

FLORIDA SHERIFFS ASSOCIATION



Protecting, Leading, Uniting Since 1893



FSA Headquarters • 2617 Mahan Drive • Tallahassee, Florida



Changes to Florida's Civil Asset Forfeiture Laws Webinar:

June 20, 2016

Wayne Evans, FSA General Counsel

**Michele Hall, Manatee County Sheriff's Office,
General Counsel**

**Bobby Lippelman, Nassau County Sheriff's Office,
General Counsel**

**Major Jim Harpring, Indian River County Sheriff's
Office, General Counsel**



Review/Basics of Florida Contraband Forfeiture Act

- FCFA is contained in Sections 932.701 through 932.706, Florida Statutes.
- Section 932.702, in summary makes it unlawful to:
 - transport, carry or convey contraband with in, upon or by means of a vessel, motor vehicle, or aircraft,
 - conceal or possess contraband,
 - use a vessel, motor vehicle, aircraft or personal or real property to facilitate doing almost anything with contraband (transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away contraband),
 - conceal, possess, or use any contraband article as an instrumentality in the commission of or in aiding or abetting in the commission of any felony or violation of the FCFA,
 - acquire personal or real property with proceeds obtained in violation of FCFA



What Exactly is “Contraband”

- 932.701(2)(a) Contraband Article:

- Any controlled substance as defined in Chapter 893, F.S., or any substance, device paraphernalia or currency used or intended to be used in violation of Chapter 893 F.S.
- ALL PROPERTY used as an instrumentality in the commission of, or in the aiding or abetting in the commission of, or in the aiding or abetting in the commission of, any felony, or which is acquired with process obtained as a result of a violation of the FCFA
 - Includes vessels, aircraft, all items, objects, tools, substances, devices, weapons, machines, vehicles of any kind, money, securities, books, records, research, negotiable instruments, current, leaseholds, or other interest in whole of any tract of land,
- Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a), F.S. (a motor vehicle being driven by a person under the influence of drugs or alcohol with a D/L suspended for prior DUI)
- Any gambling paraphernalia, lottery tickets, money or currency or other means used, was attempted, or intended to be used in violation of gambling laws of the state
- Any equipment, liquid or solid, used or attempted or intended to be used in violation of the beverage tobacco laws of the state



- Motor fuel upon which tax has not been paid as required by law
- Third or subsequent violation of s. 509.144, F.S. (Prohibited handbill distribution in a public lodging establishment)
- Photographs, film, or other recorded image including videotapes, CDs, digital tapes, or fixed disks, that is recorded in violation of the video voyeurism laws (810.145, F.S.) or possessed for amusement, entertainment, sexual arousal, gratification, or profit or purpose of degrading or abusing another person
- Personal or real property obtained as a result of Medicaid Fraud (Chapter 490, F.S.)
- Any motor vehicle offered for sale in violation of s. 320.28, F.S. (Nonresident dealers of vehicles, RVs, and mobile homes)
- Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c).



Illustrative Example

- Wayne and Bobby own a 20 acre tract of land together in Nassau County, Florida, improved with a 2,500 square foot arena for gambling, and a second small building where methamphetamine is manufactured. Wayne drives a white, windowless panel-van to transport gamblers and meth chemicals to the property. The van is titled in Wayne's name with no liens. Wayne is sometimes paid in bearer bonds by affluent, well-to-do people wanting to gamble and Wayne conceals the bonds in a hidden compartment inside the van. Bobby fills the van with gas that was smuggled into the Port of Fernandina. No taxes of any kind have been paid on the gas. The gas is stored in a commercial grade tank with a high grade fuel pump suitable for use by the agency. Bobby deposits all proceeds from this enterprise into a known bank account. A new Corvette was purchased (paid in full, no liens) by check from this account. The Corvette is titled only in Bobby's wife's name. Bobby's wife works at the gambling arena and rides to the property in the van. Wayne owns a summer condominium on the beach that is used to print and conceal lottery tickets used in the weekly gambling on the 20 acres.



- What can be seized by definition, assuming enough evidence/proof?
- What must be proven and to what standard of proof?
- What Seizure Requirements Exist?
- What is the Court's initial review to determine the lawfulness of the seizure?



What can be seized and why (assuming sufficient proof)?

- 20 acre tract of land –
 - Real property used in the concealment of contraband and commission of a felony for manufacturing meth
 - Real property used to possess or conceal money or lottery tickets for gambling
 - Note: Consider the policy of 932.704
- Panel van
 - Personal property used to transport meth chemicals and gamblers to location of crime
 - Motor vehicle used to transport and conceal the bearer bonds in a hidden compartment which are means of exchange in gambling
- Bearer Bonds
 - Money or currency or other means used or attempted or intended to be used in violation of gambling laws of the state
- Cash/Bank Account
 - Money or currency or other means used or attempted or intended to be used in violation of gambling laws of the state
 - Money earned in the felony manufacture or sale of methamphetamine
- Corvette
 - Innocent owner defense likely will be asserted as vehicle titled in Bobby's Wife's name. We will discuss this further in burden of proof and investigation section. However, in short, since Bobby's Wife worked at the gambling arena she had actual knowledge of criminal activity and that the Corvette was acquired with proceeds obtained in violation of FCFA
- Summer Condominium
 - Real property used to make and conceals items used for gambling in violation of FCFA (note proportionality argument)



932.704

- (1) It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes.



