



## ON GOOD AUTHORITY

# Seizure and Forfeiture of Drug Offenders' Assets

MARCH 1993

Since they were first enacted in the early 1980s, state laws authorizing the seizure and forfeiture of drug offenders' assets have becoming increasingly important tools for Illinois' law enforcement agencies and, more recently, for some community groups as well.

Modeled after similar federal statutes, Illinois' asset seizure and forfeiture laws are intended primarily as a way to attack the profit motive for trafficking in illegal drugs. As a secondary benefit, proceeds from forfeited assets help to fund additional drug enforcement activities at the state and local levels. In 1992, more than \$9.7 million was deposited in the state's asset forfeiture fund, and Illinois agencies shared in millions more dollars resulting from forfeitures carried out under federal law. In addition, a growing number of citizen groups are learning to work with the police in using asset seizure and forfeiture as part of a broad, community-based attack on drug trafficking and abuse.

But as the popularity of asset seizure and forfeiture in drug cases has grown, so has debate over a number of critical issues. How should forfeited funds be distributed and used? What rules of evidence—civil or criminal—should be followed in forfeiture cases? Are there adequate safeguards to protect the civil liberties and property rights of individuals? What is the long-term impact of asset seizure and forfeiture on law enforcement decision making and interagency cooperation? How legislators, judges, and criminal justice policy makers answer these and other questions could shape the future of drug enforcement in Illinois for the next decade and beyond.

### Seizure and Forfeiture Defined

Despite the widespread attention paid to asset seizure and forfeiture in recent years, there continues to be some confusion about how the process works—and even about the terms themselves. Seizure and forfeiture are *not* interchangeable terms for the same thing, but rather are distinct parts of an integrated process.

- **Seizure** is the act of physically taking possession of a piece of property (cash, a vehicle, or real estate, for example)

The Illinois Criminal Justice Information Authority is pleased to present its new series of executive briefing papers, called "On Good Authority." On a regular basis, we will publish brief, but meaningful, statistical, policy, and background information on some of the critical issues and trends facing the criminal justice system in Illinois. This first paper examines the use of asset seizure and forfeiture in drug cases. This powerful and popular law enforcement tool has come of age over the last decade, and is now entering a new, perhaps more complex phase. I hope the information in this report, as well as in future briefings on firearms, intermediate sanctions, and other criminal justice topics, will be useful to public policy makers and practitioners alike. I welcome your comments and suggestions.

Dennis E. Nowicki  
Executive Director

that is suspected of having been used to violate a drug law or acquired with the profits of illegal drug activity. Seized property, however, is *not* immediately or automatically "forfeited" by its owner, but instead becomes the subject of subsequent legal proceedings.

- **Forfeiture** is the legal proceeding following the initial seizure. It is here that the state attempts to strip the owner of all rights to the seized property and to acquire the property for future sale and distribution of proceeds. In civil proceedings, the legal case is known as an "in rem" procedure, in which the assets themselves are the defendants in the case, rather than the person from whom they were seized. Forfeiture proceedings can also be criminal, or "in personam," cases.

In most instances under Illinois law, however, a person need not be convicted of a crime before his or her property is subject to seizure and forfeiture. Instead, law enforcement



officials must establish probable cause that the property in question was tied to illegal drug activity. In the subsequent civil proceeding, the burden of proof is on the property owner to show, by a preponderance of the evidence, that his or her property was not connected with the suspected illegal activity. Criminal procedures, on the other hand, place the burden on the prosecution to prove guilt beyond a reasonable doubt.

A variety of assets are subject to seizure and forfeiture under state law, including:

- All materials, products, and equipment used to manufacture controlled substances or cannabis.
- Conveyances, such as cars, boats, and planes (except for common carriers or those conveyances owned by someone determined not to be involved in the illegal activity).
- Cash or other valuables.
- "Real property"—homes, businesses, or land (including any right, title, or interest in that property).

