Diana C. Talarek *Legislative Service Commission*

H.B. 334

126th General Assembly
(As Introduced)

Reps. Garrison, Driehaus, Fende, Hartnett, Healy, Oelslager, Ujvagi, Woodard

BILL SUMMARY

- States that a corrupt activity criminal forfeiture judgment must relate back to the time at which was committed the first of the incidents forming the pattern of corrupt activity and must include all forfeitable property in which the person had any interest at the time at which was committed the first of those incidents or at any time prior to the issuance of the judgment and all forfeitable property that constitutes proceeds derived from engaging in a pattern of corrupt activity.

- Provides that if forfeited property is transferred to any person and the prosecuting attorney can prove by a preponderance of the evidence that the defendant knowingly transferred the property in an attempt to avoid potential forfeiture of the property and that, at the time of the transfer, the transferee knew, or had reasonable cause to believe, that the property might be subject to potential forfeiture or the transferee negligently failed to take steps to determine whether the property might be subject to potential forfeiture, then notwithstanding the transfer, the transfer is fraudulent as to the state.

- Specifies that, if the court removes any property from an order of forfeiture to protect the rights of innocent persons, the court must order the forfeiture of any other reachable property up to the value of the property that is removed from the order of forfeiture.

- Provides that the prosecuting attorney may file a motion to preserve the reachability of forfeitable property at any time after the filing of an indictment or if no indictment has been filed, at any time after the commission of any of the incidents forming the pattern of corrupt activity.

- Declares an emergency.

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CONTENT AND OPERATION

Background: Engaging in a pattern of corrupt activity

Continuing law, unchanged by the bill, provides that a person is guilty of the offense of "engaging in a pattern of corrupt activity" if the person violates one of the following prohibitions (R.C. 2923.32(A) and (B)(1)):[1]

(1) No person employed by, or associated with, any enterprise may conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, may acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

[1] *See the **COMMENT** for definitions of "corrupt activity," a "pattern of corrupt activity," and "innocent person."*

(3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, may use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.[2]

Generally, engaging in a pattern of corrupt activity is a felony of the second degree. However, engaging in a pattern of corrupt activity is a felony of the first degree if one of the incidents of corrupt activity is one of the following (R.C. 2923.32(B)(1)):

(1) At least one of the incidents is a felony of the first, second, or third degree, aggravated murder, or murder;

(2) At least one of the incidents was a felony under Ohio law that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after July 1, 1996;

(3) At least one of the incidents is a felony under the law of the United States or of another state that, if committed in Ohio on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under Ohio law.

Continuing law also specifies that notwithstanding any other provision of law, a person may be convicted of engaging in a pattern of corrupt activity as well as of a conspiracy to engage in a pattern of corrupt activity. (R.C. 2923.32(B)(1).)

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[2] *Continuing law, also unchanged by the bill, specifies that a purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this third prohibition, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer (R.C. 2923.32(A)(3)).*

Property subject to criminal forfeiture for engaging in a pattern of corrupt activity

Current law

Continuing law, unchanged by the bill, requires that a court enter a judgment of forfeiture when any person is convicted of, pleads guilty to, or is adjudicated delinquent for engaging in a pattern of corrupt activity. This forfeiture is in addition to any other penalty or disposition authorized by law. Property subject to forfeiture to the state (collectively termed "forfeitable property") includes any personal or real property in which the person has an interest and that was used in the course of or intended for use in the course of engaging in a pattern of corrupt activity, or that was derived from or realized through conduct in violation of the offense, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation and any property constituting proceeds derived from the violation. Forfeitable property includes all of the following (R.C. 2923.32(B)(3)):

(1) Any position, office, appointment, tenure, commission, or employment contract of any kind acquired or maintained by the person while engaged in a pattern of corrupt activity, through which the person, while engaged in a pattern of corrupt activity, conducted or participated in the conduct of an enterprise, or that afforded the person a source of influence or control over an enterprise that the person exercised while engaged in a pattern of corrupt activity;

(2) Any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in the preceding paragraph that accrued to the person while engaged in a pattern of corrupt activity during the period of the pattern of corrupt activity;

(3) Any interest in, security of, claim against, or property or contractual right affording the person a source of influence or control over the affairs of an enterprise that the person exercised while engaged in a pattern of corrupt activity;

(4) Any amount payable or paid under any contract for goods or services that was awarded or performed while engaged in a pattern of corrupt activity.