SB 1044

- Signed by Governor Scott on April 1, 2016
- Takes effect on July 1, 2016
- Makes several significant changes to FCFA



Topics Covered Today

- Arrest Requirement and Exceptions and Initial Investigation Considerations based on Changes in FCFA
- Probable cause review internally by the agency and by the Court
- Changes to how cases are filed (filing fees, bonds)
- Negotiated settlement review
- Burden of Proof
- Distribution of forfeited property
- Annual review and reporting
- Risk assessment including attorneys fees to agency, proportionality of forfeiture as punishment
- Best practices



Investigation and Initial Seizure

Significant Changes

July 1, 2016 Change - Arrest Requirement

- A seizure may occur only if the owner of the property is arrested for a criminal offense that forms the basis for determining that the property is a contraband article under s. 932.701, or one or more of the following circumstances apply:



Investigation and Initial Seizure

Significant Changes

■ Circumstances where an arrest is not required:

- Owner of property is unknown
 - Owner cannot be identified after a diligent search, or
 - Person in possession denies ownership (disclaims), and owner cannot be identified at the time of the seizure
- Owner is a fugitive or deceased
- Individual (not the owner) arrested
 - Offense for which person is arrested is the basis for determining that the property is contraband, and
 - Owner had actual knowledge of the criminal activity



- Owner agrees to be a Confidential Informant
 - The seizing agency may not use the threat of property seizure or forfeiture to coerce the owner of the property to enter into a confidential informant agreement.
 - The seizing agency shall return the property to the owner if criminal charges are not filed against the owner and the active criminal investigation ends or if the owner ceases being a confidential informant, unless the agency includes the final forfeiture of the property as a component of the confidential informant agreement;
- Property is a monetary instrument
 - Coin or currency, traveler's check, personal check, bank check, cashier's check, money order, bank draft, negotiable instrument, and prepaid or stored value card.



Illustrative Example

- Must now wait until Wayne and Bobby are arrested for Conspiracy to Manufacture or Sell Methamphetamine, or are arrested for a criminal, gambling charge to seize:
 - The van, the corvette, the condominium, the 20 acre tract of land, the gas pump, the gas tank and any fuel, or any other personal property located at the gambling arena
- Application of Exceptions to Arrest Requirement: Do not need to wait to seize the bearer bonds or any cash, or any asset where an owner can not be located after diligent search (gold watch laying on a table next to lottery tickets and money when warrants executed and everyone scatters and denies owning everything near the lottery tickets on the table).
- Practical example: if contact is made with a suspect during a long term drug sale investigation, say upon a traffic stop where money is encountered in custody of suspect/passenger before the conclusion of investigation, without an arrest the agency can seize the money IF YOU CAN PROVE BEYOND A REASONABLE DOUBT MONEY IS PROCEEDS (i.e. Suspect/passenger sends a text messages to UC that a deal was done for that exact amount of money earlier in the day and passenger will be a later charged for felony at conclusion of investigation. NOTE: will have limited time due to PC Review before having to disclose the basis for the seizure).



Investigation

Significant Changes

- **Burden of Proof to Forfeit and Acquire Title**
 - The burden of proof for forfeiture case has changed.
 - Old standard was clear and convincing evidence.
 - Changed to **Proof Beyond a Reasonable Doubt**
 - No change to the standard of proof as it relates to “innocent” owners or co-owners. Must prove by preponderance of evidence that an owner or co-owner knew or had reason to know, after reasonable inquiry, that property was employed or likely to be employed in criminal activity.
 - Sections 932.703(7) and 932.703(8), F.S.
- **Rights, Title and Interest**
 - No longer immediately vest in the seizing law enforcement agency upon seizure.
 - Perfected by a final order of forfeiture upon proof beyond a reasonable doubt.



