

# The law of civil forfeiture



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This country has long been accustomed to property seizures used as an instrumentality of a crime and obtained through criminal activity. Such instrumentalities of crime can be referred to as property that was used to facilitate crime, such as cars used to allegedly transport illegal drugs. This concept, in most jurisdictions, is referred to as ‘asset forfeiture’ or simple confiscation. In recent years, there has been a growing trend for countries to introduce civil forfeiture, and such proceedings have become very common in the United States.

Typically, there are two types of forfeiture cases: either criminal or civil. In civil forfeiture cases, the government or state sues the item of property, not the person, and the owner is effectively a third party claimant.[1] Unlike criminal forfeiture, where property is taken after its owner has been found guilty in a court of law, with civil forfeiture, owners need not be charged with or convicted of a crime to lose homes, cars, cash, or other property.[2]

There are two types of civil forfeitures: civil in rem and civil in personam. A civil in rem action is against the property.[3] To initiate an action, the court needs to obtain actual or constructive control of the property.[4] A civil in personam action is brought against the person for the assets acquired or maintained through the conduct giving rise to the forfeiture.[5] These actions determine liability rather than criminal culpability. The analysis here will focus exclusively on rem civil forfeiture proceedings.

A civil forfeiture proceeding is a civil action and carries a lower burden of proof than that of a criminal case, where the burden of proof is beyond a reasonable doubt. In civil forfeiture, a lower burden of proof, such as

probable cause or preponderance of the evidence, is sufficient to establish the forfeiture, and no criminal conviction is required.[6] Even if the defendant is acquitted of the underlying criminal case, the government can still proceed on the related civil forfeiture case provided that there is sufficient evidence to meet the civil burden of proof.[7] This gives the government a much easier legal avenue to access and keep property seized.

## **Initiating the Forfeiture Proceeding**

Several options for forfeiture proceedings exist at both the state and federal levels. Both have statutory laws, which can use administrative and judicial forfeiture. Administrative forfeiture is usually used for uncontested matters and rooted in customs laws.[8] Judicial forfeiture is the use of the court system to file suit against the actual property, and is implemented by both state and federal courts.[9]

Generally, judicial forfeiture is required in federal cases involving property exceeding \$500, 000 in value.[10] There is no statutory deadline mandating the time period within which an action must be initiated.[11] Usually a complaint is filed containing a description of the property, and alleging sufficient facts to support a reasonable belief that the government can meet its burden of proof at trial.[12] However, one of the biggest problems about this procedure is that there is no requirement for the government to have sufficient evidence at the time of the filing.[13] At the state level, a judicial forfeiture proceeding is filed whenever property seized exceeds the maximum value permitted. Otherwise, the state uses an administrative forfeiture proceeding.[14] Most states have their own statutory requirement

limits on the value and time allowed for filing. For example, in Texas, the initial date to file a complaint is limited to 30 days.[15]

The question most frequently asked in civil forfeiture cases is ‘ who gets the access to the property?’ It would appear that the filing decision should be governed by whether the property was seized by a federal or state law enforcement agency,[16]but there are actually several different options that law enforcement agencies use to make the forfeiture most efficient for their purposes. The decision whether the case should be filed under a state or federal forfeiture proceeding must be made by the seizing agency on a case-by-case basis.[17]

The agency will typically consider several questions before proceeding. Questions raised could be: (1) if the property was seized by federal or state authority; (2) does property meet the criteria for a federal forfeiture case; (3) will the forfeiture be contested; and (4) who participated in the investigation and the seizure?[18]One interesting aspect to consider is that federal law permits property seized by state agencies to be adopted by federal law enforcement agencies and litigated in the federal court system.[19]This allows the state agency to participate in the federal equitable sharing program.

