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## FORFEITURE REFORM ACT

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# Forfeiture Reform Act

## I. Introduction

### A. Purpose

The purpose of this Legislative Guide is to provide a general overview of Iowa's civil forfeiture law, the Forfeiture Reform Act, codified in Iowa Code chapter 809A. Unless otherwise noted, Iowa Code references in this Legislative Guide are to the 2016 Iowa Code.

### B. Overview of a Civil Forfeiture Action

Civil forfeiture is a legal proceeding whereby a person's property may be forfeited to the state if the state can demonstrate that the property was more likely than not used to facilitate a crime or was furnished in an exchange that is a crime.<sup>1</sup> A civil forfeiture proceeding is independent of any criminal prosecution for the same conduct, and therefore property may be forfeited even if criminal charges are not brought or if the criminal case ends in an acquittal.<sup>2</sup> Currently, 49 states and the federal government have civil forfeiture laws.

The civil forfeiture process begins when property is seized for forfeiture. Seizing property for forfeiture usually requires a peace officer to obtain a seizure warrant from a court, but property may be seized without a seizure warrant if exigent circumstances exist.<sup>3</sup> In either case, the seizure must be supported by probable cause that the property is subject to forfeiture.<sup>4</sup>

For seized property to be forfeited, the state must show, by a preponderance of the evidence, that the property is subject to forfeiture.<sup>5</sup> Generally, this requires that the prosecuting attorney show that the property was more likely than not used in, furnished in, or the proceeds of a sufficiently serious crime.<sup>6</sup> A "prosecuting attorney" is an attorney who is authorized by law to appear on the behalf of the state in a criminal case, and includes the attorney general, an assistant attorney general, the county attorney, an assistant county attorney, or a special or substitute prosecutor whose appearance is approved by a court having jurisdiction to try a defendant for the offense with which the defendant is charged.<sup>7</sup> The prosecuting attorney is authorized, before the commencement of a forfeiture proceeding, to subpoena witnesses, compel their attendance, examine them under oath, and require the production of documentary evidence for inspection, reproduction, or copying.<sup>8</sup>

If the prosecuting attorney shows that the property is subject to forfeiture by a preponderance of the evidence, then the property will be forfeited to the state unless one of

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<sup>1</sup> Iowa Code §§809A.3, 809A.4, 809A.13(7).

<sup>2</sup> Iowa Code §809A.12(14).

<sup>3</sup> Iowa Code §809A.6.

<sup>4</sup> Iowa Code §809A.6(1), (2).

<sup>5</sup> Iowa Code §809A.13(7).

<sup>6</sup> Iowa Code §809A.4.

<sup>7</sup> Iowa Code §809A.1(6).

<sup>8</sup> Iowa Code §809A.18(1).



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three exemptions applies. The exemptions are (1) if the property owner obtained the interest in the property prior to or during the illegal activity without knowledge or reason to know of the illegal activity or its likelihood of occurrence; (2) if the property owner obtained the interest prior to or during the illegal activity and took reasonable steps to prevent the offense; and (3) if the property owner acquired the property after the conduct giving rise to forfeiture, in good faith and for value, and did not knowingly take part in an illegal transaction.<sup>9</sup> For an exemption to prevent forfeiture, the property owner claiming the exemption has the burden to prove the exemption by a preponderance of the evidence.<sup>10</sup>

If a court orders the property to be forfeited, the property or the proceeds therefrom are generally distributed among the seizing agency, other law enforcement agencies and county attorneys, and the Iowa Department of Justice.<sup>11</sup>

## C. Background and History of the Forfeiture Reform Act

The Forfeiture Reform Act was enacted by the Iowa General Assembly in 1996 and is codified as Iowa Code chapter 809A. The Forfeiture Reform Act is based on a model act written by the President's Commission on Model State Drug Laws. The commission was a bipartisan task force appointed in 1992 by President George H. W. Bush.<sup>12</sup> The commission was comprised of state legislators, treatment service providers, police chiefs, state attorneys general, a housing specialist, district attorneys, a state judge, attorneys, and other experts.<sup>13</sup> As a model, the commission used the Model Asset Seizure and Forfeiture Act, which was promulgated in 1991 and was the product of a task force of prosecutors representing the National District Attorneys Association, National Association of Attorneys General, and the United States Department of Justice.<sup>14</sup>

In December 1993, the commission published 44 model state drug laws, including the Commission Forfeiture Reform Act.<sup>15</sup> The commission stated that it believed that criminal sanctions alone were ineffective in fighting an increasingly sophisticated drug trade,<sup>16</sup> and five of the 44 model laws it published, including the Forfeiture Reform Act, were intended to provide economic remedies to fight the drug industry.<sup>17</sup>

## II. Scope of the Forfeiture Reform Act

The scope of the Forfeiture Reform Act is defined by two concepts. The first is what kind of act or omission can lead to forfeiture, because in nearly all cases the law prohibits property from being subject to forfeiture unless the state can prove certain criminal acts were committed.<sup>18</sup> The second is what property is subject to forfeiture. Only certain property is subject to forfeiture, and often the state must show a causal connection

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<sup>9</sup> Iowa Code §809A.5.

