

HB 636-FN - AS INTRODUCED

2015 SESSION

15-0385
05/01

HOUSE BILL

636-FN

AN ACT

relative to forfeiture of property.

SPONSORS:

Rep. D. McGuire, Merr 21; Rep. Rowe, Hills 22; Rep. Cushing, Rock 21; Rep. Itse, Rock 10; Rep. Sylvia, Belk 6; Rep. Rappaport, Coos 1; Rep. Theberge, Coos 3; Sen. Reagan, Dist 17; Sen. Cataldo, Dist 6; Sen. Pierce, Dist 5; Sen. Daniels, Dist 11

COMMITTEE:

Criminal Justice and Public Safety

ANALYSIS

This bill recodifies RSA 617, relative to the forfeiture of personal property.

Explanation:

Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Fifteen

AN ACT relative to forfeiture of property.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Forfeitures of Personal Property. RSA 617 is repealed and reenacted to read as follows:

2 CHAPTER 617

3 FORFEITURE OF PROPERTY

4 617:1 Definitions. In this chapter:

5 I. "Actual knowledge" means direct and clear awareness of information, a fact, or a
6 condition.

7 II. "Contraband" means goods that are unlawful to import, export, or possess, including
8 scheduled drugs without a valid prescription.

9 III. "Constructive knowledge" means knowledge that is imputed to family or household
10 members of the defendant if the defendant admitted guilt or was adjudicated guilty 3 or more times
11 for the same or specified similar offense in the 10 years prior to the alleged offense.

12 IV. "Conveyance" means a device used for transportation and includes a motor vehicle,
13 trailer, snowmobile, airplane, and vessel, and any equipment attached to it. The term "conveyance"
14 shall not include property that is stolen or taken in violation of the law.

15 V. "Instrumentality" means property otherwise lawful to possess that is used in the
16 furtherance or commission of an offense of a law subject to forfeiture. An "instrumentality" includes
17 land, buildings, containers, a conveyance, equipment, materials, products, a computer, computer
18 software, a telecommunications device, a firearm, ammunition, a tool, money, securities, and
19 negotiable instruments and other means of exchange.

20 VI. "Law enforcement agency" means any non-federal police force, or other local, county, or
21 state agency that has the authority under state law to engage in seizure and forfeiture.

22 VII. "Law subject to forfeiture" means a state law that carries a felony penalty and that
23 explicitly includes forfeiture as a punishment or sanction for the offense.

24 617:2 Purpose. The purpose of this chapter is to:

25 I. Deter criminal activity by reducing its economic incentives;

26 II. Increase the pecuniary loss from criminal activity;

27 III. Protect against the wrongful forfeiture of property; and

28 IV. Ensure that only criminal forfeiture is allowed in this state.

29 617:3 Criminal Forfeiture; Property Subject to Forfeiture; Contraband.

30 I. When a person is convicted of violating a law subject to forfeiture, the court, consistent
31 with this chapter, may order the person to forfeit:

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- 1 (a) Property the person derived from the commission of the crime;
2 (b) Property directly traceable to property derived from the commission of the crime; and
3 (c) Instrumentalities the person used in the commission of the crime.

4 II. No property right exists in contraband. Contraband is subject to seizure and shall be
5 disposed of according to state law. Contraband is not subject to forfeiture under this chapter.

6 617:4 Conviction Required; Standard of Proof.

7 I. Property may be forfeited if:

- 8 (a) The offense is of a state law subject to forfeiture;
9 (b) The offense is established by proof of a criminal conviction; and
10 (c) The state establishes that the property is forfeitable under RSA 617:3, I by clear and
11 convincing evidence.

12 II. Nothing in this section shall prevent property from being forfeited by plea agreement
13 approved by the presiding criminal court or other agreement of the parties.

14 617:5 Substitution of Assets. Upon the state's motion following conviction, the court may order
15 the forfeiture of substitute property owned by the defendant up to the value of unreachable property
16 only if the state proves by a preponderance of the evidence that the defendant intentionally
17 transferred, sold, or deposited property with a third party to avoid the court's jurisdiction.

18 617:6 No Additional Remedies. The state shall not seek personal money judgments or other
19 remedies not provided for in this chapter.

20 617:7 No Joint-and-Several Liability. A defendant is not jointly and severally liable for
21 forfeiture awards owed by other defendants. When ownership is unclear, a court may order each
22 defendant to forfeit property on a pro rata basis or by another means the court finds equitable.

