

Asset Forfeiture



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Introduction

The practice of civil and criminal asset forfeiture is utilized in some capacity in nearly every state. To put it simply, forfeiture consists of the seizure and subsequent use or sale of assets utilized or acquired during a crime. Frequently, the proceeds are used for restitution for victims or to recoup costs for the agencies tasked with apprehending and handling the defendant. The practice has been used for several years in South Dakota, but has come under scrutiny across the United States in recent years.

The History of Asset Forfeiture in South Dakota Law

There are two types of asset forfeiture used in South Dakota—criminal and civil.

For criminal forfeiture, assets may only be seized from defendants subsequent to certain criminal convictions. This is currently used for crimes such as child pornography, sexual assault, and pimping. Criminal forfeiture for crimes related to child pornography was created in 2002 in SDCL chapter 22-24 with changes occurring several times throughout the 2000s. Criminal forfeiture for crimes related to pimping was added in 2015.

For civil forfeiture, an owner does not need to be charged with a crime to have assets seized. Law enforcement need only prove they had a reasonable basis for believing a crime was committed. This type of forfeiture is currently used for drug asset forfeitures. Civil forfeiture laws came to fruition in South Dakota in 1970 with the creation of civil forfeiture in SDCL 34-20B-70 for drug-related crimes. The original statute went through a variety of changes in the 1970s and 1980s with the most recent change coming in 2016. Bills attempting to expand the practice of civil forfeiture to vehicles used in felony-offense DUIs have been proposed several times throughout the last decade, but failed to become law.

The statutory procedure for both civil and criminal forfeiture was combined into SDCL chapter 23A-49 in 2016. The procedure remains the same for both types of asset forfeiture, either prior to or post-conviction.

Current Procedures Regarding Asset Forfeiture

There are many aspects to asset forfeiture in South Dakota. A person may forfeit products, materials, containers, or equipment used in manufacturing, storing, or distributing controlled substances or marijuana. A person may also forfeit any vehicles or conveyances used to transport controlled substances or marijuana and any books, records, money, or any other assets acquired or used in the sale or purchase of controlled substances or marijuana. Less frequently, real property such as land or real estate may also be forfeited. To forfeit any of the aforementioned, law enforcement must first have probable cause that the property in question was directly related to the illegal activity in order to seize it.

Law enforcement may seize the property but for the state to keep the property it must follow certain procedures depending on the type of property being forfeited. For property other than vehicles or real property, the attorney general must file a summons and complaint in circuit court, describe the property, the state of the property's location, the property's current custodian, the name of each owner if known, the name of each party in interest, and allege the essential elements of the claimed violation. If a third person has a perfected security interest in forfeited real property or a vehicle the attorney general must, within 60 days, return the property to the secured party, satisfy any indebtedness the secured party has on the forfeited property, or return the forfeited property to the secured party and require the secured party to sell the property. Notice must be given to each owner listed, and the process is governed by the civil proceedings of SDCL chapter 15-6. The owner of the seized property must file an answer to the court and may request a trial by jury.

At any trial to forfeit property, the state must first establish there was probable cause to seize the property and institute the forfeiture action. A court will generally find probable cause when the state can prove that there was

a reasonable basis for believing that a crime was committed and the property was connected to the crime. It is then up to the the owner or claimant to prove that the property seized is not subject to forfeiture under South Dakota law. For the court to order the forfeiture of the property, the state must then show that the property is more likely than not involved with the crime by a preponderance of the evidence, the lowest burden of proof in a court of law. In comparison, a criminal conviction generally requires the burden of proof of "beyond a reasonable doubt," or that no other logical explanation can be derived from the facts of the case, except that the defendant committed the crime. South Dakota does not require a criminal conviction to forfeit property. This means that the state has a low hurdle in connecting the property to the alleged crime and an owner must prove his or her innocence by showing that the property was not connected to the alleged crime.

Property is not subject to forfeiture if the illegal act or omission was without the true owner's knowledge or consent. A person who wishes to assert innocence must prove he or she was not involved in and had no knowledge of the alleged crime in any way. This is extremely difficult to prove and creates a very high hurdle for innocent owners to jump over. Additionally, the property of a crime victim involved in asset forfeiture, such as stalking, child pornography, or other sexual offenses, is immune from forfeiture.

Revenue Derived from Asset Forfeiture

If the owner or interested party is not able to refute the allegations, the property is forfeited. Once the property is forfeited the attorney general may allow use or sale of the property by the state. The money gained from forfeited property may be returned to the seizing entity to reimburse the costs for the forfeiture and sale, placed into the general fund, paid to the victims of the crime, or placed into the South Dakota internet crimes against children fund, depending on the crime.¹

The Attorney General tracks and issues quarterly reports of assets seized. The amounts seized vary by year. Below is an example of seizures from Lawrence County, from January 1, 2014 to March 31, 2014.

