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HOUSE BILL 1683

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State of Washington                      59th Legislature                      2005 Regular Session

By Representatives B. Sullivan, Lovick, Ericks and O'Brien

Read first time 02/01/2005. Referred to Committee on Judiciary.

1            AN ACT Relating to authorizing provisional remedies in civil  
2 forfeiture proceedings; amending RCW 69.50.505; and adding a new  
3 section to chapter 69.50 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            **Sec. 1.** RCW 69.50.505 and 2003 c 53 s 348 are each amended to read  
6 as follows:

7            (1) The following are subject to seizure and forfeiture and no  
8 property right exists in them:

9            (a) All controlled substances which have been manufactured,  
10 distributed, dispensed, acquired, or possessed in violation of this  
11 chapter or chapter 69.41 or 69.52 RCW, and all hazardous chemicals, as  
12 defined in RCW 64.44.010, used or intended to be used in the  
13 manufacture of controlled substances;

14            (b) All raw materials, products, and equipment of any kind which  
15 are used, or intended for use, in manufacturing, compounding,  
16 processing, delivering, importing, or exporting any controlled  
17 substance in violation of this chapter or chapter 69.41 or 69.52 RCW;

18            (c) All property which is used, or intended for use, as a container  
19 for property described in (a) or (b) of this subsection;

1 (d) All conveyances, including aircraft, vehicles, or vessels,  
2 which are used, or intended for use, in any manner to facilitate the  
3 sale, delivery, or receipt of property described in (a) or (b) of this  
4 subsection, except that:

5 (i) No conveyance used by any person as a common carrier in the  
6 transaction of business as a common carrier is subject to forfeiture  
7 under this section unless it appears that the owner or other person in  
8 charge of the conveyance is a consenting party or privy to a violation  
9 of this chapter or chapter 69.41 or 69.52 RCW;

10 (ii) No conveyance is subject to forfeiture under this section by  
11 reason of any act or omission established by the owner thereof to have  
12 been committed or omitted without the owner's knowledge or consent;

13 (iii) No conveyance is subject to forfeiture under this section if  
14 used in the receipt of only an amount of marijuana for which possession  
15 constitutes a misdemeanor under RCW 69.50.4014;

16 (iv) A forfeiture of a conveyance encumbered by a bona fide  
17 security interest is subject to the interest of the secured party if  
18 the secured party neither had knowledge of nor consented to the act or  
19 omission; and

20 (v) When the owner of a conveyance has been arrested under this  
21 chapter or chapter 69.41 or 69.52 RCW the conveyance in which the  
22 person is arrested may not be subject to forfeiture unless it is seized  
23 or process is issued for its seizure within ten days of the owner's  
24 arrest;

25 (e) All books, records, and research products and materials,  
26 including formulas, microfilm, tapes, and data which are used, or  
27 intended for use, in violation of this chapter or chapter 69.41 or  
28 69.52 RCW;

29 (f) All drug paraphernalia;

30 (g) All moneys, negotiable instruments, securities, or other  
31 tangible or intangible property of value furnished or intended to be  
32 furnished by any person in exchange for a controlled substance in  
33 violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible  
34 or intangible personal property, proceeds, or assets acquired in whole  
35 or in part with proceeds traceable to an exchange or series of  
36 exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW,  
37 and all moneys, negotiable instruments, and securities used or intended  
38 to be used to facilitate any violation of this chapter or chapter 69.41

1 or 69.52 RCW. A forfeiture of money, negotiable instruments,  
2 securities, or other tangible or intangible property encumbered by a  
3 bona fide security interest is subject to the interest of the secured  
4 party if, at the time the security interest was created, the secured  
5 party neither had knowledge of nor consented to the act or omission.  
6 No personal property may be forfeited under this subsection (1)(g), to  
7 the extent of the interest of an owner, by reason of any act or  
8 omission which that owner establishes was committed or omitted without  
9 the owner's knowledge or consent; and