23 617:8 Seizure with Process. At the request of the state at any time, a court may issue an ex
24 parte preliminary order to seize or secure property for which forfeiture is sought and to provide for
25 its custody. Application, issuance, execution, and return are subject to state law.

26 617:9 Seizure without Process. Property subject to forfeiture may be seized at any time without
27 a court order if:

- 28 I. The seizure is incident to a lawful arrest or a search lawfully conducted;
29 II. The property subject to seizure has been the subject of a prior judgment in favor of the
30 state; or
31 III. The state has probable cause to believe that the delay occasioned by the necessity to
32 obtain process would result in the removal or destruction of the property and that the property is
33 forfeitable under this chapter.

34 617:10 Receipt. When property is seized, the law enforcement officer shall give an itemized
35 receipt to the person possessing the property; or in the absence of any person, leave a receipt in the
36 place where the property was found, if reasonably possible.

37 617:11 Title.

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1 I. At the time of seizure or entry of a restraining order, the state acquires provisional title to
2 the seized property. Provisional title authorizes the state to hold and protect the property.

3 II. Title to the property vests with the state when the trier of fact renders a final forfeiture
4 verdict and relates back to the time when the state acquired provisional title. However, this title is
5 subject to claims by third parties adjudicated under this chapter.

6 617:12 Pretrial Replevin Hearing.

7 I. Following the seizure of property, a defendant or third party has a right to a pretrial
8 hearing to determine the validity of the seizure.

9 II. The claimant may claim at any time prior to 60 days before trial of the related criminal
10 offense the right to possession of property by motion to the court to issue a writ of replevin.

11 III. The claimant shall file a motion establishing the validity of the alleged interest in the
12 property.

13 IV. The court shall hear the motion no more than 30 days after the motion is filed.

14 V. The state shall file an answer showing probable cause for the seizure, or cross motions at
15 least 10 days before the hearing.

16 VI. The court shall grant the motion if it finds that:

17 (a) It is likely the final judgment will be that the state must return the property to the
18 claimant;

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

20 (c) The property is the only means for a defendant to pay for legal representation in the
21 forfeiture or criminal proceeding. At the court's discretion, it may order the return of funds or
22 property sufficient to obtain legal counsel but less than the total amount seized, and require an
23 accounting.

24 VII. In lieu of ordering the issuance of the writ, the court may order the state to give security
25 or written assurance for satisfaction of any judgment, including damages, that may be rendered in
26 the action, or order other relief as may be just.

27 617:13 Discovery. Discovery is subject to the rules of criminal procedure.

28 617:14 Trial Proceedings. The litigation related to the forfeiture of property shall be held in a
29 single proceeding following the trial of the related alleged offense. The litigation of whether property
30 of less than \$10,000 in value shall be forfeited shall be held before only a judge.

31 617:15 Proportionality Hearing.

32 I. At any time following determination by the trier of fact, the defendant may petition the
33 court to determine whether the forfeiture is unconstitutionally excessive under the state or federal
34 constitution.

35 II. The defendant has the burden of establishing the forfeiture is grossly disproportional to
36 the seriousness of the offense by a preponderance of the evidence at a hearing conducted by the court
37 without a jury.

1 III. In determining whether the forfeiture of an instrumentality is unconstitutionally
2 excessive, the court may consider all relevant factors, including, but not limited to:

3 (a) The seriousness of the offense and its impact on the community, including the
4 duration of the activity and the harm caused by the defendant;

5 (b) The extent to which the defendant participated in the offense;

6 (c) The extent to which the property was used in committing the offense;

7 (d) The sentence imposed for committing the crime subject to forfeiture; and

8 (e) Whether the offense was completed or attempted.

9 IV. In determining the value of the instrumentality subject to forfeiture, the court may
10 consider relevant factors, including, but not limited to:

11 (a) The fair market value of the property;

12 (b) The value of the property to the defendant including hardship to the defendant if the
13 forfeiture is realized; and

14 (c) The hardship from the loss of a primary residence, motor vehicle, or other property to
15 the defendant's family members or others if the property is forfeited.

16 V. The court shall not consider the value of the instrumentality to the state in determining
17 whether the forfeiture of an instrumentality is constitutionally excessive.