A sentence or judgment of forfeiture cannot be entered unless: (1) the indictment, count in the indictment, or information charging the offense, or the complaint, indictment, or information filed in juvenile court charging the violation as a delinquent act alleges the extent of the property subject to forfeiture or (2) the criminal sentence or delinquency disposition requires the forfeiture of property that was not reasonably foreseen to be subject to forfeiture at the time of the indictment, count in the indictment, or information, if the prosecuting attorney

gave prompt notice to the defendant or the alleged or adjudicated delinquent child of such property not reasonably foreseen to be subject to forfeiture when it is discovered to be forfeitable. If there is property subject to criminal forfeiture, a special verdict must be returned as to the extent of the property, if any, subject to forfeiture. When the special verdict is returned, a judgment of forfeiture is entered. (R.C. 2923.32(B)(4).)

Also, upon an entry of a judgment of forfeiture, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action, including the appointment of a receiver, that the court determines to be proper to protect the interests of the state or an innocent person (R.C. 2923.33(D)).

Forfeited property, then, is seized and distributed as provided by law (R.C. 2923.32(B)(6) and (C) and 2923.35, *not in the bill*).

The bill

The bill adds a provision that states that the special verdict and judgment of forfeiture must relate back to the time at which was committed the first of the incidents forming the pattern of corrupt activity and must include all forfeitable property in which the person had any interest at the time at which was committed the first of those incidents or at any time prior to the issuance of the judgment and all forfeitable property that constitutes proceeds derived from engaging in a pattern of corrupt activity (R.C. 2923.32(B)(4)(b)).

Unreachable property

Current law

Current law provides that if any of the property included in the special verdict cannot be located, has been sold to a bona fide purchaser for value, placed beyond the jurisdiction of the court, substantially diminished in value by the conduct of the defendant or adjudicated delinquent child, or commingled with other property that cannot be divided without difficulty or undue injury to innocent persons, or otherwise is unreachable without undue injury to innocent persons, the court must order forfeiture of any other reachable property of the defendant or adjudicated delinquent child up to the value of the property that is unreachable (R.C. 2923.32(B)(5)(a)).

Current law also provides that if forfeitable property is transferred or rendered unavailable for forfeiture after the filing of either a corrupt activity lien notice or a criminal or delinquency proceeding for engaging in a pattern of corrupt activity, the state may bring an action against the person named in the lien notice

or the defendant or delinquent child to recover the value of the property or interest. The court must enter final judgment against that person for an amount equal to the value of the property or interest plus investigative costs and attorney's fees incurred by the state. Also, such a transfer is fraudulent as to the state, and the state has creditor's rights under the Ohio Uniform Fraudulent Transfer Act. (R.C. 2923.36(H) and (I).)

The bill

Under the bill, the provision of current law regarding how a court is to treat unreachable forfeitable property remains the default provision. However, if the property that is the subject of the special verdict of forfeiture has been sold or otherwise transferred to any person and the prosecuting attorney proves to the court by a preponderance of the evidence that the defendant or delinquent child knowingly sold or transferred the property in an attempt to avoid potential forfeiture of the property and that, at the time of the sale or transfer, the purchaser or transferee knew, or had reasonable cause to believe, that the property might be subject to potential forfeiture or the purchaser or transferee negligently failed to take steps to determine whether the property might be subject to potential forfeiture, then notwithstanding the sale or transfer, the sale or transfer is fraudulent as to the state. The property remains criminally forfeited to the state and is subject to all provisions and procedures applicable to all other property included in the special verdict of forfeiture to the same extent as if the property had not been so sold or transferred. (R.C. 2923.32(B)(5)(b) and 2923.36(I)(2).)

Rights of interested parties in the forfeitable property

Current law

Upon the entry of a judgment of forfeiture, the court must cause notice to be provided to all persons known to have, or appearing to have, an interest in the forfeited property. Any person with an interest in the forfeited property, other than the defendant or delinquent child, may petition the court to hold a hearing to determine the validity of the claim. To protect the rights of innocent persons, the court must amend, in accordance with its determination, the judgment of forfeiture if it finds, by a preponderance of the evidence, that (1) the petitioner has a legal right, title, or interest in the property that, at the time of the commission of the acts giving rise to the forfeiture of the property, was vested in the petitioner and not in the defendant or the adjudicated delinquent child or was superior to the right, title, or interest of the defendant or the adjudicated delinquent child or (2) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture. The provisions discussed above in "***Unreachable property***," regarding the state's right to bring an action against the

person for substitute property and the state's creditor's rights apply in this situation as well. (R.C. 2923.32(E)(1), (2), (3), and (4) and 2923.36(I)(2).)

The bill

The bill specifies that if the court removes any property from the order of forfeiture to protect the rights of innocent persons, the court must order the forfeiture of any other reachable property of the defendant or delinquent child up to the value of the property that is removed from the order of forfeiture (R.C. 2923.32(E)(4)(b)).

