

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **House Bill 3019**

BY DELEGATES MCGEEHAN AND FOLK

[Introduced March 14, 2017; Referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §60A-7-702, §60A-7-704, §60A-7-705 and §60A-7-706 of the Code  
 2 of West Virginia, 1931, as amended, all relating to the West Virginia Contraband Forfeiture  
 3 Act; restating the legislative findings and purpose; requiring a receipt for seized property  
 4 from law enforcement; providing procedure for replevin; stating purposes for forfeiture of  
 5 property and the procedure for forfeiture; and providing that all moneys forfeited under the  
 6 provisions of this article shall be distributed for the support of drug courts.

*Be it enacted by the Legislature of West Virginia:*

1 That §60A-7-702, §60A-7-704, §60A-7-705 and §60A-7-706 of the Code of West Virginia,  
 2 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.**

**§60A-7-702. Legislative findings.**

1 (a) The Legislature hereby finds and declares that the seizure and sale of items under the  
 2 provisions of this article is not contemplated to be a forfeiture as the same is used in article twelve,  
 3 section five of the West Virginia Constitution and to the extent that such seizure and sale may be  
 4 found to be such a forfeiture, the Legislature hereby finds and declares that the proceeds from a  
 5 seizure and sale under this article is not part of net proceeds as the same is contemplated by  
 6 such article twelve, section five of the West Virginia Constitution.

7 (b) The Legislature hereby further finds and declares that the purposes of this article are  
 8 to:

9 (1) Make uniform the standards and procedures for the seizure and forfeiture of property  
 10 subject to forfeiture;

11 (2) Protect the Constitutional rights of persons accused of a crime whose property is  
 12 subject to forfeiture and of innocent owners holding interests in property subject to forfeiture;

13 (3) Deter criminal activity by reducing its economic incentives;

14 (4) Increase the pecuniary loss from criminal activity;

15 (5) Protect against the wrongful forfeiture of property; and

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

17 (c) This article applies to:

18 Seizures, forfeitures and dispositions of property subject to forfeiture pursuant to other  
19 laws; but only to the extent that the procedures in this article for seizing, forfeiting or disposing of  
20 property are consistent with any procedures specified in those laws and does not apply to  
21 contraband, which is subject to seizure pursuant to applicable state laws, but is not subject to  
22 forfeiture pursuant to this article.

**§60A-7-704. Procedures for seizure of forfeitable property; Receipt for seized property;**  
**replevin hearing.**

1 ~~(a) Seizure of property made subject to forfeiture by the provisions of this article may be~~  
2 ~~made upon process issued by any court of record having jurisdiction over the property.~~

3 ~~(b) Notwithstanding the provisions of subsection (a) of this section, seizure of property~~  
4 ~~subject to forfeiture by the provisions of this article may be made without process if:~~

5 ~~(1) The seizure is incident to a lawful arrest or pursuant to a search under a search warrant~~  
6 ~~or an inspection warrant;~~

7 ~~(2) The property subject to seizure has been the subject of a prior judgment in favor of the~~  
8 ~~state in a forfeiture proceeding based upon this article;~~

9 ~~(3) The appropriate person has probable cause to believe that the property is directly or~~  
10 ~~indirectly dangerous to health or safety; or~~

11 ~~(4) The appropriate person has probable cause to believe that the property was used or~~  
12 ~~intended for use in violation of this chapter.~~

13 ~~(c) In the event of seizure pursuant to subsection (b) of this section, forfeiture proceedings~~  
14 ~~shall be instituted within ninety days of the seizure thereof.~~

15 ~~(d) Property taken or detained under this section shall not be subject to replevin, but is~~  
16 ~~deemed to be in the custody of the appropriate person, subject only to the orders and decrees of~~  
17 ~~the court having jurisdiction over the forfeiture proceedings. When property is seized under this~~

18 ~~article, the appropriate person may:~~

19 ~~(1) Place the property under seal;~~

20 ~~(2) Remove the property to a place designated by him or her;~~

21 ~~(3) Require the appropriate law-enforcement agency to take custody of the property and~~  
22 ~~remove it to an appropriate location for disposition in accordance with law; or~~

23 ~~(4) In the case of seized moneys, securities or other negotiable instruments, place the~~  
24 ~~assets in any interest-bearing depository insured by an agency of the federal government.~~

25 ~~The requirements of this subsection pertaining to the removal of seized property are not~~  
26 ~~mandatory in the case of real property and appurtenances thereto.~~

27 (a) When a law-enforcement officer seizes property that is subject to forfeiture, the officer  
28 shall provide an itemized receipt to the person possessing the property or, in the absence of a  
29 person to whom the receipt could be given, shall leave the receipt in the place where the property  
30 was found, if possible.

