



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2017 Wisconsin Act 211
[2017 Senate Bill 61]

Asset Forfeiture

2017 Wisconsin Act 211 relates to the forfeiture of property seized in relation to a crime.

The Act makes various changes to two forfeiture statutes: (1) the forfeiture statutes under the Controlled Substances Act, which govern the forfeiture of property seized in connection with a drug-related crime; and (2) the forfeiture statutes under the criminal sentencing laws, which relate to property seized in relation to other (non-drug-related) crimes. Unless otherwise indicated, the provisions described below apply to both of those statutes.

Very generally, state law provides that all property, real or personal, including money, is subject to forfeiture if it was used in the course of, intended for use in the course of, or directly or indirectly derived from or realized through the commission of a crime.

Under prior law, a drug-related forfeiture action could be brought independently from the criminal case, as a civil forfeiture action, while a non-drug-related forfeiture action could be brought either independently as a civil forfeiture or as a criminal forfeiture action in a criminal prosecution. Under the Act, both drug- and non-drug-related forfeiture actions may be commenced by alleging the extent of property subject to the forfeiture either as part of a criminal prosecution or as a civil forfeiture action that is independent from a criminal case.

CRIMINAL CHARGE REQUIREMENT

The Act requires that a charge concerning a crime that was the basis for a seizure of property be issued within six months after the seizure. An unlimited number of extensions may be granted, if, for each extension, a court determines that probable cause is shown and additional time is warranted.

The Act requires a court to order the return of any property if no charges have been issued within six months after a seizure of property or when an extension has not been granted.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.wisconsin.gov>.

CRIMINAL CONVICTION REQUIREMENT

The Act prohibits a judgment in a forfeiture action from being entered unless a person is convicted of the criminal offense that was the basis for the seizure of the property or is convicted of an offense that is related to the forfeiture action. In a civil forfeiture action, the proceedings must be adjourned until after the defendant is convicted. In a criminal forfeiture action, a forfeiture judgment may be entered along with the criminal conviction.

A court may waive the conviction requirement if the prosecuting attorney shows by clear and convincing evidence that any of the following applies:

- The defendant has died.
- The defendant was deported.
- The defendant has been granted immunity in exchange for testifying or otherwise assisting a law enforcement investigation or prosecution.
- The defendant has fled the jurisdiction.
- The property has been unclaimed for a period of at least nine months.
- In a drug-related crime, the property is a particular drug or plant that is identified as contraband and is subject to seizure and summary forfeiture.

The Act requires a court to order the return of any property in a forfeiture action within 30 days of an acquittal or dismissal of the charge that was the basis of the forfeiture action. If property is co-owned by two or more defendants, and one or more defendant co-owners is acquitted or the charges are dismissed against the person, the court has discretion to dispose of the co-owned property in accordance with the proportionality guidelines described below as the court deems appropriate.

RETURN OF PROPERTY PENDING FINAL JUDGMENT

The Act revises the provisions for a person whose property has been seized to apply for use of the property while the forfeiture action is pending, and expressly states that a person has a right to a hearing under those provisions. The Act does not revise the separate procedures that apply to a seized firearm.

For procedural timelines, if an initial appearance is scheduled after arrest, the Act requires a person to apply for return of seized property within 120 days of the initial appearance. Also, a hearing on the application must be held within 30 days after the motion is filed, except that either party may, by agreement or for good cause, move the court for one extension of up to 10 days.

The Act modifies prior law to specify that a court must order the return of the property after a hearing if any of the following applies:

- It is likely that the final judgment will order the return of the property and the property is not reasonably needed as evidence or for other investigatory reasons, or, if needed, satisfactory arrangements can be made for its return for subsequent use.

- The property or a portion of the property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, the property is not likely to be needed for victim compensation, restitution, or fines, and the property is not reasonably needed as evidence or for other investigatory reasons.
- All proceedings and investigations in which the property might be required have been completed.

The Act requires that if property is returned after a hearing, the court must order the person not to sell, transfer, assign, or otherwise encumber the property until the final judgment in the forfeiture action. If the property is returned to pay for legal representation, the court may require an accounting. Also, if the person is subsequently convicted or found to have committed the offense, the court must order the person to surrender the returned property for completion of the forfeiture action.

INNOCENT OWNER

The Act consolidates and revises the protections for an innocent owner of seized property and expressly states that the property of an innocent owner may not be forfeited.

In particular, the Act specifies that a person who claims to be an innocent owner of seized property may petition the court at any time for the return of the property, including during the time that a civil forfeiture action is adjourned while a conviction is pursued. The person must first prove by clear and convincing evidence that he or she has a legal right, title, or interest in the seized property.

