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FISCAL IMPACT REPORT

ORIGINAL DATE 02/27/13

SPONSOR Moores LAST UPDATED _____ HB _____

SHORT TITLE Forfeiture of DWI Vehicles SB 532

ANALYST Cerny

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15		
	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Significant *\$74.6	Significant *\$74.6	Significant *\$149.2	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*TRD's cost for a hearing officer

Relates to HB 431

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of District Attorneys (AODA)
 Office of the Attorney General (AGO)
 New Mexico Sentencing Commission (NMSC)
 Public Defender Department (PDD)
 New Mexico Department of Transportation (NMDOT)
 Taxation and Revenue Department (TRD)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

Senate Bill 532 enacts the "Motor Vehicle Nuisance Act," providing a process for civil forfeiture of vehicles driven by repeat DWI offenders and amends portions of the statutes related to

driver's license revocations to include provisions related to vehicle forfeiture.

For a detailed analysis of the bill, see Attachment 1.

FISCAL IMPLICATIONS

SB 532 carries no appropriation.

SB 532 will have a fiscal impact on state agencies charged with its administration. The Motor Vehicle Department and the courts will be conducting forfeiture cases, law enforcement agencies will be taking custody of vehicles, storing them, filing complaints of forfeiture, following through with the hearings, and handling disposition of the property. Although law enforcement agencies will be able to use proceeds from sales of forfeited vehicles to pay for reasonable expenses incurred for storage, protection and sale of the vehicles, it is not clear whether the value of the vehicles will exceed the costs associated with the forfeiture.

DPS analysis states that more extensive research would be required to accurately identify all costs as they may vary considerably by location. However, initial research has indicated "significant start-up and recurring costs incurred with the agencies that currently have similar law. Recent discussions with the City of Santa Fe Police Department indicated they have spent several million dollars in set up costs for a similar program. Storage, security systems, staff facilities and equipment, FTE, administrative costs, legal costs, procedural costs, and other unknown impacts to budget are undeterminable but likely to be substantial."

Further, DPS analysis notes that the distribution of proceeds from vehicle sales anticipated by SB 532 does not appear to support using the proceeds to cover most administrative costs than some of the storage costs and direct expenses related to auctions.

TRD analysis indicates that their Hearing Bureau would require at least one additional FTE (a hearing officer) at a total cost per year of \$74,600, a recurring expense to the TRD Hearings Bureau Operating Budget.

AGO analysis suggests at the present time publishing a complaint costs several thousands of dollar and that a database at DMV or DPS could be maintained to monitor all forfeitures on a statewide basis, with publication of complaints taking place on a such site.

AODA analysis states that the fiscal impact of SB 532 on the district attorneys is unknown, because it is not clear if the district attorneys will be handling the forfeiture proceedings, which are civil in nature.

PDD and NMDOT state no fiscal impact. AOC states minimal fiscal impact.

SIGNIFICANT ISSUES

Currently, vehicle forfeitures in DWI cases are handled at the local level; SB 532 would provide a structure for the whole state but specifically does not preempt local provisions (Section 11).

Should SB 532 be enacted one significant issue is that vehicles cannot be subject to forfeiture if a secured party, for example a lender, has an ownership interest. This will exempt a large number

of vehicles from the forfeiture provisions since many vehicles are purchased using loans.

Further, under SB 532, there does not appear to be any prohibition against transferring title to an innocent owner after arrest, which would defeat the forfeiture provisions.

AODA analysis also points out that the “innocent co-owner” and “innocent secured party” provisions raise issues. SB 532 would apply if a driver does not own the vehicle. Yet SB 532 has no provision for an “innocent owner” but only for innocent co-owners.

Further, AGO analysis suggests with regard to Section 9, C (3) that having to split a car between an innocent co-owner and a purchaser will generate some challenges. If the co-owner and the purchaser are either husband and wife or cousins or somehow related, this such an arrangement might work. However, what if the purchaser wants to use the car and the co-owner wants to use the car at the same time? Will a M-W-F schedule be set up for the purchaser’s use and then a Tues-Thurs schedule for the co-owner’s use?

When the vehicle is sold and the innocent co-owners don’t respond or can’t agree, SB 532 provides that the agency shall sell only the forfeited interest at a public sale. The purchaser would then become a co-owner with the innocent co-owner(s). It is unlikely the forfeited interest would have much value in this situation. Because innocent co-owners can force this type of sale, they will be able to control whether the sale will generate funds.

TRD analysis states that the language added on page 12, lines 15-17 allowing the implied consent hearing issues to include whether the person has a prior DWI conviction or implied consent revocation opens the door to collateral attacks on those convictions or revocation actions.

AODA in their analysis states that Section 7B of SB 532 requires the law enforcement agency to file a complaint of forfeiture or return the motor vehicle within sixty days of making a seizure. But Section 7A provides that the law enforcement agency may subject a vehicle to forfeiture when probable cause that it is a public nuisance has been found in a revocation hearing. That finding may come more than sixty days after the seizure.

Further, AODA states “It is not clear who will be representing the law enforcement agencies at forfeiture proceedings.”

DPS also has this concern stating in analysis that there are a number of procedural issues that require resolution. For example:

1. It is unclear who is responsible for the conducting of the hearings under Section 6 or how this function would be funded;
2. Would resolution of the criminal matter affect the forfeiture proceeding?
3. How will it be determined who is a victim and how restitution is to be paid, e.g. is the victim filing a separate civil lawsuit or is there a companion criminal matter that must be tracked?