31 (b) Following the seizure of property, the defendant in the related criminal matter or  
32 another person who claims an interest in seized property may, at any time before sixty days prior  
33 to a related criminal trial, claim an interest in seized property by a motion to the court to issue a  
34 writ of replevin.

35 (c) A motion filed pursuant to this section shall include facts to support the person's alleged  
36 interest in the property.

37 (d) A person who makes a timely motion pursuant to this section has a right to a hearing  
38 on the motion before the resolution of any related criminal matter or forfeiture proceeding and  
39 within thirty days of the date on which the motion is filed.

40 (e) At least ten days before a hearing on a motion filed pursuant to this section, the state  
41 shall file an answer or responsive motion that shows probable cause for the seizure.

42 (f) A court shall grant a claimant's motion if the court finds that:

43 (1) It is likely that the final judgment will require the state to return the property to the

44 claimant;

45 (2) The property is not reasonably required to be held for investigatory reasons; or

46 (3) The property is the only reasonable means for a defendant to pay for legal  
47 representation in a related criminal or forfeiture proceeding.

48 (g) The court may order the return of funds or property sufficient to obtain legal counsel  
49 but less than the total amount seized, and it may require an accounting.

50 (h) In lieu of ordering the issuance of the writ of replevin, a court may order:

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

53 (2) Any other relief the court determines to be just.

#### **§60A-7-705. Procedures for forfeiture.**

1 ~~(a) (1) Any proceeding wherein the state seeks forfeiture of property subject to forfeiture~~  
2 ~~under this article shall be a civil proceeding. A petition for forfeiture may be filed on behalf of the~~  
3 ~~state and any law enforcement agency making a seizure under this article by the prosecuting~~  
4 ~~attorney of a county, or duly appointed special prosecuting attorney.~~

5 ~~(2) A petition for forfeiture may be filed and proceedings held thereon in the circuit court~~  
6 ~~of the county wherein the seizure was made, the real property subject to forfeiture is situate, or~~  
7 ~~the circuit court of the county wherein any owner of the property subject to forfeiture may reside.~~

8 ~~(3) Any civil trial stemming from a petition for forfeiture brought under this chapter at the~~  
9 ~~demand of either party shall be by jury.~~

10 ~~(4) A petition for forfeiture of the seized property shall be filed within ninety days after the~~  
11 ~~seizure of the property in question. The petition shall be verified by oath or affirmation of a law-~~  
12 ~~enforcement officer representing the law enforcement agency responsible for the seizure or the~~  
13 ~~prosecuting attorney and shall contain the following:~~

14 ~~(i) A description of the property seized;~~

15 ~~(ii) A statement as to who is responsible for the seizure;~~

- 16           ~~(iii) A statement of the time and place of seizure;~~
- 17           ~~(iv) The identity of the owner or owners of the property, if known;~~
- 18           ~~(v) The identity of the person or persons in possession of the property at the time seized,~~  
19 ~~if known;~~
- 20           ~~(vi) A statement of facts upon which probable cause for belief that the seized property is~~  
21 ~~subject to forfeiture pursuant to the provisions of this article is based;~~
- 22           ~~(vii) The identity of all persons or corporations having a perfected security interest or lien~~  
23 ~~in the subject property, as well as the identity of all persons or corporations known to the affiant~~  
24 ~~who may be holding a possessory or statutory lien against such property;~~
- 25           ~~(viii) A prayer for an order directing forfeiture of the seized property to the state, and~~  
26 ~~vesting ownership of such property in the state.~~
- 27           ~~(b) At the time of filing or as soon as practicable thereafter, a copy of the petition for~~  
28 ~~forfeiture shall be served upon the owner or owners of the seized property, as well as all holders~~  
29 ~~of a perfected security interest or lien or of a possessory or statutory lien in the same class, if~~  
30 ~~known. Should diligent efforts fail to disclose the lawful owner or owners of the seized property, a~~  
31 ~~copy of the petition for forfeiture shall be served upon any person who was in possession or~~  
32 ~~alleged to be in possession of the property at the time of seizure, where such person's identity is~~  
33 ~~known. The above service shall be made pursuant to the provisions of the West Virginia Rules of~~  
34 ~~Civil Procedure. Any copy of the petition for forfeiture so served shall include a notice substantially~~  
35 ~~as follows:~~
- 36           ~~"To any claimant to the within described property: You have the right to file an answer to~~  
37 ~~this petition setting forth your title in, and right to possession of, the property within thirty days~~  
38 ~~from the service hereof. If you fail to file an answer, a final order forfeiting the property to the state~~  
39 ~~will be entered, and such order is not subject to appeal."~~
- 40           ~~If no owner or possessors, lienholders or holders of a security interest be found, then such~~  
41 ~~service may be by Class II legal publication in accordance with the provisions of article three,~~

