORFEITURE AND PRIVATE PROPERTY PROTECTION ACT”, TO DEFINE NECESSARY TERMS, TO ESTABLISH THAT CERTAIN PROPERTY IS SUBJECT TO FORFEITURE AFTER CRIMINAL CONVICTION, TO ALLOW THE STATE TO PETITION FOR SUBSTITUTE PROPERTY IN CERTAIN CIRCUMSTANCES, TO ESTABLISH WHEN A STATE ENTITY MAY TRANSFER A CRIMINAL INVESTIGATION TO THE FEDERAL GOVERNMENT, TO REQUIRE PROPERTY SUBJECT TO FORFEITURE TO BE IDENTIFIED IN AN INDICTMENT OR BY INFORMATION IN THE COURT AMONG OTHER THINGS, TO ESTABLISH WHEN PROPERTY MAY BE SEIZED OTHER THAN THROUGH A FORFEITURE ORDER, TO REQUIRE THE LAW ENFORCEMENT OFFICER WHO SEIZES PROPERTY TO GIVE AN ITEMIZED RECEIPT OF THE PROPERTY SEIZED, TO GRANT PROVISIONAL TITLE TO THE STATE AT THE TIME OF SEIZURE AND TO DEFINE WHAT RECORDS MUST BE KEPT, TO ALLOW FOR THE OWNER OF SEIZED PROPERTY TO POST BOND OR GIVE SUBSTITUTE PROPERTY IN CERTAIN CIRCUMSTANCES, TO PROVIDE THAT A PERSON WITH AN INTEREST IN SEIZED PROPERTY MAY PETITION THE ATTORNEY GENERAL TO REMIT OR MITIGATE PROPERTY IN CERTAIN CIRCUMSTANCES, TO PROVIDE THAT A DEFENDANT MAY MOVE TO SEPARATE THE TRIAL OF THE ALLEGED CRIME AND FORFEITURE AND DESIGNATE CERTAIN PROCEDURES AND RULES FOR THE TRIALS, TO ALLOW A PROPERTY OWNER TO APPEAL A FORFEITURE ON THE GROUNDS THAT IT IS UNCONSTITUTIONALLY EXCESSIVE, TO ESTABLISH THAT A BONA FIDE SECURITY INTEREST IS NOT SUBJECT TO FORFEITURE EXCEPT IN CERTAIN CIRCUMSTANCES, TO REQUIRE THE STATE TO MAKE REASONABLE EFFORTS TO NOTIFY INNOCENT THIRD PARTIES WHO MAY HAVE AN INTEREST IN FORFEITED PROPERTY AMONG OTHER THINGS, TO PROHIBIT THE FORFEITURE OF PROPERTY OF AN INNOCENT PARTIAL OR JOINT OWNER AND TO ESTABLISH STANDARDS THAT THE STATE MUST OVERCOME TO ALLOW THE PROPERTY TO BE FORFEITED, TO REQUIRE THE STATE TO RETURN SEIZED PROPERTY TO THE OWNER WITHIN THREE BUSINESS DAYS UNDER CERTAIN CIRCUMSTANCES, TO ESTABLISH HOW FORFEITED PROPERTY IS TO BE DISBURSED, AND TO REQUIRE ALL STATE LAW ENFORCEMENT AGENCIES TO SUBMIT ANNUAL SEIZURE AND FORFEITURE REPORTS TO THE OFFICE OF THE ATTORNEY GENERAL AND TO INSTRUCT THE DEPARTMENT TO DEVELOP FORMS AND PROCESSES FOR THE LAW ENFORCEMENT AGENCIES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 17 of the 1976 Code is amended by adding:

“CHAPTER 32

Asset Forfeiture and Private Property Protection

Section 17‑32‑10. This chapter may be cited as the ‘Asset Forfeiture and Private Property Protection Act’.

Section 17‑32‑20. As used in this chapter, the term:

(1) ‘Contraband’ means goods that are unlawful to import, export, or possess.

(2) ‘Conveyance’ means a device used for transportation, including a motor vehicle, trailer, snowmobile, airplane, vessel, and any equipment attached to it. This term does not include property that is stolen or taken in violation of the law.