To then prove that a person is not an “innocent” owner, the prosecutor must prove by clear and convincing evidence that the person had actual or constructive knowledge of the underlying crime that was the basis for the forfeiture action. If the person acquired the property interest after the occurrence of the crime that was the basis for the forfeiture action, the prosecutor must prove either that the person had actual or constructive knowledge that the property was subject to forfeiture or that the person was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

If the prosecutor fails to prove that the person is not an innocent owner, the court must find that the property is the property of an innocent owner and is not subject to forfeiture. The Act does not revise the standards and procedures that apply to an injured or innocent person who may petition a court for relief from a judgment in a criminal forfeiture action.

BURDEN OF PROOF AND SELF-INCRIMINATION

The Act revises the prosecutor’s burden of proof that property is subject to forfeiture to the clear and convincing evidence standard.

The Act also specifies that a defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture stage of a prosecution, but specifies that the trier of fact at the hearing may draw an adverse inference from the invocation of the right or privilege.

PROPORTIONALITY GUIDELINES

The Act creates statutory guidelines for a court's determination as to whether a forfeiture is excessive. The guidelines are similar to the factors articulated by the U.S. Supreme Court in *U.S. v. Bajakajian*, 524 U.S. 321 (1998), to determine whether a forfeiture constitutes an excessive fine under the Eighth Amendment to the U.S. Constitution.

The Act specifies that a person may allege that a forfeiture is grossly disproportional to the crime for which the property was seized or is unconstitutionally excessive under the State or Federal Constitution. A person making the allegation has the burden of satisfying or convincing the court to a reasonable certainty by the greater weight of the credible evidence that the forfeiture is grossly disproportional or unconstitutionally excessive.

In determining whether a forfeiture is grossly disproportional or unconstitutionally excessive, a court must consider the following factors:

- The seriousness of the offense.
- The purpose of the statute authorizing the forfeiture.
- The maximum fine for the offense.
- The harm that actually resulted from the defendant's conduct.

A court cannot consider the value of the property to the state.

If a court finds that a forfeiture is grossly disproportional to the crime for which the property was seized or that the forfeiture is unconstitutionally excessive under the state or federal constitution, a court cannot order the forfeiture of property.

ATTORNEY FEES

The Act creates an attorney fee shifting provision for an arbitrary and capricious forfeiture action. Specifically, the Act provides that reasonable attorney fees may be awarded to a person who prevails in an action to return property subject to forfeiture if a court finds that the agency or prosecuting attorney has arbitrarily and capriciously pursued the forfeiture action.

DISPOSITION OF FORFEITED PROPERTY

The Act revises the options for a law enforcement agency to dispose of property when a judgment of forfeiture is granted.

Under the Act, for both drug- and non-drug-related crimes, a law enforcement agency must sell any forfeited property, other than vehicles or money. When the agency sells the property, it may retain up to 50% of the proceeds for its publicly reported actual forfeiture expenses, and must deposit the balance in the state school fund.

If the property is a vehicle, an agency may choose to retain the vehicle for official use, for a period up to one year. By the end of the year, the agency must again choose to either sell or keep the vehicle. If the agency then sells the vehicle, the proceeds may be partially retained in the same manner as any other sale of property. If the agency chooses to retain the vehicle after

the first year, it must deposit 30% of its value in the school fund, and is responsible for depositing proceeds from any future sale that exceed that amount in the fund.

If the property is money, and the underlying charge is a drug-related crime, an agency may retain up to 50% for its publicly reported actual forfeiture expenses. For a non-drug-related crime, an agency must deposit 100% in the state school fund.

FEDERAL FORFEITURE PROCEEDINGS

The Act creates specific requirements that apply when a state or local law enforcement agency refers seized property to a federal agency as part of a federal enforcement action. First, for all such referrals, the agency must produce an itemized report of actual forfeiture expenses and submit the report to the Department of Administration for availability on the department's website.

Second, in order to receive proceeds from the property, the Act requires a federal or state criminal conviction for the crime that was the basis for the seizure. If there is a conviction, a state or local law enforcement agency may accept all proceeds from property that is referred to a federal agency.

If there is no federal or state conviction, the agency may accept proceeds from property that is referred to a federal agency only if the defendant has died, been deported, been granted immunity in exchange for testifying or other assistance, has fled the jurisdiction, or the property has been unclaimed for at least nine months.

Effective date: April 5, 2018. The Act applies to property that is seized on or after that date.

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