Testimony of Sarah Shirley, Assistant General Counsel with the Texas Department of Banking, as a Resource Witness at the Hearing on Senate Bill 626 before the Senate Committee on Jurisprudence

Date: March 5, 2001

Mr. Chairman, Members of the Committee, my name is Sarah Shirley. I am an Assistant General Counsel with the Department of Banking. I am here to talk about the legislative history of Chapter 59 and the extent to which the statute's "innocent lienholder" provisions differ from those of a number of other states and the United States.

As explained previously, under Chapter 59 a lienholder's interest in property other than real property can be forfeited unless he can show, in addition to "innocence", that he acquired and perfected his security interest prior to or during the commission of the offense that gave rise to the forfeiture. When Chapter 59 was used last year to seize and forfeit assets pledged to secure loans, we became aware of and then fully understood the potential problem this "timing" requirement posed for lienholders, particularly banks and other regulated financial institutions. We undertook to determine what the Legislature intended when it enacted Chapter 59 and also how Chapter 59 compared to the asset forfeiture statutes of other states. We were especially interested in the treatment of lienholders.

In order to ascertain the Legislature's intent, both with respect to Chapter 59 generally and, specifically, the rights of lienholders in the asset forfeiture context, we reviewed the legislative files and listened to the tapes from the legislative hearings at which House Bill 8 and House Bill 65, the asset forfeiture bills, were discussed. As I will explain in greater detail, the history of Chapter 59 clearly evidences that the Legislature enacted Chapter 59 to serve two purposes: 1) to take the profit out of crime; and 2) to generate revenue for law enforcement efforts. Additionally, although considerable discussion regarding lienholder protection appeared to have taken place during working sessions and was therefore not recorded, the discussion and testimony that was recorded make it equally clear that the Legislature intended to fully protect the rights of the innocent lienholder from civil asset forfeiture. As I will also discuss further, our review of the forfeiture statutes of 21 other states, including New York, California, Florida and Illinois, and of the United States convinces us that Texas imposes a significantly greater burden upon and provides less protection for innocent lienholders than do many other states.

I. Purpose and Legislative History of Chapter 59

Prior to 1989, most of the statutory provisions that authorized the seizure and civil forfeiture of property were included in the Texas Controlled Substances Act. Property was subject to forfeiture if it was tied to a violation of that Act, and the law did not permit the seizure and forfeiture of real property. Moreover, the forfeiture of property that was encumbered by a bona

fide security interest was not subject to forfeiture if the secured party neither had knowledge of nor consented to the act that gave rise to the forfeiture.

In 1989, Speaker of the House Gib Lewis' anti-crime package consisting of 9 bills was presented to the 71st Texas Legislature. One of the "most important" of the introduced bills was House Bill 8, the civil forfeiture bill. House Bill 8 died during the regular session, but was reintroduced as House Bill 65, passed during the First Special Session, and codified as Chapter 59 of the Texas Code of Criminal Procedure.

According to the legislative testimony, House Bill 8 was intended to "take the profit out of crime", particularly drug crimes, and "take the proceeds from the criminals." There was extensive testimony about the extent to which violating the law had become a profitable vocation and the fact that many crimes were committed because of the great profits that could be realized therefrom. Because of the limitations of the forfeiture laws then in effect with respect to the property subject to forfeiture, law enforcement testified that much seized property had to be returned to the criminal actor, and that, as a result, the State was "basically rewarding criminals by allowing them to keep that which they've garnered from their criminal activity." House Bill 8 was intended to change this.

House Bill 8 was also intended to generate revenue for state law enforcement efforts and, indeed, was at times referred to as a "windfall" for the State. Forfeited property was to "go back to the State" so that the property or money could be used for law enforcement. The bill analysis that accompanied House Bill 8 reported supporters' claims that crime-fighting agencies could realize more than $200 million per year from seizing criminals' assets and investing the proceeds in local and state crime-fighting efforts. Although House Bill 8 contained provisions by which a property owner could assert an interest in seized property, there is nothing to suggest that the Legislature intended House Bill 8 to serve as a general restitution statute.

II. Legislative Intent Regarding Lienholder Rights

The importance of protecting lienholder's rights and House Bill 8's provisions to ensure that protection was a significant issue during the legislative hearings. In testifying before the subcommittee of the House Criminal Jurisprudence Committee, Brock Stevenson, a representative of the Texas District and County Attorneys Association, one of primary supporters of House Bill 8, stated as follows in response to questioning about the differences between the federal forfeiture statutes then in effect and House Bill 8:

Stevenson: We're talking about an owner or interest holder's interest in property may not be forfeited under this subchapter if they basically show that they didn't know about this and could not have known about it or if they had a perfected lien?

Voice: Okay. How does that compare with the federal litigation?