18 617:16 Secured Interest. A bona fide security interest is not subject to forfeiture unless the
19 person claiming a security interest had actual knowledge that the property was subject to forfeiture
20 at the time that the property was seized or restrained under this chapter. A person claiming a
21 security interest bears the burden of production and must establish the validity of the interest by a
22 preponderance of the evidence.

23 617:17 Innocent Owner.

24 I. The property of an innocent owner shall not be forfeited. The process for determining
25 whether a person is an innocent owner is set out in this section.

26 II. A person who has an ownership interest in property subject to forfeiture existing at the
27 time the illegal conduct giving rise to forfeiture occurred and who claims to be an innocent owner has
28 the burden of production to show that the person has a legal right, title, or interest in the property
29 seized under this chapter.

30 III. The prosecutor shall summarily return to an innocent owner claimant an interest in
31 homesteaded property or a motor vehicle of less than \$10,000 in value.

32 IV. If paragraph II is satisfied and the state seeks to proceed with the forfeiture against the
33 property, other than property in paragraph III, the state shall prove by a preponderance of the
34 evidence that the person had actual or constructive knowledge of the underlying crime giving rise to
35 the forfeiture.

36 V. A person who acquired an ownership interest in property subject to forfeiture after the
37 commission of a crime giving rise to the forfeiture and who claims to be an innocent owner has the

1 burden of production to show that the person has legal right, title, or interest in the property seized
2 under this chapter.

3 VI. If paragraph V is satisfied and the state seeks to proceed with the forfeiture against the
4 property, the state shall prove by a preponderance of the evidence that at the time the person
5 acquired the property the person:

6 (a) Had actual or constructive knowledge that the property was subject to forfeiture; or

7 (b) Was not a bona fide purchaser without notice of any defect in title and for valuable
8 consideration.

9 VII. If the state fails to meet its burden in paragraph IV or VI, the court shall find that the
10 person is an innocent owner and shall order the state to relinquish all claims of title to the property.

11 617:18 Disposition of Property and Proceeds.

12 I. At any time when unclaimed property or contraband held for evidentiary purposes is no
13 longer needed for that purpose, the court may order it be delivered to the state treasurer within 30
14 days, or, in the case of contraband, be destroyed within 30 days.

15 II. If the forfeiture is granted, the court may order the property be delivered to the state
16 treasurer within 30 days.

17 III. Upon motion, the court may order that a portion of the currency seized or proceeds from
18 public auction be used to pay reasonable non-personnel expenses of the seizure, storage, and
19 maintenance of custody of any forfeited items.

20 IV. The state treasurer shall dispose of all non-currency forfeited property at public auction.
21 The auction proceeds and forfeited currency shall first be used to pay all outstanding recorded liens
22 on the forfeited property, then to comply with an order of the court to pay reasonable non-personnel
23 expenses, with all remaining funds to be deposited into the state's general fund.

24 617:19 Appeal. An appeal may be claimed by any party from a decree under this chapter made
25 by a justice of a circuit court or superior court.

26 617:20 Prohibition on Retaining Property; Sale Restrictions. No law enforcement agency may
27 retain forfeited property for its own use or sell it directly or indirectly to any employee of the agency,
28 to a person related to an employee by blood or marriage, or to another law enforcement agency.

29 617:21 Reporting.

30 I. On an annual basis, each law enforcement agency shall report the following information
31 about seizures and forfeitures completed by the agency under state forfeiture law and federal
32 forfeiture law:

33 (1) The total number of seizures of currency.

34 (2) The total number of seizures and the number of items in each class of property
35 seized, including vehicles, houses, and other types of property seized.

36 (3) The market value of each class of property seized, including currency, vehicles,
37 houses, and other types of property seized.

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1 (4) The total number of occurrences of each class of crime underlying the forfeitures,
2 including controlled substances, driving while intoxicated, and other crimes.

3 II. The department of justice may require that information not specified in this section also
4 be reported. The department shall develop standard forms, processes, and deadlines for electronic
5 data entry for annual submission of forfeiture data by law enforcement agencies.

6 III. Each law enforcement agency shall file with the department the report required under
7 paragraph I for the law enforcement agency and the corresponding prosecutor's office. The law
8 enforcement agency shall file separate reports for forfeitures completed under state forfeiture law
9 and federal forfeiture law. A null report shall be filed by a law enforcement agency that did not
10 engage in seizures or forfeitures during the reporting period. The department shall compile the
11 submissions and issue an aggregate report of all forfeitures in the state.