10 (h) All real property, including any right, title, and interest in  
11 the whole of any lot or tract of land, and any appurtenances or  
12 improvements which are being used with the knowledge of the owner for  
13 the manufacturing, compounding, processing, delivery, importing, or  
14 exporting of any controlled substance, or which have been acquired in  
15 whole or in part with proceeds traceable to an exchange or series of  
16 exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW,  
17 if such activity is not less than a class C felony and a substantial  
18 nexus exists between the commercial production or sale of the  
19 controlled substance and the real property. However:

20 (i) No property may be forfeited pursuant to this subsection  
21 (1)(h), to the extent of the interest of an owner, by reason of any act  
22 or omission committed or omitted without the owner's knowledge or  
23 consent;

24 (ii) The bona fide gift of a controlled substance, legend drug, or  
25 imitation controlled substance shall not result in the forfeiture of  
26 real property;

27 (iii) The possession of marijuana shall not result in the  
28 forfeiture of real property unless the marijuana is possessed for  
29 commercial purposes, the amount possessed is five or more plants or one  
30 pound or more of marijuana, and a substantial nexus exists between the  
31 possession of marijuana and the real property. In such a case, the  
32 intent of the offender shall be determined by the preponderance of the  
33 evidence, including the offender's prior criminal history, the amount  
34 of marijuana possessed by the offender, the sophistication of the  
35 activity or equipment used by the offender, and other evidence which  
36 demonstrates the offender's intent to engage in commercial activity;

37 (iv) The unlawful sale of marijuana or a legend drug shall not  
38 result in the forfeiture of real property unless the sale was forty

1 grams or more in the case of marijuana or one hundred dollars or more  
2 in the case of a legend drug, and a substantial nexus exists between  
3 the unlawful sale and the real property; and

4 (v) A forfeiture of real property encumbered by a bona fide  
5 security interest is subject to the interest of the secured party if  
6 the secured party, at the time the security interest was created,  
7 neither had knowledge of nor consented to the act or omission.

8 (2) Real or personal property subject to forfeiture under this  
9 chapter may be seized by any board inspector or law enforcement officer  
10 of this state upon process issued by any superior court having  
11 jurisdiction over the property. Seizure of real property shall include  
12 the filing of a lis pendens by the seizing agency. Real property  
13 seized under this section shall not be transferred or otherwise  
14 conveyed until ninety days after seizure or until a judgment of  
15 forfeiture is entered, whichever is later: PROVIDED, That real  
16 property seized under this section may be transferred or conveyed to  
17 any person or entity who acquires title by foreclosure or deed in lieu  
18 of foreclosure of a security interest. Seizure of personal property  
19 without process may be made if:

20 (a) The seizure is incident to an arrest or a search under a search  
21 warrant or an inspection under an administrative inspection warrant;

22 (b) The property subject to seizure has been the subject of a prior  
23 judgment in favor of the state in a criminal injunction or forfeiture  
24 proceeding based upon this chapter;

25 (c) A board inspector or law enforcement officer has probable cause  
26 to believe that the property is directly or indirectly dangerous to  
27 health or safety; or

28 (d) The board inspector or law enforcement officer has probable  
29 cause to believe that the property was used or is intended to be used  
30 in violation of this chapter.

31 (3) In the event of seizure pursuant to subsection (2) of this  
32 section, proceedings for forfeiture shall be deemed commenced by the  
33 seizure. The law enforcement agency under whose authority the seizure  
34 was made shall cause notice to be served within fifteen days following  
35 the seizure on the owner of the property seized and the person in  
36 charge thereof and any person having any known right or interest  
37 therein, including any community property interest, of the seizure and  
38 intended forfeiture of the seized property. Service of notice of

1 seizure of real property shall be made according to the rules of civil  
2 procedure. However, the state may not obtain a default judgment with  
3 respect to real property against a party who is served by substituted  
4 service absent an affidavit stating that a good faith effort has been  
5 made to ascertain if the defaulted party is incarcerated within the  
6 state, and that there is no present basis to believe that the party is  
7 incarcerated within the state. Notice of seizure in the case of  
8 property subject to a security interest that has been perfected by  
9 filing a financing statement in accordance with chapter 62A.9A RCW, or  
10 a certificate of title, shall be made by service upon the secured party  
11 or the secured party's assignee at the address shown on the financing  
12 statement or the certificate of title. The notice of seizure in other  
13 cases may be served by any method authorized by law or court rule  
14 including but not limited to service by certified mail with return  
15 receipt requested. Service by mail shall be deemed complete upon  
16 mailing within the fifteen day period following the seizure.