Stevenson: Under the federal litigation -- under 21 U.S.C. 881 and 853, they can, if they choose, ignore the rights of a lienholder. **Under our bill a lienholder is absolutely protected. We're the best friends GMAC ever had.**

Mr. Stevenson continued:
Stevenson: When I finally wrest control of the car, the first thing that happens is the lienholder on the car is either paid off by the police or the car is sold and then the proceeds go to the lienholder. The same thing under this bill for real estate and cars. **Lienholders are absolutely protected. I cannot hurt a lienholder. All the lienholder has to do is basically file a pleading - a three-by-five card - or anything that says I have a good and valid lien. I am GMAC or I am Bright Mortgage Company or whatever. And then they're protected.**

Mr. Stevenson apparently thought and testified to the effect that innocence was the key to protecting a lienholder's interest:
Stevenson: If it's a good and valid lien, and the lienholder is like GMAC, I'm not going to be able to prove that GMAC is involved in drug dealing or chop shopping. Okay? They're protected. Now, if I, as a prosecutor, am making an allegation that this is a fake or fraudulent lien ...,which we do encounter, I'm basically loading both barrels. I'm saying that you, the owner of the vehicle used it in the criminal activity, and you, the lienholder probably engaged in criminal activity because you fostered this or allowed this ...

Hearings on Tex. H.B. 8 Before the Subcommittee on Procedural Matters of the House Committee on Criminal Jurisprudence, 71st Leg., R.S. (March 1, 1989)

Mr. Stevenson's testimony is consistent with and supports the testimony of Representative Dan Morales, the author of both House Bill 8 and House Bill 65, which was actually passed during the First Called Session. When Representative Morales presented House Bill 65 to the House of Representatives, he testified in response to a question from Representative Evans about the bill's impact on the rights of lienholders and whether it applied to both real property as well as personalty as follows:

Representative Morales: There are ample notice provisions, Larry, and ample provisions with regard to the protection of security interest and lienholders.

House Floor Debate on Tex. H.B. 65, 71st Leg., 1st C.S. (July 19, 1989)

Perhaps the best articulation, however, of what the asset forfeiture bill was intended to do and the protection it was intended to provide innocent lienholders came from Representative Morales when he testified on House Bill 8 during the House of Representatives floor debate:

Representative Morales: The only thing this deals with is the manner in which the property is going to be forfeited, the circumstances in which forfeiture would be possible. **And, frankly, the most significant portion of this proposal deals with the protections of constitutional privileges, rights and immunities to ensure that individuals who are disinterested lienholders and security interest holders are not negatively impacted by the operation of the statute.**

House Floor Debate on Tex. H.B. 8, 71st Leg., R.S. (May 2, 1989)

Clearly, the Texas Legislature intended to protect the lienholder who did not know and had no reason to know that the property in which he had a security interest was subject to forfeiture, notwithstanding the literal language of the bill that required not just innocence but also perfection of the security interest prior to or during the commission of the offense. It also seems likely that the Legislature did not intend Chapter 59 to be used as it has been by the Bexar County District Attorney in the Brad Farley case.

III. Asset Forfeiture Statutes of Other States and the United States

I recall that when I first began my Chapter 59 research, I read in a Texas practitioner's treatise that the statute constituted one of our nation's most draconian civil asset forfeiture laws. As stated previously, in an effort to determine how Chapter 59's treatment of lienholders compares to the that of the statutes of other jurisdictions, we reviewed the asset forfeiture laws of a number of other states. Needless to say, we have not examined all forfeiture statutes - there are literally hundreds of them and the situations to which they apply are diverse. Some apply to one or a narrow range of offenses, such as the seizure and forfeiture of vehicles and weapons used in nighttime deer hunting or contraband associated with violations of alcoholic beverage, tobacco and controlled substances laws. Others are more general and govern, as does the Texas statute, the seizure and forfeiture of contraband associated with a wide variety of criminal offenses. We have, however, reviewed what appear to be the primary civil asset forfeiture laws of 21 states, including New York, California, Florida, Illinois and Arizona, as well as the recently amended federal civil forfeiture statute. Based upon that review, we are convinced that Texas, in requiring a lienholder to prove that he acquired his security interest prior to or during the commission of the offense, does indeed impose a greater burden on and provides less protection for the innocent lienholder than do many other jurisdictions. Of the state statutes we have reviewed, only Wisconsin specifically imposes a timing requirement on the lienholder similar to that found in Chapter 59.