Initial Investigation Threshold of Evidence to Seize Increases

- The initial forfeiture investigation will be part of a criminal investigation.
- Investigation for forfeiture will have to take into consideration the changes to the standard of proof.
- It is not enough just to seize the property due to risk of paying attorney's fees and costs if unsuccessful in an APC (now \$2,000) or final judgment (may be much higher).
- LEO's must attempt to obtain evidence to support both the seizure and the forfeiture of the property.
- An example of proof beyond a reasonable doubt of proceeds in a bank account: Several UC Drug Deals -> Surveillance to Bank -> Text Message Subpoena -> Dates and Times of Deposits Match Drug Deal Text Messages -> All Money and Assets Bought can be Seized



- Practical Example of Innocent Owner Defense:
 - Proof of actual knowledge of conduct
 - Evidence that an owner received written notification from a law enforcement agency and acknowledged receipt of the notification in writing, that the seized asset had been used in violation of the Florida Contraband Forfeiture Act on a prior occasion by the arrested person, may be used to establish actual knowledge in future;
Example: Nassau County Truck and Trailer Burglary and DSP snake case.
 - Best practice would be to send notice (certified letter or service by civil process unit) of criminal activity to titled owner and include all police reports and document this written notification



Initial Seizure Strategy and Investigative Checklist

Can/should the property be seized?

- What are the facts that can be proven beyond a reasonable doubt at trial to show that the property is contraband?
- If the property is contraband, is there probable cause to seize the property and more importantly proof beyond a reasonable doubt the property forfeiture is authorized under the FCFA?
 - If the seized property was used in the commission of a felony, do you have sufficient proof beyond a reasonable doubt?
 - If the seized property was proceeds from unlawful conduct, do you have sufficient proof beyond a reasonable doubt?
- Is there an arrest, or does the property fall into one of the exceptions to the arrest requirement?



Investigative steps to shore up forfeiture lawsuit

- Train investigators to implement use of interview and forfeiture questions of owners and witness about how and when the property was acquired, used, stored, concealed, etc.
 - Admission that the property is contraband.
 - Disclaimer of ownership.
 - Even self-serving statements (e.g. “it was my girlfriend’s money”) can be used to further the investigation if an interview of the girlfriend confirms it is not her money, the girlfriend has no income except living off of drug proceeds of boyfriend, and gives any kind of statement that boyfriend doesn’t have any income except drug proceeds.
- Follow-up efforts may be needed to prove the case
 - Investigation of sources of income, tax returns, business records, etc. Consider subpoenas through SAO.
 - Follow-up with other witnesses, to confirm or contradict statements made by owner of property or witnesses.



New Seizure Probable Cause Review by Agency and Court

■ Probable Cause Review

- Review by agency personnel per Section 932.704(11)(f):
 - Probable cause for seizure must be promptly reviewed by supervisory personnel within the seizing agency.
 - Seizing agency's legal counsel must be notified of all seizures and conduct a review to see if there is legal sufficiency to proceed with a forfeiture action.



- Review by Court
 - Must apply to a court of competent jurisdiction (Circuit Court Judge) for an order determining that probable cause exists for the seizure.
 - **Must apply within 10 business days of every seizure.**
 - Application may be filed electronically by reliable means (e-file).
 - Accompanied by an affidavit articulating the probable cause for seizing the property.
 - The Court, pursuant to Section 932.703(2)(b), is required to determine:
 - Was owner arrested, or did the seizure fall into one of the exceptions to the arrest requirement.
 - Was there probable cause to seize the property.
 - Submit to the Court a proposed order finding both criteria of arrest/exception and probable cause.
 - If Court determines criteria are not met, any forfeiture hold, lien, lis pendens, or other civil encumbrance must be released within 5 days.



Adversarial Probable Cause Hearing

- Regardless of Court finding of Arrest Requirement/Exception and determination of Probable Cause, Claimant may still request an Adversarial Preliminary Hearing.
- 932.703(3)(a):
 - When a post-seizure, adversarial preliminary hearing as provided in this section is desired, a request must be made in writing by certified mail, return receipt requested, to the seizing agency.
 - The seizing agency shall set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter.
- July 1, 2016 change: If claimant prevails at APH (finding of no probable cause), Court shall award attorney's fees up to a limit of \$2,000



FILING FEES AND BONDS

- Section 932.704 (4), F.S. has been amended as follows:
 - The Seizing agency shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred, **paying a filing fee of at least \$1,000 and depositing a bond of \$1,500 to the clerk of the court. Unless otherwise expressly agreed to in writing by the parties, the bond shall be payable to the claimant if the claimant prevails in the forfeiture proceeding and in any appeal.**



Filing Fee

- The statute does not dictate that the filing will be \$1,000 but rather requires that the filing fee be *at least \$1,000*.
- In an Advisory Bulletin issued by the Florida Court Clerks & Comptrollers Association, Clerks have been advised that unless a higher fee is established by the Court or Chief Judge, then the Clerk must charge a \$1,000 filing fee. Those that have committed set the filing fee at \$1,000.
- Agencies should contact their local Clerk of Court in this regard.



Bond

- The bond posted for any forfeiture case is payable to the claimant if they prevail in the forfeiture proceeding and in any appeal.
- The Fund is negotiating a bond and discussing the associated process.
- The bond will not be a blanket bond for all forfeitures.
- A bond will have to be issued for each forfeiture case that is filed.
- The process for securing the bond, though not finalized, is contemplated to entail:
 - Individual agencies will contact the Fund to notify them that a bond is needed.
 - The Fund will contact the bond company with a request for issuance of a bond.
 - The bond company will then forward the bond directly to the agency for inclusion with the filing of the forfeiture complaint.
 - Cost per bond estimate is \$15.00 per, though not finalized at this time.
 - Yes, it will be available to all Sheriffs, Fund members and non-members alike.
- General consensus is that using currency held in the agency LETF is not authorized under s. 932.7055.