17 (4) If no person notifies the seizing law enforcement agency in  
18 writing of the person's claim of ownership or right to possession of  
19 items specified in subsection (1)(d), (g), or (h) of this section  
20 within forty-five days of the seizure in the case of personal property  
21 and ninety days in the case of real property, the item seized shall be  
22 deemed forfeited. The community property interest in real property of  
23 a person whose spouse committed a violation giving rise to seizure of  
24 the real property may not be forfeited if the person did not  
25 participate in the violation.

26 (5) If any person notifies the seizing law enforcement agency in  
27 writing of the person's claim of ownership or right to possession of  
28 items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h)  
29 of this section within forty-five days of the seizure in the case of  
30 personal property and ninety days in the case of real property, the  
31 person or persons shall be afforded a reasonable opportunity to be  
32 heard as to the claim or right. The hearing shall be before the chief  
33 law enforcement officer of the seizing agency or the chief law  
34 enforcement officer's designee, except where the seizing agency is a  
35 state agency as defined in RCW 34.12.020(4), the hearing shall be  
36 before the chief law enforcement officer of the seizing agency or an  
37 administrative law judge appointed under chapter 34.12 RCW, except that  
38 any person asserting a claim or right may remove the matter to a court

1 of competent jurisdiction. Removal of any matter involving personal  
2 property may only be accomplished according to the rules of civil  
3 procedure. The person seeking removal of the matter must serve process  
4 against the state, county, political subdivision, or municipality that  
5 operates the seizing agency, and any other party of interest, in  
6 accordance with RCW 4.28.080 or 4.92.020, within forty-five days after  
7 the person seeking removal has notified the seizing law enforcement  
8 agency of the person's claim of ownership or right to possession. The  
9 court to which the matter is to be removed shall be the district court  
10 when the aggregate value of personal property is within the  
11 jurisdictional limit set forth in RCW 3.66.020. A hearing before the  
12 seizing agency and any appeal therefrom shall be under Title 34 RCW.  
13 In all cases, the burden of proof is upon the law enforcement agency to  
14 establish, by a preponderance of the evidence, that the property is  
15 subject to forfeiture.

16 The seizing law enforcement agency shall promptly return the  
17 article or articles to the claimant upon a determination by the  
18 administrative law judge or court that the claimant is the present  
19 lawful owner or is lawfully entitled to possession thereof of items  
20 specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this  
21 section.

22 (6) In any proceeding to forfeit property under this title, where  
23 the claimant substantially prevails, the claimant is entitled to  
24 reasonable attorneys' fees reasonably incurred by the claimant. In  
25 addition, in a court hearing between two or more claimants to the  
26 article or articles involved, the prevailing party is entitled to a  
27 judgment for costs and reasonable attorneys' fees.

28 (7) When property is forfeited under this chapter the board or  
29 seizing law enforcement agency may:

30 (a) Retain it for official use or upon application by any law  
31 enforcement agency of this state release such property to such agency  
32 for the exclusive use of enforcing the provisions of this chapter;

33 (b) Sell that which is not required to be destroyed by law and  
34 which is not harmful to the public;

35 (c) Request the appropriate sheriff or director of public safety to  
36 take custody of the property and remove it for disposition in  
37 accordance with law; or

1 (d) Forward it to the drug enforcement administration for  
2 disposition.

3 (8)(a) When property is forfeited, the seizing agency shall keep a  
4 record indicating the identity of the prior owner, if known, a  
5 description of the property, the disposition of the property, the value  
6 of the property at the time of seizure, and the amount of proceeds  
7 realized from disposition of the property.

