

2011 HOUSE JUDICIARY

HB 1388

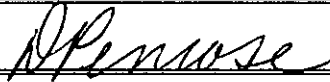
2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee Prairie Room, State Capitol

HB 1388
January 26, 2011
13430

☐ Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1388.

Rep. Klemin: Sponsor, support, will defer to Mr. Trenbeath.

Chairman DeKrey: Thank you.

Tom Trenbeath, Chief Deputy Attorney General: Support (attached 1). Many of you may be familiar with the term Lis Pendens, may not. Lis Pendens is a Latin term that tells us that there is a legal action pending. It is used often in lawsuits involving real estate, where if you file this document with the county clerk, at the beginning of your lawsuit, it would freeze those assets in place. It's a warning to the public that if they lend money based on this asset, or if they take title to this asset, that the person who filed the Lis Pendens, if they are successful in court, has priority over that. It's been that way for time immemorial in our law system. It's also used in criminal matters. It is used a lot by the US Attorney's Office, somewhat by local law enforcement in the state, but it can't be used as part of the criminal action. They actually have to start a civil lawsuit, just for the specific purpose of filing the Lis Pendens to freeze the asset (house, field, etc.) so that they can have it forfeited on the order of the judge upon conviction of the individual. It's used a lot in drug cases. It would streamline the process considerably if we could file the Lis Pendens in the criminal action itself. That's what this bill would allow in just a few words. The forfeitures are important on several levels. The testimony that I passed out is from Nick Chase, Assistant US Attorney in Fargo. You might ask why we are doing favors for the federal government, but a lot of our drug related cases, we take through the federal system because they don't have good time and they don't have parole. That makes it good to do it this way. Secondly, no matter if it is our case or their case, if they forfeit a piece of real estate, about 80% of the proceeds comes to state and local law enforcement. We, ourselves, have a passive forfeiture fund with the Bureau of Criminal Investigation, and we purchase tactical shields, bullet proof vests, tech gear, recording devices, etc. We also use it as matching funds for federal grants for equipment. In running the numbers, it appears that over the last

year, we averaged \$4,000/month. About 10% of that amount comes through the federal system. We ask for your favorable consideration of this bill.

Chairman DeKrey: Thank you. Further testimony in support of HB 1388. Testimony in opposition. We will close the hearing. What are the committee's wishes.

Rep. Kretschmar: I move a Do Pass.

Rep. Onstad: Second.

12 YES 0 NO 2 ABSENT

DO PASS CARRIER: Rep. Kretschmar

Date: 1/26/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1388

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Kretschmar Seconded By Rep. Onstad

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg		
Rep. Beadle	✓		Rep. Hogan		
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Steiner	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1388: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS**
(12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1388 was placed on the
Eleventh order on the calendar.

2011 SENATE JUDICIARY

HB 1388

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1388
3/8/11
Job #15098

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to filing of a notice of lis pendens

Minutes:

Senator Nething – Chairman

Ken Sorenson – ND Attorney General's Office – In support of bill – He says the changes in the statute are very simply but the effects will be very helpful in the law enforcement community. He explains that lis pendens is a recorded notice filed with the county recorder against a specific piece of real estate and it provides notice to any prospective purchaser or potential lien holder that there is a judicial proceeding pending that may affect the title to that property. He says the change being proposed here is to allow a lis pendens to be filed not only on a civil action but also in a criminal case. The reason for that are forfeiture proceedings in criminal cases. He gives instances when this could occur.

Senator Nething – Asks how often this occurs with real property.

Sorenson – Replies, not often on the State level but Federal level about ten times a year.

Senator Lyson – Asks if this could work if a drug dealer bought a large amount of property.

Sorenson – Says yes both the State and Federal statutes allow for the forfeiture of property whether it is personal or real estate that has been purchased with the proceeds of a criminal transaction. He explains the five types of forfeiture statutes; the one used the most is the statute relating to drug forfeitures.

Senator Sitte – Asks if this would also relate to income tax evasion.

Sorenson – He says forfeiture proceedings can be used in any criminal proceeding. He is unsure of the extent.

Jake Rodenbiker – Burleigh County State's Attorney - In support of this bill – He gives the example of a large marijuana dealer in Burleigh County that was dealing out of his residence, storing product, and proceeds. He said the property was seized and because criminal action was already instituted this legislation would allow that forfeiture to take place within that criminal action rather than have to institute a separate civil proceeding to attach the lis pendens.