<sup>10</sup> Iowa Code §809A.13(7).

<sup>11</sup> Iowa Code §809A.17(5)(e).

<sup>12</sup> President's Commission on Model State Drug Laws, Executive Summary, at 2 (1993).

<sup>13</sup> Id.

<sup>14</sup> President's Commission on Model State Drug Laws, Commission Forfeiture Reform Act, at A-12 (1993).

<sup>15</sup> President's Commission on Model State Drug Laws, Executive Summary, at 7.

<sup>16</sup> President's Commission on Model State Drug Laws, Commission Forfeiture Reform Act, at A-11.

<sup>17</sup> President's Commission on Model State Drug Laws, Executive Summary, at 8.

<sup>18</sup> Iowa Code §§809A.3, 809A.21.



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between the property and the conduct.<sup>19</sup> Moreover, even if property appears to be subject to forfeiture, an exemption to forfeiture may apply for some or all of the property.<sup>20</sup>

### A. Conduct Giving Rise to Forfeiture

The state may only subject a person's property to forfeiture, with the exception of property that is a controlled substance, which is summarily forfeited,<sup>21</sup> if the prosecuting attorney is able to show that the property is related to "conduct giving rise to forfeiture."<sup>22</sup> The property owner need not be the person who committed the conduct giving rise to forfeiture, though an innocent owner may be exempt from forfeiture.<sup>23</sup> Conduct giving rise to forfeiture can occur within or outside of the State of Iowa.<sup>24</sup>

**Categories of Acts or Omissions.** The Forfeiture Reform Act defines conduct giving rise to forfeiture as an act or omission which is a serious or aggravated misdemeanor or felony in Iowa or an act or omission outside of Iowa which would be punishable by one year or more in prison in the other state and would be a serious or aggravated misdemeanor or felony if it occurred in Iowa.<sup>25</sup> Conduct that is a simple misdemeanor or a scheduled violation therefore does not give rise to forfeiture. A minor's conduct, even if the minor is prosecuted in juvenile court, is still conduct giving rise to forfeiture if the conduct is an act or omission which would be prosecuted as a serious or aggravated misdemeanor or felony if committed by an adult.<sup>26</sup>

**Exceptions.** However, violations of the Iowa Code chapters pertaining to motor vehicles<sup>27</sup> and operating while intoxicated<sup>28</sup> do not give rise to forfeiture, even if the offense is a serious or aggravated misdemeanor or a felony, with the following exceptions: (1) a speed detection jamming device can be forfeited if such a device was sold, operated, or possessed; (2) a second or subsequent violation of driving with a suspended or revoked license due to an operating while intoxicated conviction can result in the forfeiture of the vehicle; and (3) the operation of a motor vehicle in violation of an order of impoundment or immobilization can result in the forfeiture of the vehicle.<sup>29</sup>

**Criminal Proceeding Not Required — Burden of Proof.** Whether an act or omission is conduct giving rise to forfeiture does not depend on whether a person is arrested, prosecuted, or convicted for the act or omission, and an acquittal or dismissal in a criminal proceeding does not preclude forfeiture of property.<sup>30</sup> That the same act or omission may give rise to civil forfeiture but fail to result in a criminal conviction results from

<sup>19</sup> Iowa Code §809A.4.

<sup>20</sup> Iowa Code §809A.5.

<sup>21</sup> Iowa Code §809A.21.

<sup>22</sup> Iowa Code §809A.4.

<sup>23</sup> Iowa Code §809A.5.

<sup>24</sup> Iowa Code §809A.4.

<sup>25</sup> Iowa Code §809A.3(1).

<sup>26</sup> In re Property Seized from Terrell, 639 N.W.2d 18, 20 (Iowa 2002).

<sup>27</sup> Iowa Code ch. 321.

<sup>28</sup> Iowa Code ch. 321J.

<sup>29</sup> Iowa Code §809A.3(2).

<sup>30</sup> Iowa Code §809A.12(14).



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the lower standard of proof the Forfeiture Reform Act imposes on the state as compared to the state's burden of proof in criminal trials. Under the Forfeiture Reform Act, the state must prove that property other than controlled substances is subject to forfeiture, which includes a showing that there was conduct giving rise to forfeiture, by a preponderance of the evidence.<sup>31</sup> A preponderance of the evidence means more likely than not, or that there is a 51 percent or greater probability the act or omission of a person is a serious or aggravated misdemeanor or a felony.<sup>32</sup> By contrast, under Iowa's criminal code, the state must prove a person's guilt beyond a reasonable doubt.<sup>33</sup> This is a significantly higher standard than the preponderance standard. As a result, in cases where a prosecuting attorney has enough evidence to satisfy the preponderance standard but not the beyond-a-reasonable-doubt standard, the person's conduct gives rise to forfeiture but does not result in criminal liability.