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill conflicts with HB-150, HB-162 and SB-467 as all these bills amend Section 66-8-112. HB-431 contains different vehicle seizure procedures

TECHNICAL ISSUES

SB 532 protects a co-owner if the state fails to prove by clear and convincing evidence that the co-owner “knew or should have known of the crime.” Presumably this would be the crime that led to the seizure – DWI or a violation of the Implied Consent Act – and the relevant knowledge would be at the time the crime was committed, not finding out about it later. AOC analysis states that this is not clear.

AGO analysis also notes that beginning on page 3, Section 5, the term “probable cause” is used. That phrase refers to a criminal prerequisite. Since the forfeiture hearing is either an administrative or civil proceeding, the term “probable cause” should be changed to a civil standard of proof “like preponderance of the evidence” so that no confusion arises as to the type of proceedings this bill refers to.

TRD suggests that SB 232 could be improved by a series of small amendments, specifically:

- On page 2, line 25 insert new “F. “revocation” means that a person has a previous violation under Section 66-8-112 of the Implied Consent Act.”
- Amend page 2, lines 7-10 to more clearly indicate that “conviction” does include a deferred or suspended sentence by replacing the words “whether the sentence is” with “includes a sentence that is”.
- On page 3, lines 12-13 replace “a violation of the Implied Consent Act” with “has a previous revocation pursuant to Section 66-8-112 NMSA 1978”.
- On page 4, line 5 after the first “hearing” insert “under Section 66-8-112 NMSA 1978”.
- Amend page 4 line 11 to replace “66-8-102” with “66-8-112” (the implied consent revocation statute).

On page 12, line 17 replace “violation of” with “previous administrative revocation under”.

Lastly, SB 532 may unintentionally give the hearing officer discretion to enter the forfeiture order. Page 14, line 13 states that the hearing officer “may” enter the forfeiture order.

OTHER SUBSTANTIVE ISSUES

Allowing the proceeds from forfeited property to be used for alcohol treatment and prevention programs and for enforcement of DWI violations would likely lower DWI recidivism rates according to NMDOT. In addition, the seizure, and possible forfeiture, of a vehicle driven by a convicted DWI offender would serve as a deterrent for persons with licenses suspended for driving under the influence of drugs or alcohol to not drive motor vehicles until their licenses are reinstated.

One of NMDOT’s safety goals is to reduce motor-vehicle related DWI crashes, injuries and deaths. NMDOT states DWI forfeiture of vehicles may positively impact DWI recidivism rates and serve as a deterrent to potential offenders.

NMDOT suggests that the disposition of the forfeited property would allow local jurisdictions to utilize the proceeds of the sale of property to be used for treatment, prevention, education, and law enforcement. This could significantly reduce the amount of funding NMDOT must spend on such programs, thereby potentially freeing NMDOT resources to spend on other safety programs.

QUESTIONS

Is it fair that an individual who has paid off their vehicle is subject to having that vehicle forfeited while someone else, with loan payments still due on theirs, will not have their vehicle subject for forfeiture?

CAC/blm

ATTACHMENT 1: DETAILED ANALYSIS OF SB 532

SB 532 stipulates:

A motor vehicle is a public nuisance when it is operated by a person who is arrested for driving under the influence of intoxicating liquor or drugs, or a violation of the Implied Consent Act, and that person has a prior conviction for one of those offenses.

A law enforcement officer may temporarily seize a vehicle if the officer has probable cause to believe that it is a public nuisance and retain custody if at the time of seizure the officer issues a written notice of forfeiture and the right to a hearing and a revocation hearing is pending or may be set. At the license revocation hearing, if forfeiture is an issue, the hearing officer will need to determine if the person has a prior conviction for DWI or a violation of the Implied Consent Act. If the hearing officer makes such a finding, and enters an order sustaining the revocation or denial of the person's license or privilege to drive, the department may enter an order subjecting the vehicle to forfeiture.

Once an order subjecting the vehicle to forfeiture is entered as part of a revocation hearing, or if the person failed to exercise the right to a revocation hearing, the law enforcement agency may file a complaint of forfeiture in district court. The complaint shall be served upon the person from whom the vehicle was seized, the person's attorney and all persons known or reasonably believed by the law enforcement agency to claim an interest in the motor vehicle, and the complaint shall be published at least three times in a newspaper of general circulation in the district of the court having jurisdiction. At hearing, the state must prove by clear and convincing evidence that the vehicle is a public nuisance, and that the owner has been convicted of the crime that underlies the nuisance allegation.

A forfeited vehicle would be sold at public sale by the law enforcement agency. There are protections for secured parties and co-owners. A vehicle will not be forfeited if a secured party has an ownership interest in the vehicle, unless the state proves at the forfeiture proceeding by clear and convincing evidence that the secured party knew or should have known that the person from whom the vehicle was seized was under the influence of liquor or drugs while driving. If the state fails to prove that a co-owner "knew or should have known of the crime" the co-owner has the option of buying the forfeited interest from the agency, or allow the agency to sell the vehicle with the proceeds used to pay the fair market value of the co-owner's interest, or allow the law enforcement agency to sell only the forfeited interest (so the purchaser will become a co-owner with the innocent co-owner).

Proceeds from public sale of the vehicle shall be distributed as follows: first, to pay expenses for storage, protection and sale of vehicle; second, as any restitution to or on behalf of victims of the crime, and third, any remaining balance to the General Fund to be used for drug and alcohol abuse treatment services, prevention and education programs, demand –reduction initiatives or enforcing driving under the influence violations.

Ordinances enacted by home-rule municipalities and other political subdivisions on a jurisdictional basis (as has already occurred in City of Albuquerque, City of Santa Fe, City of Las Cruces, Dona Ana County, Santa Fe County, and Torrance County), will remain in effect.