8 (b) Each seizing agency shall retain records of forfeited property  
9 for at least seven years.

10 (c) Each seizing agency shall file a report including a copy of the  
11 records of forfeited property with the state treasurer each calendar  
12 quarter.

13 (d) The quarterly report need not include a record of forfeited  
14 property that is still being held for use as evidence during the  
15 investigation or prosecution of a case or during the appeal from a  
16 conviction.

17 (9)(a) By January 31st of each year, each seizing agency shall  
18 remit to the state treasurer an amount equal to ten percent of the net  
19 proceeds of any property forfeited during the preceding calendar year.  
20 Money remitted shall be deposited in the violence reduction and drug  
21 enforcement account under RCW 69.50.520.

22 (b) The net proceeds of forfeited property is the value of the  
23 forfeitable interest in the property after deducting the cost of  
24 satisfying any bona fide security interest to which the property is  
25 subject at the time of seizure and the cost of maintaining or  
26 preserving the property as authorized by court order under section 2 of  
27 this act; and in the case of sold property, after deducting the cost of  
28 sale, including reasonable fees or commissions paid to independent  
29 selling agents, the cost of maintaining or preserving the property as  
30 authorized by court order under section 2 of this act, and the cost of  
31 any valid landlord's claim for damages under subsection (15) of this  
32 section.

33 (c) The value of sold forfeited property is the sale price. The  
34 value of retained forfeited property is the fair market value of the  
35 property at the time of seizure, determined when possible by reference  
36 to an applicable commonly used index, such as the index used by the  
37 department of licensing for valuation of motor vehicles. A seizing  
38 agency may use, but need not use, an independent qualified appraiser to

1 determine the value of retained property. If an appraiser is used, the  
2 value of the property appraised is net of the cost of the appraisal.  
3 The value of destroyed property and retained firearms or illegal  
4 property is zero.

5 (10) Forfeited property and net proceeds not required to be paid to  
6 the state treasurer shall be retained by the seizing law enforcement  
7 agency exclusively for the expansion and improvement of controlled  
8 substances related law enforcement activity. Money retained under this  
9 section may not be used to supplant preexisting funding sources.

10 (11) Controlled substances listed in Schedule I, II, III, IV, and  
11 V that are possessed, transferred, sold, or offered for sale in  
12 violation of this chapter are contraband and shall be seized and  
13 summarily forfeited to the state. Controlled substances listed in  
14 Schedule I, II, III, IV, and V, which are seized or come into the  
15 possession of the board, the owners of which are unknown, are  
16 contraband and shall be summarily forfeited to the board.

17 (12) Species of plants from which controlled substances in  
18 Schedules I and II may be derived which have been planted or cultivated  
19 in violation of this chapter, or of which the owners or cultivators are  
20 unknown, or which are wild growths, may be seized and summarily  
21 forfeited to the board.

22 (13) The failure, upon demand by a board inspector or law  
23 enforcement officer, of the person in occupancy or in control of land  
24 or premises upon which the species of plants are growing or being  
25 stored to produce an appropriate registration or proof that he or she  
26 is the holder thereof constitutes authority for the seizure and  
27 forfeiture of the plants.

28 (14) Upon the entry of an order of forfeiture of real property, the  
29 court shall forward a copy of the order to the assessor of the county  
30 in which the property is located. Orders for the forfeiture of real  
31 property shall be entered by the superior court, subject to court  
32 rules. Such an order shall be filed by the seizing agency in the  
33 county auditor's records in the county in which the real property is  
34 located.