## The Laws

In Illinois, asset seizure and forfeiture in drug cases are authorized under four separate laws:<sup>1</sup>

- Illinois Controlled Substances Act (720 ILCS 570/505)
- Cannabis Control Act (720 ILCS 550/12)
- Narcotics Profit Forfeiture Act (725 ILCS 175/5)
- Drug Asset Forfeiture Procedure Act (725 ILCS 150/1)

In addition, state and local law enforcement agencies that participate in federal drug investigations are eligible for a portion of any assets forfeited under federal law. In federal fiscal year 1991, Illinois agencies participated in joint investigations resulting in the seizure of \$36.1 million in cash and property; the precise amount distributed after forfeiture proceedings is not yet known.

During the 1980s, in fact, most asset seizure and forfeiture cases in Illinois involved these types of joint investigations with the federal government. At the time, federal laws were much stronger than comparable state laws. Federal law, for example, permitted the forfeiture of real property; state law did not. Federal procedures were also far less cumbersome than the procedures used to pursue forfeitures under the Illinois Controlled Substances Act or the Cannabis Control Act. In fact, these two state acts contained no uniform procedures for pursuing forfeitures nor any specified methods for distributing the proceeds.

In an attempt to alleviate these procedural problems, and thereby encourage greater use of state seizure and forfeiture laws, the Illinois Criminal Justice Information Authority in 1989 formed an ad hoc interagency committee to recommend changes to existing Illinois laws and procedures. The result was the Drug Asset Forfeiture Procedure Act,

which the Illinois General Assembly passed and the Governor signed the next year. The act not only clarified state seizure and forfeiture procedures, but it also expanded the law to make it more closely resemble the tougher federal statutes. Specifically, the legislation creating the Drug Asset Forfeiture Procedure Act—

- Defined those assets subject to forfeiture.
- Simplified the means by which real property may be forfeited.<sup>2</sup>
- Provided a uniform formula for distributing the proceeds of all forfeitures (see below).

The law also permits for non-judicial (or administrative) forfeitures in some cases, and it provides a variety of safeguards for property owners. For example, notice of a pending forfeiture must be given to property owners or to those having an interest in any seized property, and there is protection against forfeiture for property owners not involved in illegal drug activity (for example, someone who loans his car unwittingly to a cocaine dealer, who is then stopped by police while transporting drugs in the car).

## Types of Forfeiture Proceedings

There are two types of forfeiture proceedings allowed under the Drug Asset Forfeiture Procedure Act: non-judicial (administrative) procedures and judicial (in rem) procedures.

- **Non-judicial forfeiture** may be used only if the money or property seized is valued at \$20,000 or less, excluding the value of any conveyance. If the state's attorney determines that the seized property is subject to forfeiture, the owners of the property, as well as any known interest holders, are notified. They are then given 45 days to file a claim on behalf of the property, accompanied by a cost bond equal to 10 percent of the estimated value of that property or \$100, whichever is greater.

Upon receipt of the claim and bond, the state's attorney initiates a judicial (in rem) forfeiture proceeding (see below). If no claim is made within 45 days, the state's attorney declares the property forfeited and notifies the owners and known interest holders. State law further allows for judicial review of a state's attorney's forfeiture declaration in a non-judicial proceeding.

- **Judicial (in rem) forfeiture** procedures are required in three instances: when the money or property seized is valued in excess of \$20,000, excluding the value of conveyances; when any real property is involved; or, as explained above, when a property owner files a claim and cost bond in a non-judicial forfeiture case. If the state's attorney determines that the property is subject to forfeiture and the state has shown probable cause for the forfeiture, the property owner

<sup>2</sup> The seizure and forfeiture of real property was originally authorized by the Narcotics Profit Forfeiture Act for racketeering offenses, but it was seldom used. The Drug Asset Forfeiture Procedure Act sets out a simplified, uniform procedure for the seizure and forfeiture of real property in a variety of drug cases, not just racketeering offenses.

<sup>1</sup> State law also permits the seizure and forfeiture of conveyances involved in other major crimes such as murder, burglary, major thefts, kidnapping, and sex offenses (720 ILCS 5/36-1).



then has the burden of proving, by a preponderance of the evidence, that the property is exempt from forfeiture. If the court rules the property is not subject to forfeiture, it is returned to the owner, along with 90 percent of the original bond fee (the remaining 10 percent is retained by the clerk of the court to cover case-related costs).