42 ~~chapter fifty-nine of this code, and the publication area shall be the county wherein such property~~  
43 ~~was located at the time of seizure and the county wherein the petition for forfeiture is filed.~~

44 ~~(c) In addition to the requirements of subsection (b) above, the prosecuting attorney or~~  
45 ~~law-enforcement officer upon whose oath or affirmation the petition for forfeiture is based, shall~~  
46 ~~be responsible for the publication of a further notice. Such further notice that a petition for forfeiture~~  
47 ~~has been filed shall be published by Class II legal advertisement in accordance with article three,~~  
48 ~~chapter fifty-nine of this code. The publication area shall be the county wherein the property was~~  
49 ~~seized and the county wherein the petition for forfeiture is filed. The notice shall advise any~~  
50 ~~claimant to the property of their right to file a claim on or before the date set forth in the notice,~~  
51 ~~which date shall not be less than thirty days from the date of the first publication. The notice shall~~  
52 ~~specify that any claim must clearly state the identity of the claimant and an address where legal~~  
53 ~~process can be served upon that person. In addition, such notice shall contain the following~~  
54 ~~information:~~

55 ~~(1) A description of the property seized;~~

56 ~~(2) A statement as to who is responsible for the seizure;~~

57 ~~(3) A statement of the time and place of seizure;~~

58 ~~(4) The identity of the owner or owners of the property, if known;~~

59 ~~(5) The identity of the person or persons in possession of the property at the time of~~  
60 ~~seizure, if known;~~

61 ~~(6) A statement that prayer for an order directing forfeiture of the seized property to the~~  
62 ~~state, and vesting ownership of such property in the state shall be requested of the court.~~

63 ~~(d) If no answer or claim is filed within thirty days of the date of service of the petition~~  
64 ~~pursuant to subsection (b) of this section, or within thirty days of the first publication pursuant to~~  
65 ~~subsection (b) of this section, the court shall enter an order forfeiting the seized property to the~~  
66 ~~state. If any claim to the seized property is timely filed, a time and place shall be set for a hearing~~  
67 ~~upon such claim. The claimant or claimants shall be given notice of such hearing not less than~~

68 ~~ten days prior to the date set for the hearing.~~

69 ~~(e) At the hearing upon the claim or claims, the state shall have the burden of proving by~~  
70 ~~a preponderance of the evidence that the seized property is subject to forfeiture pursuant to the~~  
71 ~~provisions of this chapter.~~

72 ~~(f) Any order forfeiting property to the state and entered pursuant to this section perfects~~  
73 ~~the state's right, title and interest in the forfeited property and relates back to the date of seizure:~~  
74 ~~Provided, That in any proceeding under this article the circuit court shall in its final order make~~  
75 ~~specific findings with respect to whether or not probable cause to seize such property existed at~~  
76 ~~the time of such seizure.~~

77 ~~(g) During the pendency of a forfeiture proceeding, it is unlawful for any property owner or~~  
78 ~~holder of a bona fide security interest or other valid lienholder to transfer or attempt to transfer~~  
79 ~~any ownership interest or security interest in seized property with the intent to defeat the purpose~~  
80 ~~of this article, and the court wherein the petition for forfeiture is filed may enjoin a property owner~~  
81 ~~or holder of a security interest or other lienholder from making such a transfer should one come~~  
82 ~~to its attention. Any such transfer which is made in violation of the provisions of this subsection~~  
83 ~~shall have no effect upon an order of the court forfeiting seized property to the state if a notice of~~  
84 ~~lis pendens is filed prior to the recording of the instrument of transfer.~~