APPROVAL OF SETTLEMENTS

Section 932.703 (1) (b), F.S. has been amended as follows:

- After property is seized pursuant to the Florida Contraband Forfeiture Act, regardless of whether the civil complaint has been filed, all settlements must be personally approved by the head of the law enforcement agency that seized the property. If the agency head is unavailable and a delay would adversely affect the settlement, approval may be given by a subordinate of the agency head who is designated to grant such approval.
- The statute does not identify the duration of the unavailability of the agency head that would give rise to the designee having authority to grant the approval for the settlement.
- The statute does not identify the duration of the delay that would adversely affect the settlement.



- No specific language or document has been identified in the statute regarding the form for approval.
- As it is a common thread through the law in general, reasonableness in light of the totality of the circumstances should be a guide when specifics are not otherwise detailed in the statute.
- Best practice:
 - Generate a memorandum from the Sheriff identifying the Agency designee authorized to grant approval of the settlement.
 - Consideration should be given to authorizing the Undersheriff/Chief Deputy or the General Counsel/Legal Advisor (if any) to approve the settlements.
 - Create a template form for use in this regard.



DISTRIBUTION OF FOREITED PROPERTY

Section 932.7055 does not contain many changes. However, note the following:

- Local law enforcement agencies that acquire at least \$15,000 pursuant to the FCFA within a fiscal year must expend or donate no less than **25%** of the proceeds for the support and operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer programs.
- The previous amount required for expenditure/donation was 15%.



Changes to Section 322.34:

- Currently, this provision allows for a vehicle that is driven by a person who is DUI in violation of s. 316.193 to be subject to seizure and forfeiture if at the time of the offense the subject's driver license is suspended, revoked or canceled as a result of a prior conviction for DUI.
- Subsequent to a final judgment and sale of the vehicle, the agency may retain 30% of the net proceeds.
- Subsection (9) has been amended to require the remaining 70% of the proceeds to first be applied to payment of court costs, fines and fees remaining due.
- Thereafter, the remaining balance will be deposited in the General Revenue fund for use by regional workforce boards.
- Previously, the remaining 70% went directly to the General Revenue Fund.
- One interpretation of this change is that by order of the Court, the defendant could potentially be reimbursed for any fines, fees or court costs incurred by as a result of the forfeiture action.



ANNUAL REVIEW, REPORTING AND PENALTIES

Section 932.7061 is newly created within the FCFA. Requirements under this section are as follows:

- Submission of an annual report to FDLE indicating whether the agency has seized or forfeited property under the FCFA.
- Annual reports will be submitted electronically.
- Agencies receiving or expending forfeited property or proceeds from the sale of forfeited property in accordance with the FCFA shall submit a completed annual report by October 10, documenting the receipts and expenditures.
 - Receiving or expending forfeited property:
 - Agency is successful in a forfeiture proceeding and takes title or ownership of property or currency
 - Agency uses forfeited property (retains vehicle or other property for agency use)
 - Agency sells forfeited property
 - Agency retains currency
- In these cases, the agency will be required to complete the annual report by October 10.



- Preliminary discussions with FDLE indicate the following:
 - Reports required under this section will be received by the Office of Inspector General.
 - The reporting requirement regarding indication of any seizure or forfeiture by the agency and the secondary reporting requirement concerning receipt or expenditure of forfeited property or proceeds from the sale of forfeited property in accordance with the FCFA will be done on one form.
 - FDLE will be creating a template for use in fulfilling the reporting requirements under s. 932.7061.
 - The report should also be forwarded to the BOCC as the entity with budgetary authority over the agency.

- This section also prohibits the agency and the budgetary authority from anticipating future forfeitures or proceeds when considering the adoption and approval of the Agency budget.



ANNUAL REVIEW, REPORTING AND PENALTIES (cont.)

Section 932.602 is newly created within the FCFA. Requirements under this section are as follows:

- A seizing agency that fails to comply with the reporting requirements noted above is subject to a civil fine of \$5,000.
- The agency will not be subject to the fine if, within 60 days of receipt of written notification from FDLE of noncompliance, the agency substantially complies with the reporting requirements.
- Determination of the fine and enforcement under this section is the responsibility of the Chief Financial Officer.