## **The Equitable Sharing Program**

The equitable federal sharing program provides for the sharing of forfeited assets with state and local law enforcement agencies that assisted in the federal forfeiture.[20]This is obviously a big advantage to state agencies, but is also important for the federal government for cooperation between state

and federal law enforcement agencies.[21]Equitable sharing typically works through two types of investigations: (1) joint investigations; and (2) adoptive forfeitures.[22]

Joint investigations are cases where federal agencies work alongside state or local law enforcement agencies to enforce federal criminal laws.[23]Adoptive forfeiture, on the other hand, gives states an opportunity to conduct a seizure of property through the use of the federal government.[24]The reason state and local agencies resort to this option contain several factors: (1) state laws are inadequate, (2) the seized property poses a unique property-management problem (such as equipment recovered through terrorist threat), and (3) state laws might delay the forfeiture that might lead to significant change to the value of the asset.[25]If this type of situation comes up, the state agency may request a federal law enforcement agency to adopt the forfeiture.[26]This type of action may look as a violation of an individual's due process rights. However, courts have ruled that seizing property under state law and then forfeiting the assets federally, does not violate the owner's due process rights.[27]

The importance of equitable sharing in the forfeiture world should not be overstated. The program is used in drug forfeiture, money laundering, racketeering, and custom offenses. From 2006 to 2010, federal payments were made to over 8, 000 agencies amounting to \$1. 4 billion, and in 2010 alone it was \$500 million.[28]When a state or local agency seeks participation in the sharing of a federal forfeiture, they file specific papers with the federal government.[29]The amount shared will depend on whether there was a joint investigation, hours agents contributed to the investigation, <https://assignbuster.com/the-law-of-civil-forfeiture/>

which agency received a bulk of the information, and which agency took majority of the risk.[30]The decision maker who determines how to split the funds depends on the type of forfeiture case and the dollar value.[31]For example, for all cases involving property valued at \$1 million or more, the Office of the Deputy Attorney General approves the sharing.[32]

The reason to implement an equitable sharing program is to enhance and supplement law enforcement agencies at the state and local levels. To ensure compliance, the federal government requires an equitable sharing agreement to be completed by the state or local law enforcement agency and an annual certification report to be filed at the end of the fiscal year. [33]The program uses certain guidelines for permissible and impermissible expenditures governed by law enforcement ethics codes.[34]Permissible uses of shared property include payment of overtime, law enforcement training, purchase of equipment, improving facilities, upgrading detention facilities, and enacting drug awareness programs.[35]Impermissible uses include the payment of salaries, non law enforcement expenses, or extravagant expenditures.[36]

Since equitable sharing has been enacted, it has served as both a tool for local agencies to receive more funding, but also as a loophole to have the ability to use the generous federal laws on forfeiture. The argument is that the equitable sharing loophole provides a way for state and local law enforcement to profit from forfeitures that they may not be entitled to under state law, possibly creating unlawful agency action to funds they would have never been entitled to.[37]Furthermore, it has been suggested that as more funds come in, they become harder to trace.[38]One reason given for this is <https://assignbuster.com/the-law-of-civil-forfeiture/>

that too many people are involved in the administrative process which controls the distribution.[39]

## **Following the forfeited Property**

The Comprehensive Crime Control Act of 1984 changed the way the federal government deals with revenues realized from the collection of fines and forfeitures.[40] Prior to the Act, all of the money realized from fines and forfeitures, like most federal revenues, were deposited in the general fund of the United States Treasury.[41] The Crime Control legislation created three main funds, two of which we are most concerned with:[42] The Department of Justice Assets Forfeiture Fund[43] and the Department of the Treasury Forfeited Fund.[44] Both funds operate in similar ways, but are controlled by separate government offices. The Department of Justice Asset Forfeiture Fund receives forfeited currency and proceeds, and is controlled by the Attorney General. This fund follows the laws enforced by the Department of Justice.[45] The Department of Treasury Fund also receives forfeited currency and proceeds, but is administered under the laws of the Department of the Treasury, and is controlled by the Secretary of the Treasury.[46]

In the 2010 fiscal year, the federal government seized almost \$1.8 billion, and this does not include the amounts seized by state and local law enforcement agencies.[47] So the questions most frequently posed are: where does the property go; and how can an individual recover property that was unlawfully taken? When cash is ordered to be forfeited, it is transferred into the Assets Forfeiture Fund (AFF).[48] Personal property is sold at public sale and after deducting the cost of sales, the net proceeds are deposited into the fund.[49]

Once property is forfeited all persons who may have an interest in the property should receive notice. However, actual notice is not required; notice should just be reasonably calculated to apprise the parties of the proceedings, so they can present their objections.[50]When a forfeiture proceeding has commenced, the first step for an objecting individual would be to retain counsel, or attempt to have counsel appointed to them. This will prove to be challenging, as federal case law has held that there is no Sixth Amendment right to counsel in a civil asset forfeiture matter.[51]