## B. Property Subject to Forfeiture

Under the Forfeiture Reform Act, the prosecuting attorney must show by a preponderance of the evidence that the property the seizing agency seeks to have forfeited is "property subject to forfeiture."<sup>34</sup> There are five types of property that are subject to forfeiture: (1) controlled substances, (2) real and personal property, (3) proceeds, (4) weapons, and (5) enterprise interests. In addition, in some circumstances substitute assets may be subject to forfeiture.<sup>35</sup>

### 1. Controlled Substances

Controlled substances are subject to forfeiture. This includes all controlled substances,<sup>36</sup> raw materials, controlled substance analogs, counterfeit controlled substances, imitation controlled substances,<sup>37</sup> or precursor substances,<sup>38</sup> that have been manufactured, distributed, dispensed, possessed, or acquired in violation of Iowa law.<sup>39</sup> Controlled substances included in Iowa Code chapter 124 which are contraband and any controlled substance whose owners are unknown are summarily forfeited to the state, and therefore controlled substances are subject to forfeiture even without a showing of conduct giving rise to forfeiture.<sup>40</sup>

### 2. Real and Personal Property

All real and personal property, including the whole of any tract of land and any improvements to real property, is subject to forfeiture if either a person furnished or intended to furnish the property in an exchange that is conduct giving rise to forfeiture or if the property is used or intended to be used to facilitate conduct giving rise to forfeiture.

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<sup>31</sup> Iowa Code §809A.13(7).

<sup>32</sup> See Black's Law Dictionary, p. 556 (3rd pocket ed. 2006).

<sup>33</sup> Iowa Code §701.3.

<sup>34</sup> Iowa Code §809A.13(7).

<sup>35</sup> Iowa Code §809A.4.

<sup>36</sup> Iowa Code ch. 124.

<sup>37</sup> Iowa Code ch. 124A.

<sup>38</sup> Iowa Code ch. 124B.

<sup>39</sup> Iowa Code §809A.4(1).

<sup>40</sup> Iowa Code §809A.21.



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“Facilitate” means to have a substantial connection between the property and the conduct giving rise to forfeiture.<sup>41</sup> Real property subject to forfeiture includes homesteads.<sup>42</sup>

However, an exception to the forfeiture of property exists if the only conduct giving rise to forfeiture is the possession of a controlled substance.<sup>43</sup> In such a case, real property is not forfeitable, and personal property may only be forfeited in an *in personam* proceeding. The effect of being able to forfeit personal property only in an *in personam* proceeding is that property which is not owned by the person whose conduct gave rise to forfeiture is not subject to forfeiture. Instead, a judgment for the value of the property may be entered against the person whose conduct gave rise to forfeiture, and the judgment may be executed against substitute assets.<sup>44</sup>

## 3. Proceeds

Proceeds of conduct giving rise to forfeiture are forfeitable.<sup>45</sup> “Proceeds” means property acquired directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind without reduction for expenses incurred for acquisition, maintenance, production, or any other purpose.<sup>46</sup> For example, if a person makes money dealing drugs and buys a car, the car is forfeitable.<sup>47</sup> Because no reduction for expenses incurred is allowed, the forfeitable property is gross proceeds, not net proceeds.

## 4. Weapons

All weapons possessed, used, or available for use in any manner to facilitate conduct giving rise to forfeiture are forfeitable.<sup>48</sup> Because a weapon only need be available for use, the weapon does not need to have been brandished during the conduct giving rise to forfeiture for the weapon to be subject to forfeiture.

## 5. Enterprise Interests

Any interest or security in, claim against, or property or contractual right of any kind affording a source of control over any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct or through conduct giving rise to forfeiture is subject to forfeiture.<sup>49</sup>

## 6. Substitute Assets

Substitute assets are also subject to forfeiture.<sup>50</sup> Substitute assets are any property of a person up to the value of forfeitable property which is real or personal property, or

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<sup>41</sup> Iowa Code §809A.4(2), (7).

<sup>42</sup> Iowa Code §809A.4(2)(a).

<sup>43</sup> Iowa Code §809A.4(2)(b).

<sup>44</sup> Iowa Code §809A.15.

<sup>45</sup> Iowa Code §809A.4(3).

<sup>46</sup> Iowa Code §809A.1(4).

<sup>47</sup> *In re Property Seized from Boughton*, No. 13-0327, slip op. at 5 (Iowa App. Jan. 9, 2014).

<sup>48</sup> Iowa Code §809A.4(4).

<sup>49</sup> Iowa Code §809A.4(5).

<sup>50</sup> Iowa Code §809A.4(6).