Experience with both types of forfeiture proceedings, however, suggests that relatively few owners of seized property contest a forfeiture in court. Law enforcement officials attribute this to the fact that most property owners who are indeed involved in illegal drug activity do not want to be questioned about it during an open civil procedure. Any statements or information brought out in the forfeiture case can then be used by the state in developing subsequent criminal charges against the property owner.

### How are Funds Distributed?

If a case ultimately results in forfeiture, whether through a judicial or non-judicial procedure, the assets are immediately turned over to the Illinois State Police, which places them in the state's asset forfeiture fund. Non-monetary assets generally are sold, and the proceeds, along with any cash that has been forfeited, are distributed to those agencies involved in the case, according to a formula established by the Drug Asset Forfeiture Procedure Act (Figure 1).

In some cases, a participating law enforcement agency may apply to the State Police director to return to the agency a specific item of forfeited property. Such requests usually are made when a vehicle or other conveyance can be readily used by the seizing agency. Approval is at the director's discretion, without regard to the formula. However, if any real property is subsequently sold by the participating agency, the proceeds must be returned to the asset forfeiture fund and distributed

according to the formula.

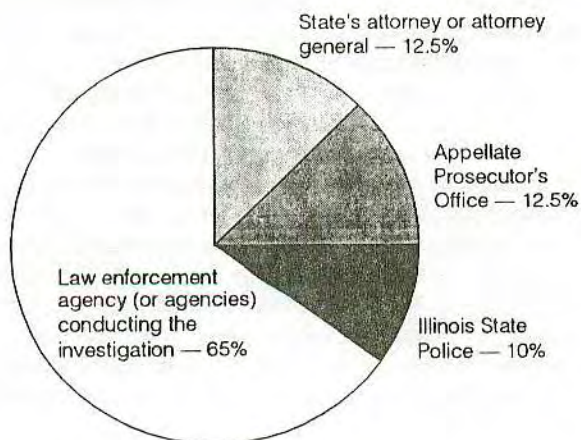
Under current Illinois law, forfeiture proceeds must be used for drug enforcement efforts. Agencies have used the additional revenue for everything from computer and surveillance equipment, to drug sniffing dogs, to "buy money" to infiltrate the upper echelons of drug trafficking organizations. A few agencies, adopting a broad definition of "drug enforcement," have used a portion of their forfeiture money to fund drug education and prevention efforts within their agencies. However, the vast majority of funds are being used for traditional enforcement activities.

### How Much is Forfeited Under Illinois Law?

Since state fiscal year 1988, more than \$34.7 million has been deposited in the Illinois State Police Forfeiture Fund (Figure 2). Annual deposits in the fund increased more than 160 percent between fiscal years 1988 and 1992, although the rate of growth in the fund has slowed in recent years. Between 1991 and 1992, deposits in the asset forfeiture fund increased by just 5 percent, compared with a 28-percent rise the year before and a 53-percent surge the year before that.

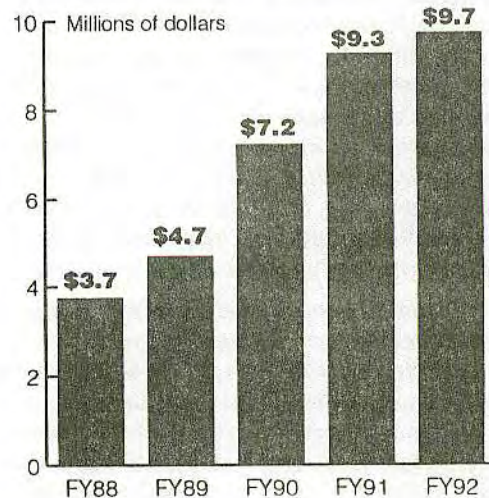
The apparent slowdown in the rate of growth in the forfeiture fund may indicate that Illinois is reaching a plateau in its potential for asset forfeitures under existing state laws. During the late 1980s and early 1990s, the state not only strengthened its asset seizure and forfeiture laws, but also invested heavily in training law enforcement officials in how to use the laws. This increased awareness and knowledge are reflected in the steady growth in the asset forfeiture fund between fiscal years 1988 and 1991. Now, following that initial surge of interest, asset seizure and forfeiture activity in Illinois may be stabilizing. This trend will need to be watched and analyzed carefully over the next few years.