(3) ‘Instrumentality’ means property otherwise lawful to possess that is used in a criminal offense, including a tool, firearm, conveyance, computer, computer software, telecommunications device, money, and other means of exchange.

(4) ‘Law enforcement agency’ has the same meaning as in Section 17-28-20(8).

(5) ‘Law subject to forfeiture’ means a state criminal law that is a felony and explicitly includes forfeiture as punishment or sanction for the offense.

Section 17‑32‑30. (A) Property used in or derived from the violation of a law is subject to forfeiture only if the violation is:

(1) of a law subject to forfeiture; and

(2) established by proof of a criminal conviction.

(B) The State shall establish that seized property is forfeitable pursuant to the provisions of Section 17‑32‑40(A).

(C) There is no civil asset forfeiture.

Section 17‑32‑40. (A) If a person is convicted of violating a law subject to forfeiture, the court shall order the person to forfeit:

(1) proceeds and property derived directly from the commission of the crime;

(2) proceeds and property directly traceable to proceeds and property derived directly from the commission of the crime; and

(3) instrumentalities used in the commission of the crime.

(B) The only property subject to forfeiture is:

(1) land, buildings, containers, conveyances, equipment, materials, products, money, securities, and negotiable instruments; and

(2) ammunition, firearms, and ammunition‑and‑firearm accessories used in the furtherance of, or in the commission of, or obtained from the proceeds of a violation of a law subject to forfeiture.

(C) The State may petition the court to order the defendant to submit substitute property owned fully by the defendant up to the value of unreachable property if the State proves, by a preponderance of the evidence, that the defendant intentionally transferred, sold, or deposited property with a third party to avoid the court’s jurisdiction. The State may not seek additional remedies including, but not limited to, a personal money judgment.

(D) A defendant is not jointly and severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court may order each defendant to forfeit property on a pro rata basis proportional to the proceeds that each defendant personally received.

Section 17‑32‑50. (A) A law enforcement agency may not transfer a criminal investigation or proceeding to the federal government with the sole intention to circumvent state forfeiture law.

(B) For a law enforcement agency to transfer a criminal investigation or proceeding that includes forfeiture to the federal government, a state court shall affirmatively find that the:

(1) suspected criminal activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer; or

(2) seized property is forfeitable only as a violation of federal law.

(C) The law enforcement agency shall report all transfers to the federal government of an investigation or criminal proceeding that involves forfeiture per the reporting requirements in Sections 17‑32‑80 and 17‑32‑200.

Section 17‑32‑60. (A)(1) Property subject to forfeiture must be identified by the State in an indictment issued by a grand jury or by information in the court in a related criminal proceeding in which a person with an interest in the property has been simultaneously charged with a violation of a law subject to forfeiture.

(2) The indictment or information must:

(a) specify the time and place of the violation;

(b) identify the property; and

(c) describe its use in the commission of the crime or derivation from the commission of the crime.

(3) The State, with the consent of the court and a defendant with an interest in the property, may file an ancillary charge alleging that property is subject to forfeiture at any time prior to trial.

Section 17‑32‑70. (A) The State may petition the court to issue an ex parte preliminary order to seize or secure property for which forfeiture is sought and to provide for its custody.

(B) Property subject to forfeiture may be seized without a court order if the:

(1) seizure is incident to a lawful arrest or a lawful search;

(2) property subject to seizure is the subject of a prior judgment in favor of the State; or

(3) State has probable cause to believe that delay occasioned by the necessity to obtain process would result in the removal or destruction of property and the property is forfeitable pursuant to Section 17‑32‑40.

(C) When property is seized, the law enforcement officer who seizes the property shall give an itemized receipt to the person in possession of the property. If the property is not with a person or the person is absent from the premises, the law enforcement officer may leave a receipt in the place where the property was found.

Section 17‑32‑80. (A) The State acquires provisional title at the time of seizure, which authorizes the State to hold and protect the property. Title to the property vests with the State when a final forfeiture verdict is returned in favor of the State and relates the verdict back to the time when the State acquired provisional title. This title is still subject to third party claims pursuant to the provisions of this chapter.

