

Civil Asset Forfeiture

By Legislative Affairs

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Background

Asset forfeiture is the process by which the government permanently takes property away from a property owner without paying just compensation, as a penalty for offenses committed by the property or property owner. There are two types of forfeiture – *civil* (in rem or against a thing) forfeitures, and *criminal* (personam or against a person) forfeitures.

Civil Forfeiture

Civil forfeitures are based on the unlawful use of a property irrespective of an owner's culpability. Civil forfeitures followed the rules of civil procedure.

Criminal Forfeiture

Criminal forfeitures are subject to all the constitutional and statutory procedural safeguards available under criminal law. The forfeiture case and the criminal case are tried together. Forfeiture counts must be included in the indictment of the defendant which means the grand jury must find a basis for the forfeiture. At trial, the burden of proof is beyond a reasonable doubt.

Federal Law

After the passage of the Comprehensive Crime Control Act of 1984, the federal government, and subsequently state and local governments, used asset forfeiture as a tactic in the war on drugs. Any property that could be linked as an asset to known drug traffickers could be confiscated even if the property was owned by someone else.

While property seizure proved to be a valuable weapon in the war on drugs, it created serious property rights violations, in particular for owners of rental properties. In many instances, authorities were able to seize and at times demolish rental properties when the owner failed to prevent drug activity. Asset forfeiture raised vital questions about the constitutional rights of property owners. Property owners were no longer "innocent until proven guilty"; instead, the onus was placed upon property owners and managers to prove that they did not consent to the illegal activity by showing that strong steps had been taken to halt the illegal activity.

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA) in part to protect those property owners who have made reasonable efforts to stop the use of their property for activities involving illegal drugs and other felonies. The following reforms were enacted upon adoption of CAFRA:

- Burden of proof shifted from the property owner to the government by requiring law enforcement officials to show by a preponderance of evidence that they are justified in undertaking a property seizure.
- Property owners, who have taken reasonable steps to prevent illegal activities, cannot be subjected to forfeiture.
- The costly bond requirement was eliminated for owners who contest a property seizure.
- Time period in which a property owner has to contest forfeiture was extended.
- Innocent owners gained the right to file suit for negligence or loss of property due to forfeiture when the claimant is not convicted of a crime.

- Allows property to be returned to an owner pending final disposition when a court determines that a resulting hardship to the owner outweighs the government's interest in the property.

State Law

CAFRA only applies in federal forfeiture cases, leaving the states to enact their own laws regarding asset forfeiture for property connected with criminal activity. Generally speaking:

- While the burden of proof for establishing cause for forfeiture is most often on the state, owners are often still burdened with establishing that 'innocent owner' exceptions apply.
- Many states still have 'innocent owner' provisions that make owners liable for criminal conduct about which they "reasonably should have known."
- Time periods for contesting the forfeiture are between 15 and 90 days.
- Many states do not allow seized property to be repleaved (returned to owner pending judgment), while many others provide for this with bonds ranging from 10% to 200% the value of the property.
- Few states explicitly provide for owner lawsuits for negligence or loss of property due to forfeiture – check with your local legal counsel.

For a complete explanation of laws in your state, consult your legal counsel, or contact your State Attorney General or County State's Attorney. Attached is a brief, summarized analysis of state laws to help you understand your liability as a property owner.

IREM Statement of Policy

<http://www.irem.org/sec1ins.cfm?sec=publicpolicy&con=regulatory.cfm&par=#civil>

APPENDIX A: Civil Asset Forfeiture Laws by State

AS A NOTE OF CAUTION, IT MUST BE UNDERSTOOD THAT THIS REPORT DOES NOT CONSTITUTE LEGAL ADVICE. THIS REPORT IS INTENDED TO PROVIDE GENERAL INFORMATION, AND SHOULD NOT BE RELIED UPON AS LEGAL GUIDANCE. BEFORE ACTING, BOTH THE LAWS OF THE STATE AND LEGAL COUNSEL SHOULD BE CONSULTED. INFORMATION SHOULD NOT BE CONSTRUED AS SPECIFIC LEGAL ADVICE OR AN OPINION ON INDIVIDUAL CASES OR SITUATIONS. THIS RESEARCH WAS INITIALLY PERFORMED IN July 2006. REMEMBER, THAT LAWS ARE IN FLUX, AND THIS RESEARCH MAY OR MAY NOT BE VALID AT THE TIME IT IS CONSULTED.