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proceeds. Substitute assets may be used when there is an order of forfeiture and any of the following is true:

- The forfeitable property cannot be located.
- The forfeitable property has been transferred or conveyed to a third party.
- The forfeitable property is beyond the court's jurisdiction.
- The forfeitable property has been substantially diminished in value while not in the actual physical custody of the court or the seizing agency.
- The forfeitable property has been commingled with other property that cannot be divided without difficulty.
- The forfeitable property is subject to any interest of another person which is exempt from forfeiture.<sup>51</sup>

### C. Property Exemptions

The Forfeiture Reform Act provides exemptions which protect innocent and non-negligent owners and make otherwise forfeitable property exempt from forfeiture.<sup>52</sup> These are affirmative defenses a property owner can raise if the state meets its burden to show that the property is subject to forfeiture. If a property owner raises such a defense during the forfeiture proceeding, the burden of proof is on the property owner,<sup>53</sup> who must show that the exemption applies by a preponderance of the evidence.<sup>54</sup>

#### 1. Exemption for Interests Acquired Before or During Conduct

The first exemption is for interests in property acquired before or during the conduct giving rise to forfeiture. If the property owner obtained the interest in the property prior to or during the illegal activity without knowledge or reason to know of the illegal activity or its likelihood of occurrence, the property is exempt from forfeiture.<sup>55</sup> For example, if a person owns a car and lends it to someone who, unbeknownst to the owner, uses it during the commission of a crime, the car is exempt from forfeiture.<sup>56</sup> In addition, if the property owner obtained the interest prior to or during the illegal activity but took reasonable steps to prevent the offense, the property is exempt from forfeiture.<sup>57</sup>

#### 2. Exemption for Interests Acquired After Conduct

The Forfeiture Reform Act also protects the interests of good faith purchasers for value. Pursuant to the second exemption, if a property owner acquires the property after the conduct giving rise to forfeiture occurred, the property is exempt if the owner acquired the property in good faith, for value, and did not knowingly take part in an illegal transaction.<sup>58</sup>

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<sup>51</sup> Iowa Code §809A.15.

<sup>52</sup> Iowa Code §809A.5(1).

<sup>53</sup> Iowa Code §809A.12(7).

<sup>54</sup> Iowa Code §§809A.13(8), 809A.14(7)(d).

<sup>55</sup> Iowa Code §809A.5(1)(a).

<sup>56</sup> *In re Property Seized from Mirzai*, No. 11-0540, slip op. at 4 (Iowa App. Dec. 21, 2011).

<sup>57</sup> Iowa Code §809A.5(1)(a).

<sup>58</sup> Iowa Code §809A.5(1)(b).



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### 3. Exceptions

Three exceptions apply to these exemptions to make the property forfeitable:

- When the person whose conduct gave rise to the forfeiture had the authority to convey the property to a good-faith purchaser for value at the time of the conduct.<sup>59</sup> This applies to situations where the innocent claimant and the person whose conduct gave rise to forfeiture are joint owners and each person has the power to sell the property.
- When the person is a co-conspirator or is otherwise criminally responsible for the conduct giving rise to forfeiture.<sup>60</sup>
- When the owner acquired the property with notice of the forfeiture or reason to believe that it was subject to forfeiture.<sup>61</sup>

## III. Seizure of Property

### A. Seizure Warrant

Absent exigent circumstances, a peace officer may only seize property for forfeiture by obtaining a seizure warrant from a district judge, district associate judge, or magistrate.<sup>62</sup> To obtain a seizure warrant, the peace officer must present the court with an affidavit under oath that demonstrates that either probable cause exists for the property's forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of any state or of the United States.<sup>63</sup> Probable cause is the same standard the state is required to meet in order for a magistrate to issue a search warrant.<sup>64</sup> In the probable cause hearing for a seizure warrant, the court may consider any evidence which would be admissible in an application for a search warrant,<sup>65</sup> which includes evidence that would not be admissible in a trial, such as hearsay.<sup>66</sup> The court may describe reasonable terms and conditions for the seizure, and the seizure may, but need not be, made in connection with a search warrant.

### B. Warrantless Seizure

Property may be seized for forfeiture without a seizure warrant if the peace officer has probable cause to believe that the property is subject to forfeiture and that exigent circumstances exist.<sup>67</sup> If property is seized for forfeiture in this manner, upon request by the owner of the property within 10 days of receiving notice of the forfeiture, the court may issue an order to show cause to the seizing agency for the sole issue of whether probable

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<sup>59</sup> Iowa Code §809A.5(2)(a).

<sup>60</sup> Iowa Code §809A.5(2)(b).

<sup>61</sup> Iowa Code §809A.5(2)(c).

<sup>62</sup> Iowa Code §809A.6(1).

<sup>63</sup> Iowa Code §809A.6.

<sup>64</sup> Iowa Code §808.3.

<sup>65</sup> Iowa Code §809A.12(8).

<sup>66</sup> Iowa Code §809A.12(8); Iowa Code ch. 808.

<sup>67</sup> Iowa Code §809A.6(2).



