

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3964/1dn  
DAK:wlj:pg

October 5, 2001

Senator Chvala:

This draft creates several significant civil penalties (forfeitures). The LRB drafting manual states that:

A forfeiture is a civil monetary penalty. Although both forfeitures and fines are penalties, an offense that is punishable only by a forfeiture is not a crime. See s. 939.12, stats. In an action to impose only a forfeiture, the rules of civil procedure apply. Among other effects, this means that a forfeiture may be imposed with a lower burden of proof (preponderance of the evidence or clear and convincing evidence) than is required for conviction of a crime (beyond a reasonable doubt), and with a verdict agreed to by five-sixths of a jury instead of a unanimous jury, as required for conviction of a crime. See s. 805.09 (2), stats.

However, the U.S. Supreme Court has, on occasion, denominated a penalty criminal, even if labeled civil by the legislature. The U.S. Supreme Court has a multiprong test to determine whether a penalty is civil or criminal. First, a court must ask whether the legislature “indicated either expressly or impliedly a preference for one label or the other.” *Hudson, et al. v. United States*, 66 U.S.L.W. 4024, 4026 (1997), quoting *United States v. Ward*, 448 U.S. 242 at 248.

Even if a court finds that the legislature has indicated an intention to establish a civil penalty, the court might still find that the penalty is so punitive as to transform the civil penalty into a criminal penalty. To determine whether the penalty is purely punitive a court must look at many factors, including:

1. Whether the penalty involves an affirmative disability or restraint (such as some type of confinement).
2. Whether the penalty has historically been considered punishment.
3. Whether the penalty comes into play only if there is a finding of intent. Generally, conviction of a crime requires some finding of intent (although there are some exceptions), whereas civil liability often does not rest on intent.

4. Whether the operation of the penalty will promote the traditional aims of criminal punishment -- retribution and deterrence. Generally, civil penalties, while having some deterrent purpose, have a compensatory goal, i.e. compensating the government or some person for a loss resulting from the violation for which the penalty is assessed.

5. Whether the behavior to which the penalty applies is already a crime.

6. Whether the penalty appears excessive in relation to the purpose of the penalty.

See *Hudson* at 4026.

I have delineated these factors only to point out that, although you wish to denominate the penalty in this bill a civil penalty (which is a very important consideration to a court), it is possible that the nature of the penalty (its purpose, its amount, etc.) will prompt a court to view the penalty as criminal, which will therefore afford all of the rights to an accused violator as are afforded to criminal defendants. This isn't a fatal flaw to the bill. I raise the issue only to make you aware that it exists.

In this bill, I have not made the Department of Health and Family Services (DHFS) the agency responsible for assessing the penalty. It seems that the Department of Justice is probably better equipped to prosecute such a significant civil claim than is DHFS. However, if you would prefer to have DHFS directly assess the forfeiture, I can amend the bill accordingly.

If you wish to discuss this bill with me, I would be happy to meet with you.

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