



## Cuomo Bill Would Move Forfeiture Rulings to Criminal Sentencings

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**Editors' Note:** *This article has been updated to reflect a [Correction](#).*

ALBANY - A bill nestled into the 2012-13 budget submitted by Governor Andrew M. Cuomo would require judges to order asset forfeiture at every felony and misdemeanor sentencing.

The measure, designed to eliminate the need to pursue assets in a civil action separate from the criminal prosecution and to generate money for the state and local governments, was inserted at the request of prosecutors, especially Manhattan District Attorney Cyrus R. Vance Jr., into the budget released Jan. 17, officials said (See Part E, page 18, of the budget's [Public Protection and General Government Article VII Legislation](#)).

Prosecutors have grumbled that the current state forfeiture process is far too cumbersome and that they lack the resources and time to begin a separate civil action unless the assets are substantial.

They also have expressed frustration over their inability to obtain forfeiture in misdemeanor cases, and that they have been forced to return assets, sometimes substantial, that they were virtually certain were ill-gotten.

In the past state prosecutors often had the U.S. attorney "adopt" a forfeiture case because the federal process is much leaner and the federal forfeiture law is much broader. But when the U.S. government "adopts" a state forfeiture case, the local prosecutor's office gets a share but the state does not.

Additionally, the existing state law allows forfeiture only upon arrest and conviction, and does not include a provision for appropriating the property of fugitives.

The bill in Mr. Cuomo's budget would shift forfeiture from civil to criminal court while making the assets of misdemeanants and fugitives subject to forfeiture.

Further, the legislation would require felons to forfeit not only property "involved" in their offense, but "traceable to such property." Forfeiture would be permitted upon an ex parte and under-seal showing of probable cause by law enforcement.

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**LAW.COM** Welcome to the Law.com network. Click here to register and get started. "The same judge who adjudicated the criminal case to order forfeiture," said Mr. Vance's chief deputy, Daniel R. Alonso. "That is not allowed now. And, more importantly, it incentivizes state prosecutors to use the state system rather than the federal."

Budget officials estimate that the measure will generate roughly \$28 million annually—currently, about \$16 million is obtained in civil forfeitures—with 40 percent going to law enforcement, 32 percent to the state and 27 percent to the district attorneys. The state's share has generally gone to support the Office of Alcohol and Substance Abuse Services.

Although budget documents describe the measure as one that would expand the authority of judges to order forfeiture, suggesting that forfeiture is not mandatory, the actual bill is replete with the word "shall" and does not appear to afford judges any discretion, observers said.

The draft bill states: "The court, in imposing sentence on a person convicted of a violation of any offense...shall order that the person forfeit any property, real or personal, constituting, or derived from, proceeds the person obtained directly or indirectly as the result of such violation."

The District Attorneys Association of the State of New York was aware the bill was being drafted and is supportive, according to Lucien Chalfen, spokesman for the organization's president, Westchester County District Attorney Janet DiFiore. But it seems to have caught the defense community off-guard. Several defense advocates said they had no idea the bill was even being discussed.

Kevin D. O'Connell, an attorney with the New York County Defender Services and president of the New York State Association of Criminal Defense Lawyers, an affiliate of the National Association of Criminal Defense Lawyers, said the bill would result in a "dangerous and burdensome expansion of the criminal court's responsibility."

Mr. O'Connell said the criminal courts are neither equipped nor designed to handle financial assignments. He also said the language governing forfeitures in felony cases—subjecting any property "involved" in an offense or "traceable to such property"—is extraordinarily broad and creates a substantial risk of injustice.

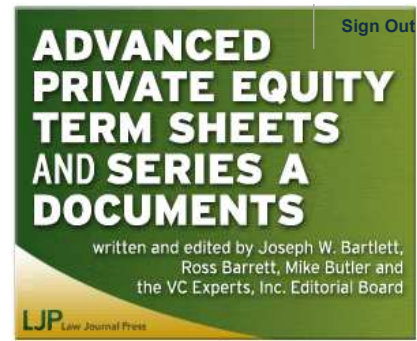
"It is very, very broad and could lead to judgments that are harsh and unfair," Mr. O'Connell said. "If an 18-year-old is involved in drugs in his family's house, are they going to take the house? If a young man borrows his grandmother's car and commits an offense, are they going to take the grandmother's car?"

Mr. O'Connell also objected to the apparent lack of judicial discretion.

"Nobody says criminals should profit from their crimes," Mr. O'Connell said. "That is not what we are saying at all. We are saying there is a process in place to make a determination of who should pay and how much and we don't see the need to change that."

Steven L. Kessler, the former head of the forfeiture unit in the Bronx District Attorney's Office and author of several treatises on forfeiture, described the proposed legislation as "horrific" in that it eviscerates a carefully drawn and balanced statute negotiated in the mid 1980s.

"We were the last state in the country to pass a forfeiture statute and the result was a remarkable piece of legislation, and it is not too often when you hear someone say there is a remarkable piece of legislation in Albany," Mr. Kessler said. "The state Legislature had reviewed the federal statute and the statutes in the 49 other states and to craft



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Mr. Kessler agreed with Mr. O'Connell that the proposed statute is exceptionally broad. He said the provision for forfeiture of real estate is far broader than permitted under federal law.

The proposed forfeiture bill is among dozens detailing the legislation necessary to implement the proposed budget.

Over the past several years, budget bills have been used to effect policy, especially since the Court of Appeals' 2004 holding in *Pataki v. Assembly/Silver v. Pataki*, 4 N.Y.3d 75.

In that case, the Court held that the governor can insert policy-setting and law-changing language in budget appropriation bills, and the Legislature's only alternatives are to accept the conditions along with the appropriation, reject both or do nothing in hopes that inaction would pressure the executive to negotiate.

Another bill included in Mr. Cuomo's budget would require that the trial date for a traffic infraction "must be a date subsequent to the date of the initial appearance" (See Part C, page 13 of the [Article VII Legislation](#)).

Officials said the bill is largely a house-keeping measure to clarify an earlier amendment to the Vehicle and Traffic Law and make plain that the initial appearance date is for a conference and not a trial. It was crafted so ticketing police officers would not have to attend every initial appearance or risk having the ticket dismissed for failure to prosecute if the defendant requests an immediate trial.

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