Although copies of the statutes we have examined are provided for your review , with the provisions most relevant to lienholder rights and financial institutions bracketed, I would like to take a few minutes to summarize what we have found. Over half of the statutes - those of Alaska, California, Colorado, Mississippi, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Utah and Wyoming - do not specifically reference the timing of the acquisition of the security interest in relation to the commission of the offense that gives rise to forfeiture. These statutes either simply provide generally that a security interest is protected if the interest holder neither had knowledge of nor consented to the act or omission on which the forfeiture is based, or expressly or impliedly recognize that a security interest may be protected regardless of whether it is acquired prior to or during the commission of the offense. Under the statutes of Utah and Alaska, for example, a lienholder's interest in a conveyance is protected if he did not know or have reason to know that a violation would or did take place in the conveyance. The California statute requires the seizing authority to prove that the person claiming an interest in seized property had actual knowledge that the property would be or was used for the offense and consented to that use. New York imposes a similar requirement on the seizing authorities to prove that the owner of an interest in an instrumentality of the crime knew that the property was or would be used for criminal purposes. With respect to a lienholder's interest in proceeds or substituted proceeds, the state must establish that the interest holder knew or should have known that the proceeds or substituted proceeds were obtained through the commission of the offense.

Although these statutes contain no specific reference to "prior to, during or after the commission of the offense", they clearly protect the security interests of innocent lienholders even though those interests may have been acquired after the commission of the offense.

Other statutes we reviewed - those of Arizona, Florida, Idaho, Iowa, Illinois, Minnesota, Ohio, Oregon, Washington and the United States - contain specific references to the time at which the security interest was created. As is the case with the statutes that contain no specific reference, these statutes either simply provide generally that an interest is protected if the interest holder did not know or have reason to know at the time the security interest was created that the property was subject to forfeiture, or explicitly or impliedly recognize that an interest may be protected even though it was created after the commission of the offense. Ohio, for example, establishes a general standard that a lienholder be a bona fide purchaser for value who was reasonably without cause to believe his interest was subject to forfeiture at the time he acquired it. Florida takes a somewhat different approach, and provides that a bona fide lienholder's interest may not be forfeited unless the state establishes that the lienholder had actual knowledge, at the time the lien was made, that the property was being employed or was likely to be employed in criminal activity. Impliedly, if the interest is acquired after the commission of the offense, the state will be unable to meet the burden of proof necessary to effect forfeiture of the security interest.

Four of the statutes we reviewed specifically reference the timing of the acquisition of the lienholder's security interest and establish different criteria for the protection of that interest depending upon whether it was acquired before or after the offense. Generally speaking, the civil asset forfeiture statutes of Arizona, Illinois, Iowa and, significantly, the recently amended federal statute establishing the general rules for federal civil asset forfeiture, require an interest holder who acquires his interest after the commission of the offense to show that he acquired the interest in good faith for value, without knowledge or reason to believe that the property was subject to forfeiture - essentially the same standard for after-acquired liens proposed by House Bill 1522.
Several statutory provisions we reviewed merit special mention. The statutes of California and Florida specifically recognize the importance of protecting the interests of innocent property owners, including bona fide encumbrancers. The statutes of California, Colorado, Florida, New York and Utah place the burden on the seizing authorities to prove that an owner or lienholder knew or should have known the facts that give rise to the forfeiture. Other state statutes deal specifically with security interests held by regulated financial institutions. In Minnesota, for example, property subject to a bona fide security interest based upon financial institution financing is subject to that interest in any forfeiture proceeding. Under Pennsylvania law, no bona fide security interest acquired or retained by a licensed financial institution in a conveyance is subject to forfeiture or impairment. And Oregon protects security interests held by regulated financial institutions in contraband so long as the institution shows by affidavit that the interest was acquired in the regular course of its business as a financial institution, for valuable consideration, without knowledge of the prohibited conduct, without the intent to defeat the interest of a potential forfeiting agency, and, if personal property, prior to the seizure and, if real property, prior to the recording of the seizure notice.

I have heard indirectly that several district attorney representatives believe our research into the asset forfeiture laws of other jurisdictions to be incomplete. As I stated previously, we have not attempted to review asset forfeiture statutes of every state, nor have I attempted to review all

asset forfeiture statutes. When we met with representatives from the Bexar County District Attorney's Office and the Texas District and County Attorneys Association in January, we all agreed that it made no sense for any of us to reinvent the civil asset forfeiture research wheel. Consistent with that agreement, I provided the TDCAA with copies the statutory provisions we had reviewed and believed to be most relevant to the protection of lienholder, owner and/or financial institution rights. We asked that DA's representatives reciprocate and share with us any statutes they identified that require a lienholder to prove he acquired his security interest prior to or during the commission of the offense, and cases or other documentation that support law enforcement's concern that the elimination of such a requirement will turn Texas into a haven for money-launderers. No materials have been provided.

Other statutes may well exist that are similar to the Texas and Wisconsin forfeiture statutes and that deprive an innocent lienholder of a security interest acquired after the commission of the offense. The bottom line remains, however, that the asset forfeiture statutes of our nation's most populous states and the primary federal civil asset forfeiture statute afford innocent lienholders the protection that House Bill 1522 seeks to ensure.