85 ~~(h) The court may void any transfer of property made before or after a forfeiture proceeding~~  
86 ~~has been commenced, which is subject to forfeiture, if the transfer was not to a bona fide~~  
87 ~~purchaser without notice for value.~~

88 ~~(i) An appeal of a decision of the circuit court concerning a forfeiture proceeding brought~~  
89 ~~pursuant to this chapter must be filed within one hundred twenty days of the date of entry of the~~  
90 ~~final appealable order. The appellant shall be required to give notice of intent to appeal within~~  
91 ~~thirty days of the entry of such appealable order.~~

92 (a) Forfeitures under this article shall be governed by all of the following purposes:

93 (1) To provide economic disincentives and remedies to deter and offset the economic

94 effect of offenses by seizing and forfeiting contraband, proceeds and certain instrumentalities;

95 (2) To ensure that seizures and forfeitures of instrumentalities are proportionate to the  
96 offense committed;

97 (3) To protect third parties from wrongful forfeiture of their property;

98 (4) To prioritize restitution for victims of offenses.

99 (b) In a civil forfeiture case under this article in which the state seeks to seize real property,  
100 the property owner may request the prosecuting attorney to file a motion in the circuit court of the  
101 county wherein the seizure was made to request a hearing before the seizure, and shall notify the  
102 property owner of the motion. The court shall hold the hearing not sooner than twenty-one days  
103 after the motion is filed. At the hearing, the court shall grant the motion if the state shows probable  
104 cause demonstrates by a preponderance of the evidence that the real property is subject to  
105 forfeiture.

106 (c) A person aggrieved by an alleged unlawful seizure of property may seek relief from the  
107 seizure by filing a motion in the appropriate court that shows the person's interest in the property,  
108 states why the seizure was unlawful and requests the property's return. If the motion is filed before  
109 an indictment, information, or a complaint seeking forfeiture of the property is filed, the court shall  
110 promptly schedule a hearing on the motion, and at not later than twenty-one days after it is filed.

111 (d) The court may extend the time for the hearing on the motion by consent of the parties  
112 or for good cause shown. At the hearing if the property seized is titled or registered under law,  
113 the state or political subdivision shall demonstrate by a preponderance of the evidence that the  
114 seizure was lawful and that the person is not entitled to the property. If the property seized is not  
115 titled or registered under law, the person shall demonstrate by a preponderance of the evidence  
116 that the seizure was unlawful and that the person is entitled to the property.

117 (e) If the motion is filed by a defendant after an indictment, information or a complaint  
118 seeking forfeiture of the property has been filed, the court shall treat the motion as a motion to  
119 suppress evidence. If the motion is filed by a third party after an indictment, information or

120 complaint seeking forfeiture of the property has been filed, the court shall treat the motion as a  
121 petition of a person with an alleged interest in the subject property.

122 (f) Upon application by the prosecuting attorney who prosecutes or brings an action that  
123 allows forfeiture under this article, the court in which the action is prosecuted or filed may issue  
124 an order taking any reasonable action necessary to preserve the reachability of the property  
125 including, but not limited to, a restraining order or injunction, an order requiring execution of a  
126 satisfactory bond or insurance policy, an order to inspect, photograph or inventory the property,  
127 an order placing a lien or lis pendens against the property or an order appointing a receiver or  
128 trustee. The court may issue an order of this nature at any of the following times:

129 (1) Upon the filing of a complaint, indictment, or information alleging the property to be  
130 subject to forfeiture under this article;

131 (2) Prior to the filing of a complaint, an indictment, or information alleging the property to  
132 be subject to forfeiture under this article, if, after giving notice to all persons known to have an  
133 interest in the property and giving those persons an opportunity to be heard, the court determines  
134 that all of the following apply:

135 (A) There is a substantial probability the state will prevail on the forfeiture issue;

136 (B) There is a substantial probability that failure to enter the order will result in the property  
137 being destroyed, being removed from the court's jurisdiction, or otherwise being made unavailable  
138 for forfeiture;

139 (C) The need to preserve the availability of the property outweighs the hardship on the  
140 person against whom the order is to be entered.

141 (g) Property may be seized by a law-enforcement officer:

142 Pursuant to an order of seizure issued by a circuit court based on a sworn application of  
143 a law-enforcement officer from which a determination is made by the court.