RISK ASSESSMENT

- Risk assessment as it relates to determination of whether to seize property and proceed with forfeiture will continue to be an integral part of forfeitures.
- Accurate valuation of property seized (usually vehicles) must occur in a timely manner.
- Costs associated with proceeding with a forfeiture that should be considered are:
 - Filing fee: \$1,000
 - Cost for bond: Possibly de minimus: \$15 (estimated)
 - Publication costs: Vary in range from \$250 - \$375
 - Service of complaint: No charge in county. Some out of county agencies will serve at no cost. Others still charge a service fee.
 - Agency cost: Consideration will differ depending on whether there is a cost for service of process or if that is deferred.
Agency has in-house counsel or retains outside counsel for forfeitures.



■ Minimum threshold

- The agency should consider establishing a minimum threshold regarding the seizure.
- Anecdotal information suggests that the average threshold amount will be in the \$3,500 - \$4,000 range as the threshold for seizure/forfeiture.
- When seizing currency the value is readily determined.
- However, when seizing property, such as vehicles, early and accurate valuation is critical.
- While a generalized valuation of a vehicle can be accomplished via the internet (Edmunds.com for example) other factors come into play such as:
 - Condition of the vehicle
 - Resale value either at agency auction or otherwise
 - Prospective use of the vehicle by the agency
- Therefore, having the appropriate personnel making preliminary determinations in the field regarding valuation of property is essential.



- Lienholder:

- Is there a lienholder and if so, what is the cost to satisfy the lien?

- Storage:

- What, if any, cost is there for storage and what type of storage is available?
- Does storage infringe on space used by Crime Scene to store evidentiary property or by Fleet Services?

- Preservation:

- The agency has an obligation to maintain the property in the same condition as when it was acquired.
- Is storage covered?
- Will there be a cost associated with maintaining the property?



■ Attorney's Fees / Costs:

- Pursuant to s. 932.704 (4), unless otherwise expressly agreed to in writing by the parties, the \$1,500 bond is payable to the claimant if the claimant prevails.
- Pursuant to s. 932.704 (9) (a), if the claimant prevails and there is no agency appeal, the agency may not assess any towing charges, storage fees, administrative costs or maintenance costs.
- Pursuant to s. 932.704 (9) (b), if the claimant prevails at trial or on appeal, the agency is required to pay to the claimant any reasonable loss of value of the seized property that was retained during the trial or appeal.
- Pursuant to s. 932.704 (9) (b), if the claimant prevails the agency is required to pay any loss of income directly attributed to the continued seizure of income-producing property.
- Pursuant to s. 932.704 (10), if the claimant prevails after an adversarial preliminary hearing (APH), the court shall award reasonable attorney's fees and costs up to \$2,000. (Previous limit was \$1,000)
- Pursuant to s. 932.704 (10), if the claimant prevails at the close of forfeiture proceedings *and* the court finds that the agency has not proceeded in good faith or the agency actions precipitating the forfeiture constituted a gross abuse of agency discretion, the court can award reasonable trial attorney's fees and costs.



- Contingent on the claimant prevailing at the APH stage, the agency could incur the following:

- Loss of bond: \$1,500
- Cost of bond: \$15 - \$25 (est.)
- Attorney's fees: \$2,000 (max)
- Cost of summons: \$10 (per claimant)
- Cost of service: Varies
- Cost of filing fee: \$1,000
- Total: \$4,545 (est.)



- Contingent on the claimant prevailing at trial, the agency could incur, by a conservative estimate, \$7,545. Consider the following:

- Loss of bond: \$1,500
- Cost of bond: \$15 - \$25 (est.)
- Attorney's fees: *Conservative* estimate considering APH, preparation to include discovery, depositions, and a one-day trial with attorney securing \$250 per hour: \$4,000 - \$5,000, dependent on the length of trial and finding that agency did not proceed in good faith or gross abuse of discretion. Also, prevailing attorney's fees in circuit in which forfeiture takes.

- Cost of filing fee: \$1,000
- Cost of summons: \$10 (per claimant)
- Cost of service: Varies



IMPACT ON THE CLAIMANT

- Consideration should be given to what, if any, impact a successful forfeiture action will have on the claimant.
- Will the forfeiture action, notwithstanding any criminal court action, successfully impede the claimant from future criminal activity?
- Will the action “send a message” to the community?
- Important to note the following:
 - A vast majority of potential claimants will become aware of the changes to the FCFA.
 - Potential claimants will adjust their behavior based on the changes to the FCFA.
- In light of the changes to the FCFA and the impacts noted above, agencies will have to give due consideration to alternatives to forfeiture. These alternatives will now be discussed by Manatee County Sheriff’s Office General Counsel Michele Hall.



2016 FCFA QUESTIONS

- Do the provisions in the new law apply retroactively?
- Is the seizing agency required to send a claimant a copy of the application for a determination of probable cause within 10 days of seizure?
- Does the seizing agency have to prove beyond a reasonable doubt that the property is a contraband article?
- What is the meaning of the provision stating that when an owner cannot be located after 90 days property is deemed to be contraband?