(B) The State shall use reasonable diligence to secure seized property and prevent waste.

(C) The State entity in custody of seized property that is subject to forfeiture shall maintain a record of:

(1) the exact kind, quantity, and form of the property;

(2) the date and from whom it received the property;

(3) the violation of law that subjected the property to seizure;

(4) the liens against the seized property;

(5) the make, model, and serial number of each seized firearm;

(6) to whom and when the notice of forfeiture was given;

(7) to whom the property was delivered; and

(8) the date and manner of destruction or disposition of the property.

The records required pursuant to this subsection are subject to the provisions of Chapter 4, Title 30, the Freedom of Information Act.

Section 17‑32‑90. (A) If the owner of the seized property seeks its possession before trial, the owner may post bond or give substitute property in an amount equal to the fair market value of the seized property at the time bond is determined. This does not apply to property reasonably held for investigatory purposes.

(B) After the owner has posted bond or given substitute property, the State shall return the seized property within three business days. The forfeiture action may proceed against the bond or substitute property as if it were the seized property.

Section 17‑32‑100. A person who has an interest in seized property may file a petition for remission or mitigation for the forfeiture action with the Attorney General of South Carolina before the entry of a court order disposing of the forfeiture action. The Attorney General shall remit or mitigate the forfeiture on terms and conditions the Attorney General deems reasonable if he finds that:

(1) the petitioner did not intend to violate the law; or

(2) extenuating circumstances justify the remission or mitigation of the forfeiture.

Section 17‑32‑110. (A) Following the seizure of property pursuant to the provisions of this chapter, a defendant or third party has the right to a pretrial hearing to determine the validity of the seizure.

(B) The claimant, at any time prior to sixty days before trial of the related criminal violation, may claim the right to possession of property by motion to the court to issue a write of replevin.

(C) The claimant shall file a motion establishing the validity of the alleged right, title, or interest in the property. The court shall hear the motion no more than thirty days after the motion is filed. The State shall file an answer showing probable cause for the seizure or cross‑motions at least ten days before the hearing.

(D) The court shall grant the motion if it finds that:

(1) it is likely the final judgment will be that the State must return the property to the claimant; or

(2) the property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding.

(E) The court may order the State to give security for satisfaction of any judgment, including damages, that may be rendered in the action or order other relief as may be just in lieu of ordering the issuance of the writ.

Section 17‑32‑120. (A) The trial of the alleged crime and the trial related to the forfeiture of property must be held in a single proceeding unless the defendant moves to separate the trial.

(B) The defendant may waive the right to a trial by jury related to the forfeiture of property while preserving the right to trial by jury of the alleged crime. If the jury finds a defendant guilty of the related criminal offense and the defendant did not waive the right to trial by jury related to the forfeiture, the court shall instruct and submit the issue of forfeiture to the jury. The court may use interrogatories to address the forfeiture issue.

(C) If the court separates the jury trial:

(1) the court shall first instruct and submit to the jury the issue of guilt or innocence and shall restrict arguments to that issue; and

(2) each party may introduce evidence in the forfeiture phase that was not introduced in the criminal phase.

Section 17‑32‑130. (A) Following a finding of fact against him, the owner of the property may petition the court to determine whether the forfeiture is unconstitutionally excessive under the South Carolina or United States Constitution. The owner of the property has the burden of establishing that the forfeiture is grossly disproportional to the seriousness of the offense by a preponderance of the evidence at a hearing conducted by the court without a jury.

(B) The court shall consider all relevant factors when determining the constitutionality of a forfeiture including, but not limited to:

(1) the seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused by the person whose property is subject to forfeiture;

(2) the extent to which the person whose property is subject to forfeiture participated in the offense;

(3) the extent to which the property was used in the commission of the offense;

(4) the sentence imposed for committing the crime subject to forfeiture; and

(5) whether the offense was attempted or completed.

(C) The court shall consider all relevant factors, except the value of the property to the State, when determining the value of the property subject to forfeiture including, but not limited to, the:

(1) fair market value of the property;

(2) value of the property to the person, including hardship to the owner if the property is forfeited; and

(3) hardship from the loss of the property to family members or others if the property is forfeited.