Opposition – 0

Close the hearing

Senator Olafson moves a do pass
Senator Lyson seconds

Roll call vote – 6 yes, 0 no

Senator Olafson will carry

Date: 3/8/11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1388

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Lyson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment Senator Olafson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1388: Judiciary Committee (Sen. Nething, Chairman) recommends **DO PASS**
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1388 was placed on the
Fourteenth order on the calendar.

2011 TESTIMONY

HB 1388

1

HB 1388
January 26, 2011
House Judiciary Committee

Comments of Assistant US Attorney Nick Chase

I. Current Lis Pendens statute

Lis pendens statutes provide notice to the public (and especially potential buyers or banks providing loans) that there is a judicial case pending that could affect the title of a specific piece of real property. North Dakota's lis pendens statute allows lis pendens notice on real property records only when there is a state or federal civil case pending that could affect the title to real property.

There is no federal lis pendens statute or real estate title statute. Therefore, in all federal actions where the title to real property can be affected, whether it is forfeiture related or not, the United States Attorney's only authority to file a lis pendens notice is under North Dakota law.

Therefore, in all federal civil actions that could affect the title to real property located in North Dakota, this office files a lis pendens on the real property under North Dakota law.

II. Change in Lis Pendens statute

The requested change would allow lis pendens notice to be filed when there is a criminal case pending that could affect the title to real property – in the same manner as when a civil case is pending that could affect the title to real property.

III. Reasons for Requested Change

A. Forfeiture Purposes

Currently, under state and federal law, prosecutors can seek forfeiture of real property because: (1) the property was purchased with proceeds of illegal conduct; (2) the property was somehow used to commit the criminal offense (i.e., facilitating property); or (3) the convicted criminal has spent or hidden the proceeds of illegal conduct and the real property is substituted for the proceeds not found (i.e., substitute assets). A successful forfeiture divests all of the criminal's legal interest in the property.

Forfeiture law allows prosecutors to seek forfeiture at the same time as, and as part of, the criminal charges and as part of a separate civil case. Right now, when

our office has a drug case or white collar case (the two most likely involving forfeiture) charged where forfeitable real property exists, we include that forfeitable property in the Indictment AND file a separate civil case seeking forfeiture of the same real estate for the sole purpose of being able to provide notice to the public that this real estate might be forfeited. As with all civil cases, we have to initiate a civil case with summons and complaint, forcing the owner to file a civil answer to our complaint. This process makes work for our office, the owner of the property and the court involved.

B. Notice is Always Good

The public could only benefit because most often these criminal forfeitures arise in cases involving manufacture/distribution of controlled substances or fraud. The lis pendens would put potential buyers on notice not only that there is a claim against the property, but that there are also other considerations that may be significant to them regarding the character of the property itself (environmental hazards) or of the owner.

C. Other state lis pendens statutes

I cannot say that every state has a lis pendens statute that allows notice in criminal and civil cases. But I can say that Minnesota every state I have ever looked to forfeit property has allowed us to file lis pendens notice of a criminal case in North Dakota that might affect the title to the real property. It is never a reason to do something because everyone else is doing it, but the fact that this change is not novel is at least noteworthy.

IV. Possible Criticisms and Responses

A. Overreaching Federal law enforcement

The requested change has no state/federal distinction. The law already allows federal prosecutors to use the lis pendens statute for civil case, as it allows state prosecutors seeking civil forfeiture. This requested change would allow state and federal prosecutors to use lis pendens in criminal cases as it is used in civil cases. Moreover, in any case where federal criminal forfeiture is available, is also atomically allowable as a civil proceeding. Therefore, a federal prosecutor's authority to forfeit or not to forfeit is not affected by changing the lis pendens statute.

B. If you can do everything under civil actions already, why is the change needed?

Right now, in drug cases and white collar cases, many times we have to initiate a civil action in addition to having the criminal indictment. Having to initiate a civil action (which we do about 5-10 times a year) serves no one's interests. For our office, there is a lot of work and paperwork to initiate a civil action. For the owner of the property, who already receives notice of the criminal forfeiture (must be notified under federal law anyway), he or she now has to respond to the civil process in addition to the criminal process, or face forfeiture. In the end, there are unnecessary and duplicative parallel proceedings on the same issues.