RETROACTIVITY

Although it's possible that a court could rule that the 2016 FCFA applies to civil forfeiture cases filed prior to July 1, 2016 - - in which case some or all of the new requirements may apply to pending cases - - the law generally provides as follows:

- Retroactivity of a substantive statute is generally disfavored in the law in accordance with fundamental notions of justice that have been recognized throughout history.
- Florida legislation is presumed to operate prospectively unless there is clear legislative intent to the contrary.
- The Legislature's inclusion of an effective date of a law effectively rebuts any argument that retroactive application of the law was intended.

There is no clear intent to make the 2016 FCFA retroactive. The Legislature has provided an effective date of July 1, 2016.



RETROACTIVITY

Reasonable approach: Given the preceding legal principles, it appears unlikely that the 2016 FCFA will be applied retroactively. Assume the new requirements do not apply to forfeiture actions filed before July 1, 2016 until a court in your jurisdiction rules otherwise.

- If a court rules that the 2016 FCFA applies retroactively, the agency should immediately re-evaluate all pending forfeiture cases to determine if the requirements of the new statute, including the beyond a reasonable doubt standard of proof, can be met.
- If there is doubt as to whether the requirements of the new law can be met, agencies should consider settling or dismissing a pending action.
- If a court finds that a seizing agency has not proceeded at any stage of the proceedings in good faith, the court may award fees and costs to the claimant.



10-DAY APPLICATION FOR DETERMINATION OF PROBABLE CAUSE / NOTICE TO CLAIMANT

- Law enforcement is required to apply for an order determining probable cause within 10 days of seizure.
- It is not clear whether or under what circumstances the seizing agency is required to provide a claimant with notice that an application for determination of probable cause has been requested.
- It can be argued that the application for a 10-day probable cause determination is similar to an application for a warrant. In both situations law enforcement is seeking a probable cause determination.



10-DAY APPLICATION FOR DETERMINATION OF PROBABLE CAUSE / NOTICE TO CLAIMANT

In a survey conducted by the Florida Association of Police Attorneys, legal advisors took the following positions:

- The claimant must be given notice.
- There is no requirement to provide notice to a claimant if a complaint has not been filed
- The claimant should be given notice if a complaint has been filed and a case number has been assigned so as not to violate the ex parte rule.
- Even if a complaint has been filed, the legislative intent indicates that the application for a determination of probable cause is to be ex parte.



NOTICE TO CLAIMANT OF 10-DAY APPLICATION FOR DETERMINATION OF PROBABLE CAUSE

Reasonable approach: Apply for the 10-Day PC determination prior to filing the forfeiture complaint. Assert that the application is analogous to a complaint for a warrant, and that no notice is required.

- Contact Court Administration or your Chief Judge prior to July 1st to see how your judicial circuit would like to receive the application and draft order (e.g., hand deliver to Judicial Assistant, through an eWarrant program, email, etc.)
- **Note: If you file the application with the Clerk of Court and the Court assigns a case number, you may be required to provide notice to the claimant.**



Seizure of Currency-Beyond a Reasonable Doubt

- During the forfeiture stage, the government has the affirmative burden of proving beyond a reasonable doubt these two elements:
 1. The item seized is a “contraband article”. The definition of “contraband article” is found in § 932.701. Examples are property used as an instrumentality in commission of a felony, property acquired by proceeds obtained as a result of violating the Act.
 2. A violation of the Act has occurred. Violations of the Act include possession, concealment, or transportation of contraband articles.
- Currency is a “contraband article” when it is used, or intended to be used, in violation of any provision of chapter 893 “if the totality of the facts presented by the state is clearly sufficient to meet the state’s burden of establishing probable cause to believe that a nexus exists between the article seized and narcotics activity...”



Seizure of Currency-Beyond a Reasonable Doubt

- Read together, this means the government must prove beyond a reasonable doubt that the totality of facts meet the state's burden of establishing probable cause to belief that a nexus exists between the currency and narcotics activity.
- Many agency attorneys feel the new requirement of proving a violation of the act beyond a reasonable doubt “swallows” the requirement for a probable cause nexus, and requires agencies to prove beyond a reasonable doubt that the currency has a nexus with narcotics activity.
- This could have a significant impact on currency seizures.
- Increased investigative efforts will need to be utilized to gain sufficient evidence to meet this increased burden.



Seizure of Currency-Beyond a Reasonable Doubt

Reasonable approach : Proceed carefully when forfeiting currency. It will be very difficult to meet the beyond a reasonable doubt standard based on the fact that there is a nexus between currency and narcotics activity. The fact that currency is found in a safe that contains a large quantity of cocaine or the fact that "buy money" is mixed in with currency seized pursuant to a search warrant may not meet the beyond a reasonable doubt standard.



Seizure of Currency-Beyond a Reasonable Doubt

- Investigations must include efforts to obtain evidence to use in the forfeiture stage.
 - Gather the facts that show that the property is contraband;
 - Interview owner(s) about how and when the property was acquired;
 - Follow-up with witnesses who might confirm or contradict statements made by owner(s) or others with interest in the property;
 - Gain admissions, when possible;
 - Utilize disclaimers of ownership or interest.
- Additional follow-up efforts may be needed to prove the case.