Although there has been some movement in recent years to change the law on this issue, the process has been overwhelmingly slow. Changes under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)[52], discussed in more detail later, has permitted appointments of counsel in two limited circumstances: (1) if the attorney has been appointed to represent a party in a related criminal case, the attorney may petition the court to be appointed to represent that person in a civil forfeiture matter, and (2) if the claim is against real property, a claimant may request court to appoint an attorney from Legal Services Corporation to represent him on that claim.[53]Although this has certainly had a significant impact for indigent people, the reforms have not been extensive enough to impact the majority of people in need of attorneys regarding this matter.

The next step for a claimant is to file a motion for return of property.[54]This is one of the first pretrial motions and is generally brought under the criminal law provisions of the federal or state statutes. This motion will test the seizure and will require the government to establish that the property is subject to forfeiture or is required for evidence.[55]After this motion is filed,



the claimant can seek some provisional remedies or the return of property under a hardship provision.[56]These provisions provide that the seized property may be returned to the claimant, pending final judgment. However, both provisions are very difficult obstacles and require the claimant to prove substantial hardship that outweighs the risk that property is gone.[57]The claimant will also be afforded the opportunity to file a motion to dismiss, motion to suppress, and challenge the statute of limitations. All three of these actions require significant resources and can be very expensive for individuals without monetary means.

Some uses of the property seized become very controversial. For example, the federal investigative agency has the ability to retain the property for law enforcement use.[58]Even more controversial are issues such as payouts for informant awards, payoffs to lien holders and mortgagees, and numerous investigative expenses.[59]However, the courts do not control disbursement of funds, as they are not authorized unless they are under statute.[60]

### **A Balance Between the Good and the Bad**

Of course, as with all aspects of law, civil forfeiture cases carry an argument for both sides of the spectrum; an analysis of whether such cases are good or bad for society. Proponents of civil forfeiture typically argue that this is a necessary tool in prevention of drug trafficking and other crimes, and has been touted as an effective penalty and deterrent.[61]Forfeiture allows the government to recover property obtained through crime ridden gains, sell it, and hire more police enforcement officers.[62]Another argument, and the official policy of the United States, is that criminal offenders whose property was forfeited are less likely to continue their criminal enterprise.[63]

This shows that when forfeiture proceeds outweigh enforcement costs, forfeiture seems to be successful, at least from a budget stand point. This analysis goes hand in hand with another byproduct of forfeiture, which is more drug arrests; police are able to use more assets from forfeiture to fund their departments for more crime prevention and control.[64]Furthermore, such forfeiture allows for the property taken to be used in a positive way in the community. Examples of this can be seen in cases involving multiple offenders of drunk driving to street racing.

Proponents also look at how forfeiture affects society as whole. The impact of financial crime on society and the limited success of conventional law enforcement strategies has, forced The National District Attorneys Association (NDAA) to issue a proclamation for law enforcement officers and prosecutors to aggressively pursue forfeiture actions to eliminate the instrumentalities of crimes.[65]The NDAA proclamation for asset forfeiture has four main goals: (1) Destroy the money base of illegal enterprise; (2) Deter individuals from using property to facilitate criminal activity; (3) Confiscate the proceeds of criminal activity; and (4) Rededicate the money to the public good.[66]

All this may look good on paper, but has also been criticized by many legal scholars, lawyers, and other people of higher learning. Criticisms seem to project civil forfeiture to be infiltrated by wide spread corruption.[67]Critics say that not only is the property seized subject to policing for profit, but that civil forfeiture has flipped the system upside down by where your property is proven guilty before you are proven innocent.[68]Even greater are the

externalities of mass forfeitures where many people, other than the alleged offender, have been affected.

As civil forfeiture is primarily used in drug cases, it is the families of alleged drug dealers that become victims.[69]Such examples can be found in every state, where people are no longer able to make a living or go to school because it is no longer financially feasible.[70]The results of this analysis points to another problem; while people are being victimized, asset forfeiture has not deterred drug trafficking to the levels initially expected.[71]In fact, drug related crime has increased despite the commitment of vast amounts of resources.[72]

The most reasonable approach to understanding the benefits and the downfalls of asset forfeiture is to review the history of the past 25 years, understand the cost analysis of how forfeiture affects communities across the nation, have a good grasp of the reforms which have been implemented on privacy rights, and to analyze the future of civil forfeiture.