State	Citation	Burden of Proof (unless otherwise indicated, burden is on the state)	Standard for Owner Liability	Bond/Replevin	Time period for contesting
Alaska	17.30.110	Law does not have provisions for real property.			
Arizona	13-4311	Preponderance of the evidence	Did not know and could not reasonably have known	No provisions for bond	30 days
Arkansas	5-64-505	Preponderance of the evidence	Knowledge or consent	Property not subject to replevin	60 days
California	HSC11469-11495	Government must prove beyond a reasonable doubt; real property only subject to forfeiture if owner is convicted of a crime	Property which is used as a family residence or for other lawful purposes, or which is owned by two or more persons, one of whom had no knowledge of its unlawful use, shall not be subject to forfeiture.	No provisions for bond	Not specified
Colorado	16-13-504	Preponderance of the evidence	Involved in or knew of the subject act.	No provisions	Not specified
Connecticut	Sec. 54-36h	clear and convincing evidence	Did not or could not have reasonably known	No provisions	Not specified
Delaware	§ 4784	Innocent owner must rebut presumptions	Consent or knowledge	Property not subject to replevin	45 days
Florida	932.703	Preponderance of the evidence	The owner knew or should have known after a reasonable inquiry	Equivalent to the value of the property	
Georgia	16.13-49	Not specified	Consent, reasonably know	Property not subject to replevin	30 days
Hawaii	HRS 712 A	Preponderance of the evidence	Knowledge or consent	10% of the estimated value of the property \$2,500, whichever is greater	30 days
Idaho	Title 37, Chapter 28	Not specified	Known, or should have known	No provisions	Within twenty (20) days of the mailing of the notice

Illinois	725 ILCS 150	If the State shows probable cause, the claimant has the burden of showing by a preponderance of the evidence that the the property is not subject to forfeiture.	Is not legally accountable, or did not solicit, conspire, or attempt to commit the conduct	10% of the "reasonable value," as alleged by the State's attorney	45 days
Indiana	IC 34-24-1	Preponderance of the evidence	None specified for real property	Property not subject to replevin	20 days
Iowa	CHAPTER 809A	the burden of proving the existence of the exemption is on the claimant.	Did not/could not reasonably have known; did not knowingly take part	amount determined by the court to be reasonable	10 days
Kansas	60-4102	The state bears the burden of proving that an exemption claimed under this section is not applicable	Did not/could not have reasonably known	amount equal to the full fair market value of the property as determined by the plaintiff's attorney	Not specified
Kentucky	218A.410 218A4.15	The Commonwealth - probable cause; The respondent - preponderance of the evidence	Knowledge or consent of the owner.	Property not subject to replevin	Not specified
Louisiana	RS 40:2606-15	State – probable cause; Respondent – preponderance of the evidence	legally accountable; consent; and did not know and could not reasonably have known of the conduct or that it was likely to occur	No provisions	30 days
Maine	Title 15, Part 7, Chapter 517	Preponderance of the evidence	knowledge or consent	No provisions	None specified
Maryland	§ 12-102.	owner establishes by a preponderance of the evidence	committed without the owner's actual knowledge	not repleviable	None specified
Massachusetts	Chapter 94C – Sect 47	State - existence of probable cause; claimant shall then have the burden of proving that the property is not forfeitable	knew or should have known	Property not subject to replevin	None specified
Michigan	Section 333.7522	On the state	Knowledge or consent	10% of the value, but not less than \$250.00 or greater than \$5,000.00	20 days
Minnesota	609.5317	clear and convincing evidence	landlord made every reasonable attempt to evict a tenant or to assign the county attorney the right to bring an eviction action against the tenant	amount equal to the retail value of the seized property	None specified
Mississippi	41-29-179(2)	Preponderance of the evidence	None specified	No provisions	30 days
Missouri	513.607	The burden of proof will be on the investigative agency to prove all allegations contained in the petition	actual knowledge	amount of the property's value	None
Montana	45-9-206	Not specified	act or omission was the owner's or was with the owner's express consent.	None specified	