“DEEMED CONTRABAND AFTER 90 DAYS” PROVISION

F.S. 932.703(c): “If at least 90 days have elapsed since the initial seizure of the property and the seizing agency has failed to locate the owner after making a diligent search, the seized property is deemed a contraband article that is subject to forfeiture under the [FCFA]”. The intent of this provision is unclear.

- It’s possible the intent was to preclude seizing agencies from filing for a default judgement before 90 days from the date of seizure have elapsed in cases where the owner has not been personally served.
- It’s also possible the intent was to preclude seizing agencies from filing for a default judgement before 90 days from the date of seizure have elapsed in cases where the claimant has not been identified after making a “diligent effort” to locate the owner.



DEEMED CONTRABAND AFTER 90 DAYS” PROVISION

Reasonable approach:

- **Known owner:** Perform a diligent search in order to locate and serve the owner.
- **Unknown owner:** Perform a diligent search in order to identify an owner of the seized property.

In either of the above situations, if an owner is not located, file a motion for a default judgement even if the 90 days has not elapsed. If the court denies the motion as untimely, file another motion for default after the 90 day period has expired.



Alternatives to Forfeiture Under FCFA

Other ways to prevent criminals from retaining property that is used to commit crimes:

- Unclaimed evidence statute
- Unclaimed monies statute
- Independent statutory authorization to forfeit
- Release to lien holder



UNCLAIMED EVIDENCE DEFINITION

F.S. 705.101

“Unclaimed evidence” means any tangible personal property, including cash, not included within the definition of “contraband article,” as provided in s. 932.701(2), which was seized by a law enforcement agency, was intended for use in a criminal or quasi-criminal proceeding, and is retained by the law enforcement agency or the clerk of the county or circuit court for 60 days after the final disposition of the proceeding and to which no claim of ownership has been made.



Unclaimed Evidence F.S. 705.105

- Title to unclaimed evidence or unclaimed tangible personal property lawfully seized pursuant to a lawful investigation in the custody of the court or clerk of the court from a criminal proceeding or seized as evidence by and in the custody of a law enforcement agency shall vest permanently in the law enforcement agency 60 days after the conclusion of the proceeding.
- A proceeding is not considered to be concluded if a petition or appeal is still pending.
- While the statute does not require that notice be provided to the property owner, the provision of notice may defeat a defendant's claim that he did not know the property was held as evidence or that the proceeding had concluded.



Unclaimed Evidence

F.S. 705.105

- Reasonable approach: In cases where no one has claimed ownership or is likely to claim ownership, provide notice to actual or potential owners that the property is in the possession of the agency and will be lawfully disposed of if not timely claimed.



UNCLAIMED EVIDENCE

F.S. 705.105 EXAMPLE NOTICE LETTER

DATE ISSUED: 06/03/2016

REF: 2016-016176

The Manatee County Sheriff's Office is in possession of the property listed below. You may claim this property at the Evidence Management Section Office by presenting this letter and proper identification. If not claimed by 09/01/2016 the property will be disposed of in the manner prescribed by law.

The Manatee County Sheriff's Office Property and Evidence Section can be reached at (941) 747-3011 x1130. Office hours are 8:00 A.M. to 4:00 P.M., Monday through Friday, excluding holidays. You must call and schedule an appointment in order to claim your property.

Incident Report # 2016-016176

Property ID# 2196914,2196915,2196916,2196917,2196918,2196919



UNCLAIMED EVIDENCE

F.S. 705.105

- Defendants often file a motion for return of property held as evidence after the 60 day period has expired. If the motion is facially sufficient, the court must hold an evidentiary hearing.
- At a hearing on a motion for return of property, the court is required to attach portions of the record showing that the property was seized pursuant to a lawful investigation or held as evidence. Agency legal counsel must provide the court with documentation or testimony establishing that the property was seized pursuant to a lawful investigation or held as evidence, and show that the defendant's motion was untimely.



MONEY AS UNCLAIMED EVIDENCE

F.S. 116.21

- Sheriffs are authorized at their discretion on or before September 25 of each year to pay into the fine and forfeiture fund any unclaimed moneys deposited or collected by them prior to January 1 of the preceding year as long as a claim for the money has not been made.
- During the month of July each year Sheriffs **may** compile a list of all unclaimed moneys which came into their hands prior to January 1 of the prior year. The list shall include the name of the defendant and the amount of unclaimed money.
- The list must be published one time during the month of July in a newspaper of general circulation and shall specify that unless moneys are claimed on or before September 1 they shall be declared forfeited to such county.