Section 17‑32‑140. A bona fide security interest in property is not subject to forfeiture unless the person claiming the security interest had actual knowledge that the property was subject to forfeiture at the time the property was seized or restrained. The party claiming the security interest bears the burden of establishing the validity of the interest by a preponderance of the evidence.

Section 17‑32‑150. (A) A person who has not been charged in the indictment but has an interest in the property subject to forfeiture may not intervene after the criminal trial has begun. Following the entry of a guilty plea in the court or a verdict of forfeiture of property, the State shall exercise reasonable diligence to identify a person with a potential interest in the property and make reasonable efforts to give notice to potential claimants. The State shall provide notice by publication in a newspaper most likely to give notice to potential claimants and provide written notice of its intent to dispose of property to a person known or alleged to have an interest in the property exempted from forfeiture under this chapter, including a person making claims for:

(1) court‑ordered child support;

(2) employment‑related compensation; and

(3) payment of unsecured debts.

(B) A third party asserting a legal interest in the property may petition the court for a hearing to adjudicate the validity of the interest in the property within sixty days of the date of the notice. The request for hearing shall:

(1) be signed by the petitioner under penalty of perjury;

(2) state the nature and extent of the petitioner’s right, title or interest in the property;

(3) the time and circumstances of the petitioner’s acquisition of the right, title, or interest; and

(4) any additional facts supporting the petitioner’s claim and the relief sought.

(C) Upon the filing of a petition, the court must schedule the hearing no later than six months after the sentencing of any defendant convicted upon the same indictment. The court must issue or amend a final order of forfeiture after a hearing if the court determines that the petitioner:

(1) has a legal right, title, or interest in the property that renders the order of forfeiture invalid in whole or in part because it was vested in the petitioner rather than the defendant or was superior to the defendant’s right, title, or interest at the time the property was seized or restrained; or

(2) is a bona fide purchaser for value of the right, title, or interest in the property and was without cause to believe that the property was subject to forfeiture at the time of purchase. The State has the burden of proof with respect to the issue of whether the petition was without cause to believe the property was subject to forfeiture at the time of purchase.

Section 17‑32‑160. (A) The property of an innocent partial or joint owner may not be forfeited under any forfeiture statute. A person who has a partial or joint interest in property subject to forfeiture at the time the illegal conduct occurred and claims to be an innocent partial or joint owner has a prima facie case that they have a legal right, title, or interest in the property seized or restrained.

(B) The State must prove by a preponderance of the evidence that the innocent owner had actual knowledge of the underlying crime giving rise to the forfeiture or was wilfully blind to its commission. If the State fails to meet its burden, the court shall find that the person was not a party to the crime and is an innocent partial or joint owner. If the State meets its burden, the innocent owner may reestablish innocent owner status by showing that they took reasonable steps to prohibit, abate, or terminate the illegal use of the property by a preponderance of the evidence. The innocent owner may show that they did all that could reasonably be expected by demonstrating that they:

(1) gave timely notice to an appropriate law enforcement agency of information that led the person to know that conduct giving rise to forfeiture would occur or had occurred; or

(2) revoked or made a good faith attempt to revoke permission for those engaging in illegal conduct to use the property or took other reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of property.

The innocent owner is not required to take steps that they reasonably believe would subject them to physical danger.

(C)(1) A person who acquired an ownership interest in property after the commission of a crime giving rise to forfeiture occurred and claims to be an innocent partial or joint owner must establish a prima facie case that they have a legal right in the property seized. The State must prove by a preponderance of the evidence that the person had actual knowledge that the property was subject to forfeiture or was wilfully blind to the commission of the crime yes subjected the property to forfeiture in order to proceed with the forfeiture.