144 (h) A person's property is subject to forfeiture if:

145 (1) The person was arrested for an offense to which forfeiture applies;

146 (2) The person is convicted by a criminal court of the offense; and

147 (3) The state establishes by clear and convincing evidence that the property is subject to  
148 forfeiture as provided in this article.

149 (i) Following a person's conviction for an offense to which forfeiture applies, a court may  
150 order the person to forfeit:

151 (1) Property the person acquired through commission of the offense;

152 (2) Property directly traceable to property acquired through the commission of the offense;

153 and

154 (3) Any instrumentality the person used in the commission of the offense.

155 (i) Nothing in this section may prevent property from being forfeited by the terms of a plea  
156 agreement that is approved by a court or by other agreement of the parties to a criminal  
157 proceeding.

158 (k). Subject to the provisions of this article, at any time, at the request of the state, a court  
159 may issue an ex parte preliminary order to seize property that is subject to forfeiture and for which  
160 forfeiture is sought and to provide for the custody of the property. The execution on the order to  
161 seize the property and the return of the property, if applicable, are subject to this article and other  
162 applicable state laws. Before issuing an order pursuant to this subsection, the court shall make a  
163 determination that:

164 (1) There is a substantial probability that: (i) The property is subject to forfeiture; (ii) the  
165 state will prevail on the issue of forfeiture; and (iii) failure to enter the order will result in the  
166 property being destroyed, removed from the state or otherwise made unavailable for forfeiture;  
167 and

168 (2) The need to preserve the availability of the property through the entry of the requested  
169 order outweighs the hardship to the owner and other parties known to be claiming interests in the  
170 property.

171 (l) Property subject to forfeiture may be seized at any time, without a prior court order, if

172 the property alleged to be property subject to forfeiture is not a residence or a business, when:

173 (1) The seizure is incident to a lawful arrest for a crime or a search lawfully conducted  
174 pursuant to a search warrant and the law-enforcement officer making the arrest or executing the  
175 search has probable cause to believe the property is subject to forfeiture and that the subject of  
176 the arrest or search warrant is an owner of the property;

177 (2) The property subject to seizure is the subject of a previous judgment in favor of the  
178 state; or

179 (3) The law-enforcement officer making the seizure has probable cause to believe the  
180 property is subject to forfeiture and that the delay occasioned by the need to obtain a court order  
181 would result in the removal or destruction of the property or otherwise frustrate the seizure.

**§60A-7-706. Disposition of forfeited moneys, securities or other negotiable instruments;  
distribution of proceeds.**

1 (a) Whenever ~~moneys~~, securities or other negotiable instruments are forfeited under the  
2 provisions of this article, such proceeds shall be distributed as follows:

3 (1) Ten percent of the proceeds shall be tendered to the office of the prosecuting attorney  
4 which initiated the forfeiture proceeding;

5 (2) The balance shall be deposited in a special Law-enforcement Investigation Fund. The  
6 fund may be placed in any interest-bearing depository insured by an agency of the federal  
7 government. The fund shall be administered by the chief of the Law-enforcement Agency that  
8 seized the forfeited property.

9 (3) All moneys forfeited under the provisions of this article shall be distributed for the  
10 support of drug courts.

11 (b) No funds shall be expended from the special Law-enforcement Investigation Fund  
12 except as follows:

13 (1) In the case of the funds belonging to the State Police, the funds shall only be expended  
14 at the direction of the Superintendent of the State Police and in accordance with the provisions of

15 article two, chapter eleven-b of this code and the provisions of subdivision (10), subsection (b),  
16 section two, article two, chapter twelve of this code;

17 (2) In the case of funds belonging to the office of either the sheriff or prosecuting attorney  
18 of any county in which the special fund has been created, the funds therein may only be expended  
19 in the manner provided in sections four and five, article five, chapter seven of this code; and

20 (3) In the case of funds belonging to the police department of any municipality in which  
21 the special fund has been created, the funds therein may only be expended in the manner  
22 provided in section twenty-two, article thirteen, chapter eight of this code.

NOTE: The purpose of this bill is to amend certain provisions of the West Virginia Contraband Forfeiture Act. It restates the legislative findings and purpose. The bill; requires a receipt for seized property from law enforcement and provides a procedure for replevin. The bill states purposes for forfeiture of property and the procedure for forfeiture. And the bill and provides that all moneys forfeited under the provisions of this article shall be distributed for the support of drug courts.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.