MONEY COLLECTED/HELD FOR SAFEKEEPING

F.S. 116.21

- **Reasonable approach:** When unclaimed money is not evidence, hold the money for the requisite amount of time and follow the procedural requirements of F.S. 116.21.
- **Example:** A homicide occurs in the parking lot of a restaurant. After receiving consent to search to search the restaurant, detectives find \$15,000 in a drawer at the hostess stand. Restaurant personnel disclaim any interest in the money. No link exists between the money and the homicide.



INDEPEPENT AUTHORIZATION FOR FORFEITURE

Most statutes authorizing forfeiture incorporate the provisions of the FCFA, and will require compliance with the new FCFA procedures.

Examples of statutes that provide an independent basis for forfeiture but incorporate the FCFA:

- **F.S. 319.33** Offenses involving vehicle identification numbers, applications, certificates
- **F.S. 893.12** Drug abuse, prevention and control



INDEPENDENT AUTHORIZATION FOR FORFEITURE

Some statutes provide a basis for asset forfeiture that is independent of the FCFA.
Examples:

- **F.S. 895.05** Racketeer Influenced and Corrupt Organization Act
- **F.S. 849.36** Seizure and forfeiture of property used in the violation of lottery and gambling statutes
- **F.S. 812.035** Theft, Robbery and Related Crimes (possibly)

Forfeiture actions brought under these statutes likely do not require compliance with the FCFA but still must meet due process standards.

Reasonable approach: Consult an attorney before seeking forfeiture under a statute that does not incorporate the FCFA. Established forfeitures principles still may impact application of the statutory provisions.



RELEASE OF PROPERTY TO LIENHOLDER

- When seized property is subject to a lien, it may be cost prohibitive to file a forfeiture action.
- As an alternative to forfeiture, property may be released to a lienholder (assuming it is no longer needed as evidence).
- Some lienholders will enter into a lienholder agreement and be dissuaded from returning the property to the owner.



EXAMPLE RELEASE OF PROPERTY TO LIENHOLDER

MANATEE COUNTY SHERIFF'S OFFICE LIENHOLDER AGREEMENT AND ACKNOWLEDGEMENT

MCSO#

THIS AGREEMENT is made by and between the Manatee County Sheriff's Office ("MCSO") and _____ ("LIENHOLDER") this _____ day of _____, 201_.

1. MCSO and LIENHOLDER acknowledged the benefits to each other by avoiding forfeiture litigation, and enter into this Agreement for the sole purpose of preventing same, and in consideration of the mutual covenants which are herein contained.
2. The property which is the subject matter of this Agreement is as follows:
_____, VIN # _____.
3. LIENHOLDER represents that it has a valid and perfected security interest and/or valid first lien in or against the subject vehicle, which said security interest and/or first lien is superior to any and all interests of _____ (registered owner).



RELEASE OF PROPERTY TO LIENHOLDER

4. LIENHOLDER represents that it is entitled to immediate possession of the subject vehicle by virtue of its contract with _____, owner of the subject vehicle, a copy of which contract is attached hereto and by reference made a part hereof.
5. MCSO agrees to surrender whatever right, title or interest it may have in the subject vehicle by operation of Chapter 932, Florida Statutes, and agrees to surrender possession of same to LIENHOLDER.
6. LIENHOLDER represents to MCSO that all statements in this Agreement are true and further agrees to hold harmless and indemnify MCSO or any of its employees, agents, deputies, or servants from any and all damages, actions, suits, claims of whatsoever kind made by or on behalf of any person, including owner, as a result of MCSO surrendering possession of the said vehicle to LIENHOLDER.
7. LIENHOLDER represents by the execution of this Agreement that it has been given actual notice regarding the arrest of the registered owner(s) or other persons using said vehicle, and the charges filed against him/her.



RELEASE OF PROPERTY TO LIENHOLDER

Pursuant to section 932.70, Florida Statutes, evidence that a Lienholder received written notification from a law enforcement agency that the seized asset was used in violation of the Florida Contraband Forfeiture Act on a prior occasion by the owner may be used to establish lienholder's actual knowledge that the property is being used in violation of the Florida Contraband Act. In the event the lienholder releases the vehicle to the registered owner, Lienholder acknowledges that it might not be considered an innocent owner should the vehicle again be utilized by the registered owner in violation of the Florida Contraband Forfeiture Act.

LEINHOLDER/Authorized Agent

Signed by:

Lienholder Address

City, State, Zip Code

[Include Notary Block]



RELEASE OF PROPERTY TO LIENHOLDER

Reasonable approach: When it is cost prohibitive or impractical to pursue a forfeiture claim, consider releasing the property to a lienholder after providing proper documentation.

Example:

Vehicle is seized because owner used vehicle in a string of daytime burglaries . Vehicle has been treated poorly and is now worth half it's former value. Lienholder refuses to relinquish its claim for anything less full value of the remaining payments. Releasing the vehicle to the lienholder is the most efficient way to keep vehicle from being used to commit crimes.



THANK YOU FOR ATTENDING.

Please feel free to ask questions.