Also under the bill, the provision of current law discussed regarding how a court may remove forfeitable property from an order of forfeiture to protect innocent third parties remains the default provision. However, if the property that is the subject of the hearing has been sold or otherwise transferred to any person and the prosecuting attorney proves to the court by a preponderance of the evidence that the defendant or delinquent child knowingly sold or transferred the property in an attempt to avoid potential forfeiture of the property and that, at the time of the sale or transfer, the purchaser or transferee knew, or had reasonable cause to believe, that the property might be subject to potential forfeiture or the purchaser or transferee negligently failed to take steps to determine whether the property might be subject to potential forfeiture, then notwithstanding the sale or transfer, the sale or transfer is fraudulent as to the state. The property included in the judgment of forfeiture remains criminally forfeited to the state and is subject to all provisions and procedures applicable to all other property included in the special verdict of forfeiture to the same extent as if the property had not been so sold or transferred. (R.C. 2923.32(E)(5) and 2923.36(I)(2).)

Preserving reachability of forfeitable property before a conviction or guilty plea

Current law

There are multiple options to protect the reachability of forfeitable property in a corrupt activity case before a judgment of forfeiture is actually entered.

An indictment has been filed. If an indictment has been filed, the prosecuting attorney may file a motion requesting the court to issue an order to preserve the reachability of forfeitable property. Upon the filing of the motion, the court must give notice to any person who will be affected by the order and then hold a hearing on the motion at which all affected persons have any opportunity to be heard. If the prosecuting attorney, by a preponderance of the evidence, shows that the particular action is necessary to preserve the reachability of the property, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other necessary action, including the

appointment of a receiver. The bill makes no change to this provision. (R.C. 2923.33(A).)

No indictment has been filed. If no indictment has been filed, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other necessary action, including the appointment of a receiver, if the prosecuting attorney shows all of the following by a preponderance of the evidence (R.C. 2923.33(B)(1)):

(1) That the particular action is necessary to preserve the reachability of the property;

(2) That there is probable cause to believe that the property with respect to which the order is sought in the event of a conviction or delinquency adjudication would be subject to criminal forfeiture;

(3) That the requested order would not result in irreparable harm to the party against whom the order is to be entered that outweighs the need to preserve the reachability of the property.

Without an indictment, an order to preserve the reachability of property may only be made for 90 days unless it is extended for good cause shown or unless an indictment is returned alleging the property is subject to forfeiture.

The bill additionally provides that the prosecuting attorney may file a motion to preserve the reachability of any property at any time after the commission of any of the incidents forming the pattern of corrupt activity or at any time after the initiation of the conspiracy to commit corrupt activity (R.C. 2923.33(B)(2)).

No notice to defendant or delinquent child. Finally, if the prosecuting attorney applies for such an order, the court may grant a temporary restraining order to preserve the reachability of forfeitable property without notice to any party if all of the following occur (R.C. 2923.33(C)(1)):

(1) An indictment has been filed alleging that property is subject to criminal forfeiture or the court determines that there is probable cause to believe that property with respect to which the order is sought would be subject to criminal forfeiture.

(2) The property is in the possession or control of the party against whom the order is to be entered.

(3) The court determines that the nature of the property is such that it can be concealed, disposed of, or placed beyond the jurisdiction of the court before any party may be heard in opposition to the order.

This type of a temporary restraining order expires within the time the court fixes, not to exceed 10 days. The order may be extended for good cause shown or if the party against whom it is entered consents to an extension. Prior to the expiration of this type of a restraining order, the court must hold a hearing concerning the order.

The bill additionally provides that the prosecuting attorney may file an application for a restraining order to preserve the reachability of property at any time after the filing of an indictment, complaint, or information or, if no indictment, complaint, or information has been filed, at any time after the commission of any of the incidents forming the pattern of corrupt activity (R.C. 2923.33(C)(2)).

Time at which an order to preserve the reachability of property attaches

The bill also provides that if a court takes one of the above described actions to preserve the reachability of property or grants a temporary restraining order to preserve the reachability of property, the action or order must relate back to the time at which was committed the first of the incidents forming the pattern of corrupt activity. The action or order must also include all forfeitable property in which the person had any interest at the time at which was committed the first of those incidents or at any time prior to the taking of the action and all forfeitable property that constitutes proceeds derived from corrupt activity. (R.C. 2923.33(E).)

Filing of a corrupt activity lien notice

The state may also file a corrupt activity lien notice upon the institution of any corrupt activity criminal proceeding or the filing of any complaint, indictment, or information in juvenile court alleging corrupt activity. Under current law, one of the items that must be included in the notice is a description of the real or personal property subject to the notice and of the interest in that property of the person named in the notice, to the extent the property and the interest of the person in it reasonably is known at the time the proceeding is instituted or at the time the notice is filed. The bill modifies this requirement to instead provide that the notice include a description of the real or personal property subject to the notice and of the interest in that property that the person named in the notice *has or had and that subjects the property to forfeiture*, to the extent the property and that interest of the person in it reasonably is known at the time the proceeding is instituted or at the

time the notice is filed. (R.C. 2923.36(B)(6), italicized language added by the bill.)