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cause for forfeiture exists. Such a hearing must occur within 30 days of the order to show cause unless there is good cause for a delay.<sup>68</sup>

### C. Occupied Real Estate

Notwithstanding the standard procedures for seizure by warrant and for warrantless seizure, seizure of inhabited residential real estate, which would remove the residents, may only be done after a preseizure adversarial judicial determination of probable cause.<sup>69</sup> However, this determination may be made ex parte if the prosecuting attorney has demonstrated exigent circumstances.<sup>70</sup> The Forfeiture Reform Act also permits the state to file a lien on property, including real estate, so that the state may protect its interest without removing the property from the owner or displacing residents.<sup>71</sup>

### D. Constructive Seizure

In addition to physical seizure, the state may seize property constructively.<sup>72</sup> To accomplish this, the state must post notice of the seizure for forfeiture on the property, give notice to the property owner, and file or record a notice of pending forfeiture in the public records relating to that type of property.

### E. Property Management and Preservation

Once property has been seized for forfeiture, the property is held by the state during the pendency of the forfeiture action, or returned to the property owner in certain circumstances. Moreover, after seizure for forfeiture the seized property is not subject to alienation, conveyance, attachment, or return under Iowa Code chapter 809,<sup>73</sup> unless the property has been released after the property owner has posted a surety bond or cash with the court equal in value to the property.<sup>74</sup>

Seized property may be returned if actual custody is unnecessary.<sup>75</sup> Seized property may also be released to the property owner if the property owner posts a surety bond or cash in an amount equal to the fair market value of the property.<sup>76</sup> The state, however, may oppose the release of the property if it is contraband, evidence, or is particularly designed for use in conduct giving rise to forfeiture.<sup>77</sup> If a bond or cash is posted and the state prevails in the forfeiture proceeding, the bond or cash is forfeited in lieu of the property.<sup>78</sup>

If the state retains the seized property during the pendency of the forfeiture proceeding, the property can be removed to an appropriate place designated by the court,

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<sup>68</sup> Iowa Code §809A.12(3).

<sup>69</sup> Iowa Code §809A.6(3).

<sup>70</sup> Iowa Code §809A.6(3).

<sup>71</sup> Iowa Code §809A.9.

<sup>72</sup> Iowa Code §809A.6(4).

<sup>73</sup> Iowa Code §809A.7(1).

<sup>74</sup> Iowa Code §809A.7(5).

<sup>75</sup> Iowa Code §809A.7(2).

<sup>76</sup> Iowa Code §809A.7(5).

<sup>77</sup> Iowa Code §809A.7(5).

<sup>78</sup> Iowa Code §809A.7(5).



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retained as evidence, removed to a storage area for safekeeping, deposited in an interest-bearing account, or transferred to a custodian to maintain and operate the property as reasonably necessary to maintain its value.<sup>79</sup>

The court may order property which has been seized for forfeiture sold, leased, rented, or operated to satisfy a specified interest of any interest holder, or to preserve the interests of any party on motion of such party, after notice to persons known to have an interest in the property, and an opportunity for a hearing.<sup>80</sup> If the seized property is liable to perish, to waste, or to be foreclosed upon or significantly reduced in value, or if the expenses of maintaining the property are disproportionate to the property's value, the court may order a commercially reasonable sale of the seized property.<sup>81</sup> The proceeds from such a sale would first be applied to expenses of the sale, then to satisfy any exempt interests of the property in order of their priority.<sup>82</sup> Any remaining proceeds are placed in an interest-bearing account, and would be forfeited upon an ultimate finding that the property was subject to forfeiture.<sup>83</sup>

## IV. Forfeiture Proceedings

### A. Commencement of Proceedings

After property has been seized for forfeiture, if the property owner requests the return of the property, the state has 90 days from the seizure to file a notice of pending forfeiture and 90 days after the notice of pending forfeiture upon which a proper claim has been filed to file a judicial forfeiture proceeding.<sup>84</sup> Failure to file a notice of pending forfeiture or a judicial forfeiture proceeding within 90 days deprives a court of jurisdiction to hear the claim, and therefore the state loses its right to forfeiture.<sup>85</sup> The statute of limitations requires that a forfeiture action be commenced within five years after the last conduct giving rise to forfeiture or the cause of action becomes known or should have become known.<sup>86</sup>

If the state files a verified complaint in lieu of a notice of pending forfeiture, a property owner or interest holder must file an answer within 20 days after service on the claimant of the complaint.<sup>87</sup> The forfeiture hearing shall be held without a jury and within 60 days after service of the complaint unless continued for good cause.<sup>88</sup>

If the state files a notice of pending forfeiture, then within 30 days after the effective date of the notice of pending forfeiture, an owner of or interest holder in the property may file a claim against the property or a petition for recognition of exemption as to the

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<sup>79</sup> Iowa Code §809A.7(6).

<sup>80</sup> Iowa Code §809A.7(8).

<sup>81</sup> Iowa Code §809A.7(9).

<sup>82</sup> Iowa Code §809A.7(9).

<sup>83</sup> Iowa Code §809A.7(9).

<sup>84</sup> Iowa Code §809A.8(1).

<sup>85</sup> In re Property Seized from Williams, 676 N.W.2d 607, 613 (Iowa 2004).