12 IV. By April 1 of each year, the department shall make available on its website the reports
13 submitted by law enforcement agencies and its aggregate report.

14 617:22 Return of Property, Damages, and Costs.

15 I. The law enforcement agency that holds the property shall return property to the owner
16 within a reasonable period of time not to exceed 5 days after:

17 (a) The court finds that owner had a bona fide security interest;

18 (b) The court finds that the owner was an innocent owner;

19 (c) The acquittal of or dismissal of the owner of the criminal charge that is the basis of
20 the forfeiture proceedings; or

21 (d) The disposal of the criminal charge that is the basis of the forfeiture proceedings by
22 nolle prosequi.

23 II. The law enforcement agency that holds the property is responsible for any damages,
24 storage fees, and related costs applicable to property returned under paragraph I.

25 2 Forfeiture of Items Used in Connection With Drug Offense. RSA 318-B:17-b is repealed and
26 reenacted to read as follows:

27 318-B:17-b Forfeiture of Items Used in Connection With Drug Offense. Property used in
28 connection with a drug offense may be seized and subject to forfeiture pursuant to RSA 617.

29 3 Search Warrants; Seizure, Custody and Disposition of Articles. Amend RSA 595-A:6 to read as
30 follows:

31 595-A:6 Seizure, Custody and Disposition of Articles; Exceptions. If an officer, in the execution
32 of a search warrant, or by some other authorized method, finds property or articles he is empowered
33 to take, he shall seize and safely keep them under the direction of the court or justice so long as
34 necessary to permit them to be produced or used as evidence in any trial. Upon application by a
35 prosecutor, defendant, or civil claimants, the court, prior to trial or upon an appeal after trial, shall,
36 upon notice to a defendant and hearing, and except for good cause shown, order returned to the
37 rightful owners any stolen, embezzled or fraudulently obtained property, or any other property of

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1 evidential value, not constituting contraband. This section shall apply regardless of how possession
2 of the property was obtained by the state. Photographs or other identification or analysis made of
3 the returned property shall be admissible at trial as secondary evidence, in lieu of the originals, for
4 all relevant purposes, including ownership. In the case of unknown, unapprehended defendants, or
5 defendants willfully absent from the jurisdiction, the court shall have discretion to appoint a
6 guardian ad litem to represent the interest of such unknown or absent defendants. The judicial
7 findings on such matters as ownership, identification, chain of possession or value made at such an
8 evidentiary hearing for the restoration of property to the rightful owners shall thereafter be
9 admissible at trial, to be considered with other evidence on the same issues, if any, as may be
10 admitted before the finder of fact. All other property seized in execution of a search warrant or
11 otherwise coming into the hands of the police shall be returned to the owner of the property, or shall
12 be disposed of as the court or justice orders, which may include forfeiture *pursuant to RSA 617* and
13 either sale or destruction as the public interest requires, in the discretion of the court or justice, and
14 in accordance with due process of law. Any property, the forfeiture and disposition of which is
15 specified in any general or special law, shall be disposed of in accordance therewith.

16 4 New Paragraph; Trafficking in Persons; Forfeiture. Amend RSA 633:7 by inserting after
17 paragraph VI the following new paragraph:

18 VII. All offenses under this section shall qualify as offenses for forfeiture pursuant to
19 RSA 617.

20 5 Repeal. The following are repealed:

21 I. RSA 318-B:17-c through 318-B:17-f, relative to the forfeiture of controlled drugs.

22 II. RSA 633:8, relative to the forfeiture of items used in connection with trafficking in
23 persons.

24 III. RSA 633:9, relative to administrative forfeiture of items used in connection with
25 trafficking in persons.

26 6 Effective Date. This act shall take effect January 1, 2016.

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HB 636-FN - FISCAL NOTE

AN ACT relative to forfeiture of property.

FISCAL IMPACT:

The Office of Legislative Budget Assistant is unable to complete a fiscal note for this bill, **as introduced**, as it is awaiting information from the Judicial Branch, Departments of Justice and Safety, and the New Hampshire Associations of Counties, who were contacted on 01/08/15. When completed, the fiscal note will be forwarded to the House Clerk's Office.