FIGURE 1  
Basic distribution formula for forfeited assets



*Note: This distribution formula is for forfeitures under the Controlled Substances Act and Cannabis Control Act; the Narcotics Profit Forfeiture Act uses a slightly different formula. In Cook County, 25% goes to the state's attorney and none to the Appellate Prosecutor's Office.*

FIGURE 2  
Deposits in the State Police Forfeiture Fund



Source: Illinois State Police



When analyzing changes over time in asset seizures and forfeitures, two factors must be kept in mind, however:

- First, seizures and forfeitures in drug cases are, by their very nature, mercurial. One or two large forfeitures in a given year can inflate the total for that year, just as the absence of any large forfeitures can deflate the totals in other years.
- Second, there can be a significant delay from the time a piece of property is seized and the time it is ultimately forfeited and the proceeds distributed. This is especially true for large or complex seizures, in which the property owner may contest the seizure or in which the sale of the property (such as a large parcel of land) may take some time. These natural time delays mean that a surge in asset seizures may not be reflected in the state forfeiture fund for a few years.

In addition, recent budgetary data indicate that, even during the recent upswing in the state forfeiture fund, asset forfeitures still account for a relatively small percentage of overall spending on drug enforcement in Illinois. Among the state's metropolitan enforcement groups (MEGs), for example, forfeitures made up between 7 percent and 9.5 percent of their annual expenditures from fiscal years 1988 through 1991 (Figure 3).

This trend—along with the apparent leveling-off of forfeiture proceeds overall—suggests that asset forfeiture cannot be relied upon as a consistent or growing source of revenue for drug enforcement efforts in Illinois. Given the mercurial nature of seizures and forfeitures, particularly in individual jurisdictions, it would be dangerous for budget makers to shift responsibility for drug enforcement funding from sources such as general tax revenues to asset forfeiture proceeds, just because of strong forfeiture activity in one year.

### Ongoing Issues and Concerns

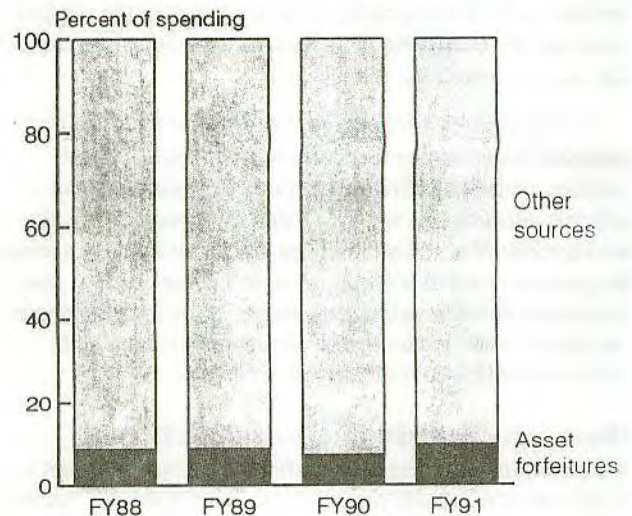
The use of asset seizure and forfeiture has matured in Illinois over the last decade. State laws have been strengthened, training opportunities have been expanded, and more law enforcement agencies are using this very potent tool to hit drug traffickers where it probably hurts the most—in the pocketbook. In addition, these agencies are reaping the benefits of an additional, albeit relatively small, source of revenue for expanded drug enforcement activities.