<sup>86</sup> Iowa Code §809A.20.

<sup>87</sup> Iowa Code §809A.13(5).

<sup>88</sup> Iowa Code §809A.13(7).



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property.<sup>89</sup> If a petition for recognition of exemption is timely filed, the prosecuting attorney may delay filing a judicial forfeiture proceeding for up to 180 days after the notice of pending forfeiture.<sup>90</sup> The prosecuting attorney then determines whether to recognize the exemption as valid, and notifies the petitioning party and seizing agency of such a decision.<sup>91</sup> Such a decision must be provided by the prosecuting attorney within 60 days after the notice of pending forfeiture if the petitioning party is a regulated interest holder, such as a bank, or otherwise within 120 days after the notice of pending forfeiture.<sup>92</sup> If the prosecuting attorney does not recognize the exemption, the property owner may file a claim for an exemption.<sup>93</sup> If a property owner fails to timely file a proper claim, the prosecuting attorney may proceed to dispose of and allocate the property as specified under the Forfeiture Reform Act.<sup>94</sup>

## B. Judicial Proceedings

### 1. *In Rem vs. In Personam* Proceedings

Judicial forfeiture proceedings may be either *in rem*<sup>95</sup> or *in personam*.<sup>96</sup> In an *in rem* proceeding, the state proceeds directly against the property the state is seeking to forfeit. In an *in personam* proceeding, the state proceeds against the person the state alleges committed conduct giving rise to forfeiture. An *in rem* proceeding determines the rights of the world as to the property subject to forfeiture, whereas an *in personam* proceeding only relates to the defendant's interest in the property.<sup>97</sup> If a court enters an *in personam* forfeiture order, the prosecuting attorney may then proceed with an *in rem* action to resolve the remaining interests in the property.<sup>98</sup>

### 2. Expedited Probable Cause Hearing

The Forfeiture Reform Act provides a mechanism for an expedited probable cause hearing. Upon request by the owner of the property within 10 days of receiving notice of the forfeiture, the court may issue an order to show cause to the seizing agency for the sole issue of whether probable cause for forfeiture exists.<sup>99</sup> Such a hearing must occur within 30 days of the order to show cause unless there is good cause for a delay. If the court determines there is not probable cause for forfeiture, the seizing agency must release the property to the property owner.

### 3. Claim Preclusion

A defendant convicted in any criminal proceeding cannot deny the essential allegations of the criminal offense of which the defendant was convicted or to which the

<sup>89</sup> Iowa Code §809A.8(1).

<sup>90</sup> Iowa Code §809A.8(1).

<sup>91</sup> Iowa Code §809A.8(1).

<sup>92</sup> Iowa Code §809A.8(1).

<sup>93</sup> Iowa Code §809A.8(1).

<sup>94</sup> Iowa Code §809A.8(1).

<sup>95</sup> Iowa Code §809A.13.

<sup>96</sup> Iowa Code §809A.14.

<sup>97</sup> Iowa Code §§809A.13(8), 809A.14(7).

<sup>98</sup> Iowa Code §809A.14(7).

<sup>99</sup> Iowa Code §809A.12(3).



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defendant pled guilty in any forfeiture proceeding. A defendant whose conviction is overturned on appeal may file a motion to correct, vacate, or modify a judgment of forfeiture.<sup>100</sup>

### 4. Attorney Fees

The ability of a property owner to recover attorney fees depends on whether the property owner successfully proves an exemption. If an owner makes a claim based on an exemption and prevails, the agency or political subdivision bringing the forfeiture action must pay the owner's reasonable attorney fees and costs, as determined by the court.<sup>101</sup>

If a property owner otherwise prevails, for example if the prosecuting attorney could not show that the property is subject to forfeiture by a preponderance of the evidence, the property owner can only recover attorney fees if the prosecuting attorney's conduct in bringing the case is unreasonable enough to warrant sanctions under Iowa Rule of Civil Procedure 1.413(1).<sup>102</sup> Rule 1.413(1) requires counsel to certificate that:

[C]ounsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.<sup>103</sup>

If the court finds that reasonable cause existed for the seizure for forfeiture or for the filing of the notice of pending forfeiture or complaint, the property owner is not entitled to costs or damages.<sup>104</sup>

### 5. Presumptions

The Forfeiture Reform Act provides for two presumptions in judicial proceedings. First, the fact that money or a negotiable instrument is found in close proximity to any contraband or an instrumentality of conduct giving rise to forfeiture gives rise to the presumption that the money is the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct, and is therefore forfeitable.<sup>105</sup> If the state can demonstrate this, the property will be deemed to be forfeitable unless the property owner can produce evidence to negate the presumption.

The second presumption is the net-worth presumption. A presumption arises that any property of a person is subject to forfeiture if the state establishes any of the following: that the person engaged in conduct giving rise to forfeiture; that the property was acquired during the period of the conduct giving rise to forfeiture or within a reasonable time after

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<sup>100</sup> Iowa Code §809A.12(6).