County		Vehicles	Currency	Misc.
Lawrence				
\$801 (Anderson) (T - 41794)	Default		\$801.00	
\$19,751 (Schwartz) (MBM - 40078)	Forfeited		\$19,751.00	
\$5,925 (Sternhagen) (MBM - 40139)	Forfeited partial		\$3,425.00	
2008 Harley Davidson (Hacker-Brumley) (JT - 40797)	Summary Judgment *auction	*\$11,900.00		
2013 GMC Sierra Denali Pickup (O'Brien) (JT - 40893)	Buy back	\$200.00		
1999 Black Harley Davidson FXSTB (Renwick) (JT - 40882)	Forfeited *Auction	*\$5,300.00		
\$550 (Katon, Almeida, Hobbs, Landreth, Rutter) (T - 41504)	Defaulted		\$550.00	

¹ In November 2016, the voters of South Dakota passed Constitutional Amendment S, also known as Marcy's Law. Subdivision 14 of Marcy's Law gives victims of crime the right to, "full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal conduct and as provided by law for all losses suffered as a result of delinquent conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government." This change in the constitution is likely to have a substantial impact on how the revenues from asset forfeiture are distributed, shifting a bulk of the revenues from law enforcement to crime victims.



During that quarter, \$105,475 worth of vehicles and \$169,365 in cash was seized across the state. If an owner or interested party does not answer the summons and complaint, the court will issue a default judgment ordering the property to be disposed as requested in the complaint. Property may otherwise be determined forfeited, partially forfeited, or bought back by the original owner. Law enforcement agencies in South Dakota are allowed to keep up to one hundred percent of revenue from forfeiture. Some sources estimate that the amount of revenue in the state is approximately one million dollars per year. However, the precise amount of revenue from forfeiture is unknown due to the lack of a reporting requirement.

Federal Asset Forfeiture

Asset forfeiture also exists on a federal level. South Dakota participates in the federal equitable sharing program. This allows for the state and federal officials to work together and seize property under both state and federal law, and split forfeiture proceeds based on the percentage of the work completed by each agency. This amount varies but does not generally constitute a large percentage of forfeited funds in South Dakota. The state received a little more than one million dollars from federal equitable sharing between the years of 2000 and 2013. South Dakota ranks last in the nation for federal equitable sharing utilization.

Asset Forfeiture in Other States

Asset forfeiture laws vary greatly by state regarding the government's required level of proof, who has the burden of proof for proving or disproving innocence, reporting requirements, and where proceeds of forfeiture are distributed.

Of the surrounding six states three; Minnesota, Montana, and Nebraska, require the state to show a higher burden of proof than South Dakota. The three states require a criminal conviction before any property can be forfeited to the state. This means the state has the burden to prove beyond a reasonable doubt that a crime was committed and to prove beyond a reasonable doubt that the property was connected to the crime. In Nebraska, however, there is an exception; gambling crimes only require a preponderance of the evidence that the property was connected to the crime for asset forfeiture. In Minnesota and Montana, once the state receives a criminal conviction, the state must prove the assets were tied directly to the crime by clear and convincing evidence. Clear and convincing evidence is a more rigorous standard than preponderance of the evidence but is less rigorous than proof beyond a reasonable doubt. Clear and convincing evidence means that a fact is substantially more likely than not to be true. Of the remaining states, Iowa and Wyoming require the same burden of proof as South Dakota, a preponderance of the evidence. Only one state requires a lower burden than South Dakota, and that is North Dakota. North Dakota only requires the state have probable cause to seize the property, and that is enough to forfeit the property.

Once a state has proven its burden, all but one of the surrounding states require an innocent owner to prove his or her innocence for the owner's property to not be subject to forfeiture. South Dakota is no exception. Only Montana places the burden on the state of disproving an innocent owner's claim.

Iowa and Wyoming are the only surrounding states that allow for one hundred percent of forfeiture revenues to go back to law enforcement agencies. This is the same in South Dakota. When law enforcement agencies are the ones seizing the property and the ones who benefit one hundred percent from those proceeds, it can potentially be seen as an incentive to seize property to increase department budgets. Montana and North Dakota agencies receive one hundred percent of revenues up to a certain dollar amount. Montana receives up to one hundred twenty-five thousand dollars, and any amount above that is split equally between the state forfeiture fund and the state general fund. North Dakota receives one hundred percent up to two hundred thousand dollars, and any excess goes to the state general fund. In Minnesota, law enforcement receives ninety percent of revenues from



forfeiture and remaining revenue goes into the state general fund. However, in human trafficking cases, law enforcement receives sixty percent of revenues, and the remaining forty percent goes to victims' services organizations. Finally, Nebraska receives the lowest percentage of forfeiture revenues at fifty percent. The remaining fifty percent is required to go to "the common schools" according to Nebraska's constitution.