As asset seizure and forfeiture enters its next phase in Illinois, some still unresolved legal and policy issues, as well as some emerging new ones, will likely confront lawmakers, judges, criminal justice practitioners, and others. Here is a brief rundown of some of these ongoing issues and concerns:

- **Use of forfeited assets for community-based efforts.** Under current Illinois law, law enforcement agencies are the only entities that may receive the proceeds of forfeited assets, and agencies must now use those funds for drug enforcement activities. While some agencies have taken a broad interpretation of drug enforcement, and used forfeiture funds for drug abuse education and prevention programs within their own

FIGURE 3

### Sources of funds for Illinois MEG units



Source: Illinois Criminal Justice Information Authority analysis of MEG financial statements

agencies, a growing number of citizen groups are now recommending that some forfeiture funds be used for *community-based* drug prevention efforts as well. In response, the Illinois General Assembly in 1992 adopted Senate Joint Resolution 113, creating a task force to study the issue. The task force was chaired by State Senator Miguel del Valle and State Representative Robert LeFlore.

The product of this task force is a plan in which four Chicago-area law enforcement agencies have volunteered to contribute a portion of their forfeiture proceeds to help fund pilot community-based drug prevention programs over the next two years. The participating agencies—Chicago Police Department, Cook County State's Attorney's Office, Cook County Sheriff's Office, and Illinois Attorney General's Office—have agreed to contribute a combined total of up to \$500,000 for this effort. Current plans call for the funding of five community-based pilot projects over the two years—four in Chicago and one in south suburban Cook County. Funding of these projects is expected to begin in the summer of 1993.

The pilot projects will be selected and grant funds will be awarded by a Project Oversight Board within the Illinois Criminal Justice Information Authority. This 11-member board includes representatives of the contributing agencies, along with the Authority, the City of Chicago, the Illinois Department of Alcoholism and Substance Abuse, and four community representatives appointed by the Authority's executive director. The Authority will be responsible for managing the funds, monitoring grants, and evaluating the pilot projects.

This pilot approach should provide valuable insight for legislators and other policy makers into the feasibility of using forfeiture funds for community-based drug prevention efforts



on a broader scale. Some law enforcement officials, however, caution that the funding of non-enforcement projects may have some unintended effects on forfeiture activity. Experience in other states which have *mandated* that forfeiture funds go for non-enforcement programs (such as into general education funds) suggests that seizure and forfeiture activity may decline when law enforcement lacks the financial incentive to go after dealers' assets. As a result, *financial* considerations end up interfering with the application of a powerful *law enforcement* tool. The pilot approach being tried in Illinois may avoid this problem, however, because the contributions by the participating law enforcement are *voluntary*, not mandated by law, and the non-enforcement entities being funded are still involved in drug-related projects.

- **Use of civil procedures.** Forfeiture procedures, such as many of those used in Illinois, have been scrutinized for their reliance on civil, rather than criminal, rules of evidence. While the use of civil procedures in asset forfeiture cases has been upheld repeatedly by the courts, legislation to require a criminal conviction before allowing a forfeiture has been introduced several times in Illinois in recent years. None of these bills has passed, however.

Critics of the current practice allege that forfeiture laws can strip persons, who have not been found guilty of any crime, of their basic property rights and can instill a profit motive into police operations. Defenders of the existing approach argue that current forfeiture laws are the only effective law enforcement weapons that target the enormous profits associated with the illegal drug trafficking. They also point out that Illinois' laws have significant safeguards to protect innocent persons who think their property has been improperly seized, while punishing actual offenders.

Although federal and state courts have generally upheld the use of civil procedures in asset forfeiture cases, future legislation and court challenges are likely.

- **Fairness issues.** A variety of fairness issues related to asset seizure and forfeiture continue to be argued, particularly at the federal level. For example, the Supreme Court this term agreed to decide whether the government's use of its seizure power is a violation of the Eighth Amendment to the U.S. Constitution, which provides a guarantee against cruel and unusual punishment, including excessive fines (*Austin v. United States*). The question in this instance is whether the value of the property subject to forfeiture outweighs the severity of the crime. The case involves the seizure by police of the home and business of a St. Louis man who pled guilty in state court and was sentenced to seven years in prison for a single count of possession of cocaine with intent to distribute. The forfeiture was upheld by the 8th U.S. Circuit Court of Appeals; a High Court ruling is expected this summer.