<sup>101</sup> Iowa Code §809A.12(7).

<sup>102</sup> Iowa Code §809A.12(16).

<sup>103</sup> Iowa R.Civ.P. 1.413(1).

<sup>104</sup> Iowa Code §809A.16(8).

<sup>105</sup> Iowa Code §809A.12(9).



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that period; or that no likely source for acquisition of the property exists other than the conduct giving rise to the forfeiture.<sup>106</sup>

## 6. Constructive Trustees

A person who acquires property subject to forfeiture is a constructive trustee of the property, and its fruits, for the benefit of the state, to the extent that the person's interest is not exempt from forfeiture.<sup>107</sup> Therefore, if a person acquires property subject to forfeiture without paying value or with knowledge that the property is subject to forfeiture, that person is a constructive trustee of the property for the state.<sup>108</sup> On the other hand, if a person acquires property subject to forfeiture by paying fair market value for it and without knowledge that it is subject to forfeiture, the person would be an innocent owner and therefore would not be a constructive trustee of the property.<sup>109</sup>

## 7. Relation Back

Title to property that is forfeited to the state vests with the state at the time of the conduct giving rise to forfeiture.<sup>110</sup> Therefore any property transferred after the conduct remains subject to forfeiture.<sup>111</sup> The purpose of this relation-back doctrine is to prevent collusive or fraudulent transfers which may otherwise be used to avoid forfeiture.<sup>112</sup> Innocent owners who acquire the property in good faith and for value are exempt from this relation-back provision.<sup>113</sup>

## 8. Right to Counsel

The Sixth Amendment to the United States Constitution guarantees the right to counsel in criminal cases, which, generally speaking, are cases where defendants may potentially lose their liberty.<sup>114</sup> Because the forfeiture proceedings in Iowa are civil cases, the right to counsel guarantee is not applicable.<sup>115</sup>

## 9. Proportionality

The doctrine of proportionality is a criminal law concept related to the Eighth Amendment guarantee against excessive fines and cruel and unusual punishment.<sup>116</sup> Courts have applied the Eighth Amendment to the United States Constitution to criminal prosecutions to require that a rational relationship exists between the underlying offense and the punishment imposed.<sup>117</sup> According to the President's Commission, which drafted the law that Iowa's law is based upon, civil forfeiture is not intended to punish wrongdoing,

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<sup>106</sup> Iowa Code §809A.12(10).

<sup>107</sup> Iowa Code §809A.12(12).

<sup>108</sup> Iowa Code §§809A.5(1),809A.12(12).

<sup>109</sup> Iowa Code §§809A.5(1),809A.12(12).

<sup>110</sup> Iowa Code §§809A.12(13), 809A.16(4).

<sup>111</sup> Iowa Code §§809A.12(13), 809A.16(4).

<sup>112</sup> President's Commission on Model State Drug Laws, Commission Forfeiture Reform Act, at A-15.

<sup>113</sup> Iowa Code §809A.12(13).

<sup>114</sup> Scott v. Illinois, 440 U.S. 367, 373 (1979).

<sup>115</sup> In re Property Seized from Behmer, No. 05-0936, slip op. at 6 n.2 (Iowa App. May 10, 2006).

<sup>116</sup> Weems v. United States, 217 U.S. 349, 379 (1910).

<sup>117</sup> See e.g. Solem v. Helm, 463 U.S. 277, 284 (1983).



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but rather is intended to remove the financial incentive of criminal activity and compensate the public for economic loss attributable to illegal property use — essentially, the forfeited properties constitute damages.<sup>118</sup>

However, the Iowa Supreme Court has held that civil forfeiture is remedial and penal in nature. The Court has held that civil forfeiture is constitutionally excessive if the defendant can show “gross disproportionality.”<sup>119</sup> The Court has stated that, “[t]o constitute a violation of the Eighth Amendment, such disproportionality must be so excessive that ‘in justice the punishment is more criminal than the crime.’”<sup>120</sup> Factors included in this analysis are “the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited.”<sup>121</sup> The Court added that “[o]ther helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant’s motive and culpability and, of course, the extent that the defendant’s interest and the enterprise itself are tainted by criminal conduct.”<sup>122</sup>

### 10. Exclusionary Rule

The exclusionary rule is an evidentiary rule related to the Fourth Amendment’s ban on unreasonable searches and seizures.<sup>123</sup> The exclusionary rule, subject to certain exceptions, bars the admissibility of evidence in a criminal trial that has been obtained in violation of the Fourth Amendment to the United States Constitution.<sup>124</sup> For example, if a police officer searches a home without a search warrant and an exception, such as exigent circumstances, does not apply, any evidence gathered at the house may not be used in the criminal prosecution.<sup>125</sup> In the civil forfeiture context, the Iowa Supreme Court has held that the state, “[i]n establishing a right to forfeiture, ... may not rely on evidence obtained in violation of fourth amendment protections.”<sup>126</sup> The Court added that if property that is otherwise forfeitable has been seized in violation of the Fourth Amendment, the property can still be forfeited if the state can prove its case with admissible evidence.<sup>127</sup>

### 11. Immunity Orders

The prosecuting attorney may request the court to issue an order requiring a person to produce evidence, notwithstanding that person’s refusal to do so on the basis of the privilege against self-incrimination.<sup>128</sup> A person cannot refuse to comply with an immunity order on the basis of the self-incrimination privilege, and if such person refuses to comply with the immunity order, the person may be compelled or punished by the district court

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<sup>118</sup> President’s Commission on Model State Drug Laws, Commission Forfeiture Reform Act, at A-16.