(2) The court shall limit the value of an interest in real property for which innocent ownership has been recognized to the value necessary to maintain reasonable shelter in the community for the person and all dependents residing with the person. An otherwise valid innocent owner claim may not be denied on the grounds that the person gave nothing of value in exchange for the property if:

(a) the property is the person’s primary residence;

(b) depriving the person of the property would deprive the person of the means to maintain reasonable shelter in the community for the person and all dependents residing with the person;

(c) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(d) the person acquired the interest in the property through marriage, divorce, legal separation, or the person was the spouse or legal dependent of someone whose death resulted in the transfer of the property through inheritance or probate.

(D) If the court determines that an innocent joint or partial owner has an interest in seized property, the court shall enter an appropriate order reflecting the innocent owner’s preference for:

(1) severing the property;

(2) transferring the property to the State with a provision that the State compensate the innocent owner to the extent of their interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(3) permitting the innocent owner to retain the property subject to a lien in favor of the State to the extent of the forfeitable interest in the property.

Section 17‑32‑170. (A) The State shall return property to the owner within a reasonable period of time not to exceed three business days after a court finds that:

(1) the owner had a bona fide security interest;

(2) the owner was an innocent owner;

(3) charges against the owner were dismissed; or

(4) the owner was found not guilty of the criminal charge that is the basis for the forfeiture action.

(B) If property returned pursuant to subsection (A) has been damaged, the owner may make a claim in small claims court for the damages to the seized property against the agency that seized the property.

(C) The State is responsible for any storage fees and related costs applicable to property returned under subsection (A).

Section 17‑32‑180. (A) If a trier of fact finds that property is to be forfeited, the court shall order the State to:

(1) return stolen property to its owner;

(2) sell firearms, ammunition and firearm accessories to licensed firearm dealers in a commercially reasonable manner; and

(3) sell other property in a commercially reasonable manner.

(B) The law enforcement agency that seized the property may not retain it for its own use or sell it directly to any employee of the agency, family member of an employee, or to another law enforcement agency.

Section 17‑32‑190. (A) Proceeds seized and proceeds from the sale of forfeited assets only may be distributed pursuant to a court order. The court shall order the funds be used to pay, in order of priority, for the following purposes:

(1) storage and sale expenses;

(2) satisfaction of valid liens against the property;

(3) restitution ordered to the victim of the criminal offense;

(4) reimbursement of investigation costs excluding salaries that the law enforcement agency incurred in the seizure of the assets subject to the forfeiture action;

(5) court‑ordered child support obligations;

(6) claims for compensation by the defendant’s employees; and

(7) claims for compensation by defendant’s unsecured creditors.

(B) All remaining funds must be forwarded to the Office of the State Treasurer for deposit into the general fund.

(C) A law enforcement agency may not directly or indirectly transfer seized or forfeited property to a federal law enforcement authority or other federal agency unless the:

(1) value of the seized or forfeited property exceeds fifty thousand dollars, excluding the potential value of controlled substances; and

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

(3) seized or forfeited property only may be forfeited under federal law.

Section 17‑32‑200. (A) Every law enforcement agency in this State shall compile and file a report with the Office of the Attorney General on no less than an annual basis listing the following information on each individual seizure and forfeiture completed under state and federal forfeiture law including, but not limited to, the:

(1) date the property was seized;

(2) type of property seized, including details such as the year, make and model of a conveyance;

(3) alleged crime associated with the seizure of the property and outcome of the related criminal action;

(4) venue of the forfeiture case and whether the property owner was represented by counsel;

(5) market value of the property seized;

(6) net amount received from the forfeiture, the gross amount received from the forfeiture and the total administrative and other expenses deducted;

(7) date and manner of the disposition of the property; and

(8) data on how the funds were spent.

(B) The Office of the Attorney General shall develop a standard form, filing process, and establish deadlines for the submission of forfeiture data and shall publish the reports when it publishes agency accountability reports.

(C) A law enforcement agency that fails to submit a report is in violation of this chapter and may have funds withheld until the agency is found in compliance with the provisions of this section.”

SECTION 2. The provisions of this act provide the exclusive process governing forfeiture of property in this State, and if there is a conflict between the provisions of this act and another provision of law, the provisions of this act control. However, the provisions of this act do not apply to property considered “contraband” as defined in this act.

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. This act takes effect upon approval by the Governor.

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