The Supreme Court this term has already tackled another fairness issue—the “innocent owner” question—ruling in February that innocent owners who can prove they knew nothing about the crimes to which the property is linked are entitled to keep those assets (*U.S. v. A Parcel of Land in Rumson, N.J.*). By a 6–3 vote, the Court held that the government does not become the owner of assets at the moment they

are used in a criminal drug transaction if another owner acquired them later with no knowledge of the crimes. This case involved a house owned and occupied for the last six years by the girlfriend of a man allegedly involved in a \$24-million marijuana smuggling operation in Florida. Before being indicted in 1990, the alleged offender, now a fugitive, had given the woman a gift of \$216,000, which she used to purchase the home in New Jersey. Following the indictment, federal officials demanded the house be forfeited because, they argued, it was bought with proceeds from the marijuana smuggling operation and thus belonged to the government. The Court ruled, however, that before forfeiture can occur, individuals claiming ownership of the assets must be allowed to show they had no knowledge of its illegal source.

While neither of these fairness questions has become a major issue in Illinois, rulings by the U.S. Supreme Court will obviously have an effect on law enforcement practices and possible future court challenges. Of particular concern to law enforcement officials is the innocent owner issue. Following the Court's ruling in February, many officials expressed concern that drug traffickers could now more easily protect their ill-gotten assets by doling them out to family and friends.

- **Law enforcement practices.** Some law enforcement experts remain concerned over the long-term impact of asset seizure and forfeiture laws on drug investigations, case dispositions, and—perhaps most importantly—interagency cooperation. As far back as 1988, for example, the National Criminal Justice Association cautioned that policy makers may come to expect or demand more from forfeiture actions than law enforcement can produce, given the high costs of carrying out such cases. The group also warned that questions may arise about an enforcement strategy that “appears to assign a higher priority to seizing property than apprehending criminals.”

Several issues related to law enforcement practices still need to be researched and resolved in Illinois. Are police making investigatory and enforcement decisions based on the potential for forfeiture rather than the imperatives of public safety? Are prosecutors accepting pleas for reduced penalties in return for a quick forfeiture of assets? What is the impact on interagency cooperation when there is a “competition” for a possible forfeiture? Some of Illinois' metropolitan enforcement groups and drug task forces have reported cases of local police agencies pursuing investigations beyond their jurisdictions in order to seize assets. What problems are caused by this, and what can be done to create a more cooperative spirit?

Resolving these and other issues could have a significant impact on the future scope and effectiveness of asset seizure and forfeiture as a drug enforcement tool. For while the courts have generally upheld the broad concept of asset seizure and forfeiture in drug cases, they have grown less and less tolerant of perceived abuses of the system. If nothing else, the Supreme Court's recent ruling on innocent owners should serve to remind both public policy makers and law enforcement practitioners that asset seizure and forfeiture is a weapon that must be wielded with care and precision. ■



## **For Further Reading on Asset Seizure and Forfeiture**

**Asset Forfeiture.** Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance, 1992 (two-page fact sheet). For copies, contact the National Criminal Justice Reference Service, 800-851-3420.

**Asset Forfeitures and Seizures.** Springfield, Ill.: Illinois Local Governmental Law Enforcement Officers Training Board, 1990. For copies, contact the training board, 217-782-4540.

**Assets Seizure and Forfeiture: Developing & Maintaining a State Capability.** Washington, D.C.: National Criminal Justice Association, 1988 (manual). For copies, contact NCJA, 202-347-4900.

**Forfeiture Procedure in Illinois: Drug Asset Forfeiture Procedure Act: An Introduction.** Springfield, Ill.: Illinois Local Governmental Law Enforcement Officers Training Board, 1990 (brochure). For copies, contact the training board, 217-782-4540.

**Creating Safe Neighborhoods...Using Illinois' Drug Laws.** Chicago: Illinois Criminal Justice Information Authority, 1992 (16-page booklet). For copies, contact the Authority's Legal Consequences of Drug Abuse Campaign, 312-793-8550.

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