<sup>119</sup> *In re Property Seized from Chioldo*, 555 N.W.2d 412, 416 (Iowa 1996) (quoting *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995)).

<sup>120</sup> *Id.* at 416 (quoting *Bieri*, at 236).

<sup>121</sup> *Id.* at 417.

<sup>122</sup> *Id.* at 417 (quoting *Bieri*, at 236).

<sup>123</sup> *Weeks v. United States*, 232 U.S. 383, 393 (1914).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *In re Property Seized from Flowers*, 474 N.W.2d 546, 548 (Iowa 1991).

<sup>127</sup> *Id.* at 548.

<sup>128</sup> Iowa Code §809A.19(1).



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issuing an order for civil or criminal contempt.<sup>129</sup> The production of evidence compelled by an immunity order, and any information directly or indirectly derived from the production of evidence, cannot be used against the person in a subsequent criminal case, except in a prosecution for perjury, false swearing, or an offense otherwise involving a failure to comply with the order.<sup>130</sup>

### C. Failure of Property Owner to File a Claim or Answer

Even if no property owner files a claim or an answer, if the value of the property to be forfeited is in excess of \$5,000, the state must apply to a court for an order of forfeiture.<sup>131</sup> The court must order the property forfeited to the state if the prosecuting attorney can establish that the court has jurisdiction over the forfeiture proceeding, that the state properly supplied notice to property owners, and facts sufficient to show probable cause for forfeiture.<sup>132</sup>

### D. Nonjudicial Forfeiture

The Forfeiture Reform Act provides for nonjudicial forfeiture. Nonjudicial forfeiture is a method by which the state can exercise its forfeiture power without a court first approving the forfeiture. Nonjudicial forfeiture is only available where both the value of the property subject to forfeiture has an estimated value of \$5,000 or less and no person files a claim opposing forfeiture within 30 days of service of a notice of forfeiture.<sup>133</sup> Failure of the state to properly serve notice of forfeiture on a claimant is a basis for the forfeiture to be set aside for 180 days after the declaration of forfeiture.<sup>134</sup>

## V. Allocation of Property

Once property has been forfeited to the state, the property is allocated as specified in the Forfeiture Reform Act. Controlled substances are destroyed, but prescription drugs may be given to nonprofit hospitals.<sup>135</sup> Weapons and ammunition are deposited with the Department of Public Safety and disposed of in accordance with the department's rules. Weapons which are not illegal or offensive may be sold at auction. Proceeds, less expenses, are deposited in the General Fund of the State.<sup>136</sup> On order of the court or declaration of forfeiture forfeiting the property, the state may transfer good and sufficient title to any subsequent purchaser or transferee.<sup>137</sup>

If the forfeited property is cash or proceeds from the sale of real property, then the Department of Justice cannot retain more than 10 percent of the gross sale.<sup>138</sup> The balance of the proceeds are distributed to the seizing agency for use by the seizing agency

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<sup>129</sup> Iowa Code §809A.19(3).

<sup>130</sup> Iowa Code §809A.19(4).

<sup>131</sup> Iowa Code §809A.16(3).

<sup>132</sup> Iowa Code §809A.16(3).

<sup>133</sup> Iowa Code §809A.16(1).

<sup>134</sup> Iowa Code §809A.16(2).

<sup>135</sup> Iowa Code §§124.506, 809A.17(5)(a).

<sup>136</sup> Iowa Code §809A.17(5)(b).

<sup>137</sup> Iowa Code §809A.16(7).

<sup>138</sup> Iowa Code §809A.17(5)(e).



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or for division among law enforcement agencies and county attorneys pursuant to any agreement entered into by the seizing agency. If more than \$400,000 in cash is forfeited, the seizing agency receives 45 percent, other law enforcement agencies within the region receive 45 percent, and the Department of Justice receives 10 percent.

Other forfeited property may be used by the Department of Justice in the enforcement of the criminal law.<sup>139</sup> The department may give, sell, or trade property to any other state agency or to any other law enforcement agency within the state if, in the opinion of the Attorney General, it will enhance law enforcement within the state. Forfeited property which the Department of Justice does not use in the enforcement of the law may be requisitioned by the Department of Public Safety or any law enforcement agency for use in enforcing Iowa's criminal laws.<sup>140</sup>

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<sup>139</sup> Iowa Code §809A.17(3).

<sup>140</sup> Iowa Code §809A.17(4).