Nebraska	Section 28-431	the claimant proves by a preponderance of the evidence	at no time had any knowledge	Property not subject to replevin	30 days
Nevada	NRS 453.301		Rental property is subject to forfeiture unless tenant – if convicted – is evicted.	No provisions	None specified
New Hampshire	Section 318-B:17-b	preponderance of the evidence	owner or owners thereof were consenting parties	No provisions	None specified
New Jersey	2C:64-1	owner of the property establishes by a preponderance of the evidence	was not involved in or aware; done all that could reasonably be expected	equal to the market value	90 days
New Mexico	Article 27	State must prove by clear and convincing evidence	Owner must be charged with a crime	No provisions	30 days
New York	CVP 13-A	clear and convincing evidence	Knowingly benefited; voluntarily agree to such use;	No provisions	None specified
North Carolina	§ 75D-1	Not specified	actual or constructive knowledge that the property was subject to forfeiture	double the amount of the property's value	Not specified
North Dakota	29-31.1-01.	For purposes of this subdivision, property does not include a residence or other real estate where a coowner, whether by joint tenancy, tenancy in common, or tenancy by the entireties, of the residence or other real estate, has not been convicted of the criminal offense that was facilitated by the use or intended use of the property.			
Ohio	2925.42	Property owner must be convicted on felony drug charges			
Oklahoma	Statute Section 47-1505	preponderance of the evidence	did not know, and did not have reason to know	Property not subject to replevin	60 days
Oregon	Chapter 475A	Not specified	knew and failed to take reasonable action under the circumstances to terminate the prohibited conduct or prevent use of the seized property to facilitate the prohibited conduct	10 percent of the value of the interest claimed by the person in the property	15 days
Pennsylvania	§ 6801	the burden shall be upon the claimant	knowledge or consent	not be subject to replevin	30 days
Rhode Island	SECTION 21-28-5.04	the burden of pleading and proof of any exemption or exception shall be upon the person claiming its benefit	knowledge, actual or constructive; a consenting party to the alleged illegal act	No provisions	Not specified
South Carolina	SECTION 44-53-520	burden of proof of any such exemption or exception shall be upon the person claiming its benefit	consent to, were not privy to, or did not have knowledge of the use of the property	Seized property not subject to replevin	Not specified
South Dakota	34-20B-70.1.	preponderance of the evidence	actual knowledge	Seized property not subject to replevin	Not specified
Tennessee	Chapter 33	Only specified that burden is on the state	and consented to such use; were co-conspirators	twenty-five thousand dollars (\$25,000)	30 days

Texas	Code of Criminal Procedure - Chapter 59	a preponderance of the evidence	knew or reasonably should have known	equal to the appraised value of the property	None specified
Utah	24-1-06	clear and convincing evidence	is criminally responsible; knew of, and allowed the property to be used; reasonable action taken to prohibit the illegal use	No provisions	30 days
Vermont	§ 4244.	The state shall have the burden of proving all material facts by clear and convincing evidence	knowledge or reason to believe that the property was being or would be used in violation of the law	No provisions	None specified
Virginia	Title 19.2, Chapter 22.1	a preponderance of the evidence	did not know or have reason to know of the tenant's conduct.	amount equal to the appraised value of the property plus court costs	30 days
Washington	RCW 69.50.505	a preponderance of the evidence	without the owner's knowledge or consent	No provisions	90 days
Washington, DC	DC ST § 48-905.02	Not specified	without the knowledge and consent of the owner	\$2,500 or 10% of the fair market value of the claimed property	30 days
West Virginia	§60A-7-703	a preponderance of the evidence	without his or her knowledge or consent	not be subject to replevin	30 days
Wisconsin	961.555	a reasonable certainty by the greater weight of the credible evidence; The burden of proof of any exemption or exception is upon the person claiming it.	None specified	shall not be subject to replevin,	Not specified
Wyoming	35-7-1049	The burden of proof of any exemption or exception is upon the person claiming it	has knowledge of or gives consent	Seized property not repleviable	Not specified