Effect of the bill

The bill states that the intent of the General Assembly in making the changes discussed above in "***Property subject to criminal forfeiture***," "***Unreachable property***," "***Rights of interested parties in the forfeitable property***," and "***Preserving reachability of forfeitable property***," is to clarify the application of the criminal forfeiture provisions of the Corrupt Activity Law as they existed prior to the effective date of the bill. Also, it is the intent of the General Assembly in enacting the bill that the bill's changes to the criminal forfeiture provisions do not make any substantive changes to those provisions, do not revise the sanctions in effect prior to the effective date of the bill or impose any new sanctions for engaging in a pattern of corrupt activity, and are remedial in nature. The provisions of the bill apply to all violations of the offense of engaging in a pattern of corrupt activity that are committed on or after the effective date of the bill and to all violations of that offense that occur prior to the effective date of the bill provided that, on or before the effective date of the bill, the person who committed the violation has not been sentenced, or had an order of disposition imposed, for the violation. (Section 3.)

COMMENT

"Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following (R.C. 2923.31(I)):

(1) Conduct defined as "racketeering activity" under the "Organized Crime Control Act of 1970";

(2) Conduct constituting any of the following:

(a) A violation of R.C. 1315.55, 1322.02, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2905.01, 2905.02, 2905.11, 2905.22, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2913.05, 2913.06, 2921.02, 2921.03, 2921.04, 2921.11, 2921.12, 2921.32, 2921.41, 2921.42, 2921.43, 2923.12, or 2923.17; R.C. 1315.53(F)(1)(a), (b), or (c); R.C. 1707.042(A)(1) or (2); R.C. 1707.44(B), (C)(4), (D), (E), or (F); R.C. 2923.20(A)(1) or (2); R.C. 4712.02(J)(1); R.C. 4719.02, 4719.05, or 4719.06; R.C. 4719.07(C), (D), or (E); R.C. 4719.08; or R.C. 4719.09(A).

(b) Any violation of R.C. 3769.11, 3769.15, 3769.16, or 3769.19 as it existed prior to July 1, 1996, any violation of R.C. 2915.02 that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of R.C. 3769.11 as it existed prior to that date, or any violation of R.C. 2915.05 that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of R.C. 3769.15, 3769.16, or 3769.19 as it existed prior to that date.

(c) Any violation of R.C. 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37, any violation of R.C. 2925.11 that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of R.C. 2915.02 that occurred prior to July 1, 1996, any violation of R.C. 2915.02 that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would not have been a violation of R.C. 3769.11 as it existed prior to that date, any violation of R.C. 2915.06 as it existed prior to July 1, 1996, or any violation of R.C. 2915.05(B) as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation exceeds $500, or any combination of violations described in paragraph (2)(c), above, when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds $500;

(d) Any violation of R.C. 5743.112 when the amount of unpaid tax exceeds $100;

(e) Any violation or combination of violations of R.C. 2907.32 involving any material or performance containing a display of bestiality or of sexual conduct, as defined in R.C. 2907.01, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the violation or combination of violations, the payments made in the violation or combination of violations, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation or combination of violations exceeds $500;

(f) Any combination of violations described in paragraph (2)(c), above, and violations of R.C. 2907.32 involving any material or performance containing a display of bestiality or of sexual conduct, as defined in R.C. 2907.01, that is explicit and depicted with clearly visible penetration of the genitals or clearly

visible penetration by the penis of any orifice when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds $500.

(3) Conduct constituting a violation of any law of any state other than Ohio that is substantially similar to the conduct described in paragraph (2), above, provided the defendant was convicted of the conduct in a criminal proceeding in the other state.

"Innocent person" includes any bona fide purchaser of property that is allegedly involved in a violation of R.C. 2923.32, including any person who establishes a valid claim to or interest in the property in accordance with R.C. 2923.32(E), and any victim of an alleged violation of that section or of any underlying offense involved in an alleged violation of that section (R.C. 2923.32(D)).

"Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

At least one of the incidents forming the pattern must occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern must occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.

For the purposes of the criminal penalties that may be imposed for engaging in a pattern of corrupt activity, at least one of the incidents forming the pattern must constitute a felony under the laws of this state in existence at the time it was committed or, if committed in violation of the laws of the United States or of any other state, must constitute a felony under the laws of the United States or the other state and would be a criminal offense under the laws of this state if committed in this state. (R.C. 2923.32(E).)

HISTORY

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Introduced	09-01-05	p. 1623

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