## **Effectiveness of Asset Forfeiture**

Although much focus in recent years has been on the shortfall of civil asset forfeiture, many positive affects have occurred nationwide as well. Stories of transformed neighborhoods, community outreach programs, and control of the drug trade has brought hope to many Americans. The questions that remain concern, whether or not the positive impacts have had anything to do with civil asset forfeiture, or simply have to do with the economic cycle of society as a whole. For example, we know that people commit crimes because the expected benefits of the crime to him exceed the costs.

[73] Thus, it can be assumed that criminals operate in areas where criminal activity is opportunistic. This is where civil asset forfeiture plays a huge role; a direct impact on taking away criminal opportunity.

As we know by now, the main goal of asset forfeiture is revenue generation, linked to punishment and deterrence.[74] Depriving drug traffickers and criminals of their illegal proceeds, using the proceeds against them by supporting law enforcement, has been effective in many respects.[75] A team of economists recently offered up a theoretical argument concerning the possible deterrent effect of forfeiture, but they also argued that a mix of sanctions, not just forfeiture, would be most ideal: “ by employing a mix of sanctions, with harm-based fines (or other punishment) plus confiscation of illegal gain [i. e., forfeiture], courts will be able to get closer to efficient deterrence than they can when constrained to use punishments in isolation.”[76]

So from an economic stand point, forfeiture can be seen as a fine for committing a crime. And if no crime is proven and alleged proceeds of crime have been forfeited, should also be seen as a deterrence mechanism. Because incarceration does not deter all offenders, forfeiture is intended to pick up where traditional punishments leave off. The argument for this is that imprisonment generates no revenue for the state, like fines do, and the social costs of imprisonment exceed those than the taking of one’s assets and property.[77] This analysis leads us to believe that both imprisonment and asset forfeiture play a key role in prevention of criminal activity.[78]

## **Reduction of Drug Trade and Use**

The main goal in most jurisdictions across the United States is for asset forfeiture to cut off the food chain of drug supply.[79]To successfully accomplish this initiative, all agencies come together to attack the financial infrastructures of criminal drug organizations.[80]One study found that the use of multiple agencies combined with flexible state forfeiture laws closely relate to drug arrests, and, secondarily, to forfeiture.[81]In other words, states with the most generous forfeiture laws, those that return the greatest percentage of forfeiture proceeds to police, saw the greatest arrest activity: “ police focus relatively more effort on drug control when they can enhance their budgets by retaining seized assets.”[82]Controversially, this takes the focus from finding solutions to specific crime problems to revenue generation. Yet it is difficult to fault police departments for seeking revenue to support continued crime fighting.

Whether more drug arrests are desirable depends, of course, on the particular drug-related problem. Careful analysis of a local drug problem should be conducted before making this judgment. For example, if high-volume drug arrests overwhelm the courts and/or compromise public support for law enforcement efforts, then more drug arrests (and, by extension, forfeiture) may be undesirable.[83]

## **Reduction of other crime**

Asset forfeiture is certainly not limited to drug enforcement and can target a wide range of crime related activity. Much of the language surrounding forfeiture is couched in terms of removing the profit from criminal activity.

[84]Crimes such as street racing and prostitution have been heavily impacted once assets and property are taken.

Illegal street racing fatalities have been at an all time high in recent years and San Diego was first to implement a street racing forfeiture ordinance.

[85]A study of the program revealed that not only has the problem of illegal street racing been affected, other crimes that were involved with racing have gone down as well.[86]This clearly shows that street racers have responded

to the risk of having their vehicles taken. Likewise, prostitution is also a crime heavily impacted by the asset forfeiture laws. Vehicles of prostitution clients have been an increasingly popular form of seizure to fight

prostitution.[87]Closure of motels, shutdown of brothels and seizing assets of ring leaders has helped stop prostitution in many jurisdictions as well.

[88]More importantly, as a result of these seizures, there has been a direct impact on crimes such as human trafficking.[Share this: Facebook Twitter  
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