Finally, only one state has a reporting requirement. Minnesota requires law enforcement agencies to report forfeitures to the state auditor on a monthly basis. The state auditor is then required to make a report of the forfeitures annually to the Legislature. Iowa, Montana, Nebraska, North Dakota, and Wyoming are all like South Dakota and do not require agencies to report forfeitures. Below is a summary of asset forfeiture in South Dakota, the surrounding states, and the federal government.

State	Government Standard of Proof	Burden of Innocence	Reporting Requirements	% of Revenue to Law Enforcement
Iowa	Preponderance of the Evidence	Owner	None	100%
Minnesota	Criminal Conviction and Clear and Convincing Evidence	Owner	Agency reports to state auditor on monthly basis, and state auditor reports to Legislature annually.	90%, except in cases of human trafficking then 60%
Montana	Criminal Conviction and Clear and Convincing Evidence	State has burden to disprove claim of innocence	None	100% of up to \$125,000
Nebraska	Criminal Conviction and Beyond a Reasonable Doubt or Preponderance of the Evidence	Owner	None	50%
North Dakota	Probable Cause	Owner	None	100% up to \$200,000
South Dakota	Preponderance of the Evidence	Owner	None	100%
Wyoming	Preponderance of the Evidence	Owner	None	100%
Federal Government	Preponderance of the Evidence	Owner	Annual Forfeiture Reports	100%

New Mexico's asset forfeiture laws are considered some of the strictest in the country. Every asset forfeiture requires a criminal conviction. The state must tie the evidence to the crime by clear and convincing evidence. Furthermore, the state bears the burden of disproving any innocent owner claims, instead of the innocent owner bearing the burden of proving their innocence, as is the case in South Dakota. Money from the forfeitures goes into the state's general fund with no money from the forfeitures returning to the law enforcement agencies. Similarly, Missouri also requires a criminal conviction prior to forfeiture. However, once forfeited, the state only needs to prove a connection to the crime by a preponderance of the evidence. No money returns to the law enforcement agency—all funds are directed towards education. Both New Mexico and Missouri have higher standards and requirements to forfeit property than South Dakota.

Recent National Changes in Asset Forfeiture

The Institute for Justice released a comprehensive report on asset forfeiture across the country in 2010, causing several states to re-evaluate their asset forfeiture laws. Fourteen states and Congress attempted reform laws in 2013, 2014, and 2015. To date, at least five states have substantially reformed their asset forfeiture laws including: New Mexico, Nevada, Montana, Minnesota, and Michigan. Often, a state will shift from civil to criminal forfeiture



when working to reform the laws and redirect the revenue gained from forfeiture to entities or programs other than law enforcement. In late 2014, *The Washington Post* investigated federal asset forfeiture laws, causing a change in the Department of Justice's equitable sharing policies as well.

In 2015, the Wyoming Legislature attempted to pass legislation that would have required a felony conviction with a sentence of a year or more in order to forfeit property. The legislation passed both houses but was vetoed by the Governor.

There have been many lawsuits in the area of asset forfeiture throughout the country. In 2012, a class action lawsuit was brought against the city of Tenaha, Texas, for racial profiling and abuse of asset forfeiture. From 2006 to 2008, it was the alleged practice that local law enforcement would target, stop, detain, search, and seize property from non-white citizens or those traveling with non-white citizens. During that time approximately \$3 million worth of assets were seized. The city eventually settled with the plaintiffs. Additional lawsuits have been brought against authorities in New Mexico, Arizona, Indiana, New York, and several other states. In 2016, the United States Supreme Court ruled in *Luis v. United States* that it was unconstitutional to freeze substitute assets prior to conviction. Prior to the case, certain states allowed authorities to freeze "untainted" assets of the accused, to protect the assets for the government's subsequent forfeiture after a conviction. This opinion caused a change in those policies.

Conclusion

While South Dakota has the lowest federal equitable sharing participation in the country, it has still been criticized for its civil forfeiture laws. First, there is a very low bar of proof required for law enforcement to seize and forfeit property. Second, an owner must prove their innocence in order to have their property returned, even when they have not been convicted of a crime. Finally, the current law may be perceived to encourage seizure, as 100% of revenues go to law enforcement and there are no reporting requirements.

Prior to 2010, asset forfeiture was a largely unknown practice. However, in the last six years, several reports and investigations have brought the practice into the limelight. Overall, reform has been slow but steady with the future of asset forfeiture trending toward shifting from civil forfeiture to criminal forfeiture, increasing the burden of proof required of the state, and directing forfeiture revenue toward agencies other than law enforcement.

This issue memorandum was written by Roxanne Hammond, Senior Legislative Attorney, and Jessica LaMie, Research Analyst, on 10/25/2016 for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.