35 (15) A landlord may assert a claim against proceeds from the sale  
36 of assets seized and forfeited under subsection (7)(b) of this section,  
37 only if:

1 (a) A law enforcement officer, while acting in his or her official  
2 capacity, directly caused damage to the complaining landlord's property  
3 while executing a search of a tenant's residence; and

4 (b) The landlord has applied any funds remaining in the tenant's  
5 deposit, to which the landlord has a right under chapter 59.18 RCW, to  
6 cover the damage directly caused by a law enforcement officer prior to  
7 asserting a claim under the provisions of this section;

8 (i) Only if the funds applied under (b) of this subsection are  
9 insufficient to satisfy the damage directly caused by a law enforcement  
10 officer, may the landlord seek compensation for the damage by filing a  
11 claim against the governmental entity under whose authority the law  
12 enforcement agency operates within thirty days after the search;

13 (ii) Only if the governmental entity denies or fails to respond to  
14 the landlord's claim within sixty days of the date of filing, may the  
15 landlord collect damages under this subsection by filing within thirty  
16 days of denial or the expiration of the sixty-day period, whichever  
17 occurs first, a claim with the seizing law enforcement agency. The  
18 seizing law enforcement agency must notify the landlord of the status  
19 of the claim by the end of the thirty-day period. Nothing in this  
20 section requires the claim to be paid by the end of the sixty-day or  
21 thirty-day period.

22 (c) For any claim filed under (b) of this subsection, the law  
23 enforcement agency shall pay the claim unless the agency provides  
24 substantial proof that the landlord either:

25 (i) Knew or consented to actions of the tenant in violation of this  
26 chapter or chapter 69.41 or 69.52 RCW; or

27 (ii) Failed to respond to a notification of the illegal activity,  
28 provided by a law enforcement agency under RCW 59.18.075, within seven  
29 days of receipt of notification of the illegal activity.

30 (16) The landlord's claim for damages under subsection (15) of this  
31 section may not include a claim for loss of business and is limited to:

32 (a) Damage to tangible property and clean-up costs;

33 (b) The lesser of the cost of repair or fair market value of the  
34 damage directly caused by a law enforcement officer;

35 (c) The proceeds from the sale of the specific tenant's property  
36 seized and forfeited under subsection (7)(b) of this section; and

37 (d) The proceeds available after the seizing law enforcement agency

1 satisfies any bona fide security interest in the tenant's property and  
2 costs related to sale of the tenant's property as provided by  
3 subsection (9)(b) of this section.

4 (17) Subsections (15) and (16) of this section do not limit any  
5 other rights a landlord may have against a tenant to collect for  
6 damages. However, if a law enforcement agency satisfies a landlord's  
7 claim under subsection (15) of this section, the rights the landlord  
8 has against the tenant for damages directly caused by a law enforcement  
9 officer under the terms of the landlord and tenant's contract are  
10 subrogated to the law enforcement agency.

11 NEW SECTION. **Sec. 2.** A new section is added to chapter 69.50 RCW  
12 to read as follows:

13 (1) Prior to a determination of forfeiture of real property under  
14 RCW 69.50.505 and upon a motion by the seizing agency, the court may  
15 issue orders to prevent and restrain a person from permitting  
16 foreclosure on the property and from committing or permitting waste on  
17 the property. The orders issued under this section may include, but  
18 are not limited to, restraining orders or prohibitions or taking such  
19 other actions, including the acceptance of satisfactory performance  
20 bonds, or other restraints as the court deems proper. The orders may  
21 also include attachment, receivership, the appointment of custodians,  
22 accountants, or trustees, or any other action to ensure the maintenance  
23 and preservation of the real property subject to forfeiture under RCW  
24 69.50.505.

25 (2) The court may issue an order under this section when it  
26 determines that:

27 (a) There is a substantial probability that the seizing agency will  
28 prevail on the issue of forfeiture and that failure to enter the order  
29 would likely result in the property being damaged, subject to  
30 foreclosure, or otherwise be unavailable for forfeiture; and

31 (b) The need to preserve the availability of the property through  
32 the issuance of the court order outweighs the hardship on any party  
33 against whom the order may operate.

34 (3) An order entered under this section shall be effective for not  
35 more than ninety days, unless extended by the court for good cause  
36 shown.

1           (4) This section does not preclude any other remedy available to  
2 the parties under statute, court order, or agreement.

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