

SB0087S04 compared with SB0087S03

~~deleted text~~ shows text that was in SB0087S03 but was deleted in SB0087S04.

Inserted text shows text that was not in SB0087S03 but was inserted into SB0087S04.

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Senator Daniel W. Thatcher proposes the following substitute bill:

CIVIL ASSET FORFEITURE REVISIONS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel W. Thatcher

House Sponsor: Eric K. Hutchings

LONG TITLE

General Description:

This bill modifies the Forfeiture and Disposition of Property Act regarding forfeiture and the claiming of property.

Highlighted Provisions:

This bill:

- ▶ amends specified definitions;
- ▶ amends provisions regarding the determination that property is subject to forfeiture;
- ▶ amends civil forfeiture procedures to provide for seized currency to be returned to the claimant in specified circumstances;
- ▶ provides that when property valued at less than \$10,000 is seized, the property shall be returned to the claimant;
- ▶ provides that when property is determined to be subject to forfeiture, and the

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claimant is then acquitted of the offense giving rise to the forfeiture, the property shall be returned; and

- ▶ facilitates the return of seized property to an innocent owner.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

24-1-102, as last amended by Laws of Utah 2014, Chapter 112

24-2-103, as enacted by Laws of Utah 2013, Chapter 394

24-4-102, as enacted by Laws of Utah 2013, Chapter 394

24-4-104, as last amended by Laws of Utah 2014, Chapter 112

24-4-107, as enacted by Laws of Utah 2013, Chapter 394

24-4-110, as last amended by Laws of Utah 2014, Chapter 112

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **24-1-102** is amended to read:

24-1-102. Definitions.

As used in this title:

(1) "Account" means the Criminal Forfeiture Restricted Account created in Section 24-4-116.

(2) (a) [~~"Acquittal"~~] "Acquitted" means a finding by a jury or a judge at trial that a claimant is not guilty.

(b) [~~An acquittal~~] "Acquitted" does not include:

- (i) a verdict of guilty on a lesser or reduced charge;
- (ii) a plea of guilty to a lesser or reduced charge; or
- (iii) dismissal of a charge as a result of a negotiated plea agreement.

(3) "Agency" means any agency of municipal, county, or state government, including law enforcement agencies, law enforcement personnel, and multijurisdictional task forces.

(4) "Claimant" means any:

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- (a) owner of property as defined in this section; ~~{ or }~~
 - (b) interest holder as defined in this section ~~{}~~; or ~~{}~~
 - ~~{}~~(c) person or entity who asserts a claim to any property seized for forfeiture under this title. ~~{}~~
- (5) "Commission" means the Utah Commission on Criminal and Juvenile Justice.
- (6) "Complaint" means a civil in rem complaint seeking the forfeiture of any real or personal property under this title.
- (7) "Constructive seizure" means a seizure of property where the property is left in the control of the owner and the seizing agency posts the property with a notice of intent to seek forfeiture.
- (8) (a) "Contraband" means any property, item, or substance that is unlawful to produce or to possess under state or federal law.
- (b) All controlled substances that are possessed, transferred, distributed, or offered for distribution in violation of Title 58, Chapter 37, Utah Controlled Substances Act, are contraband.
- (9) "Innocent owner" means a claimant who ~~{ provides to the prosecuting attorney evidence that the third party }~~:
- (a) held an ownership interest in property at the time the conduct subjecting the property to forfeiture occurred, and:
 - (i) did not have actual knowledge of the conduct subjecting the property to forfeiture; or
 - (ii) upon learning of the conduct subjecting the property to forfeiture, took reasonable steps to prohibit the illegal use of the property; or
 - (b) acquired an ownership interest in the property and ~~[who]~~ had no knowledge that the illegal conduct subjecting the property to forfeiture had occurred or that the property had been seized for forfeiture, and:
 - (i) acquired the property in a bona fide transaction for value;
 - (ii) was a person, including a minor child, who acquired an interest in the property through probate or inheritance; or
 - (iii) was a spouse who acquired an interest in property through dissolution of marriage or by operation of law.

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(10) (a) "Interest holder" means a secured party as defined in Section 70A-9a-102, a mortgagee, lien creditor, or the beneficiary of a security interest or encumbrance pertaining to an interest in property, whose interest would be perfected against a good faith purchaser for value.

(b) "Interest holder" does not mean a person who holds property for the benefit of or as an agent or nominee for another person, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value.

(11) "Known address" means any address provided by a claimant to the agency at the time the property was seized, or the claimant's most recent address on record with a governmental entity if no address was provided at the time of the seizure.

(12) "Legal costs" means the costs and expenses incurred by a party in a forfeiture action.

(13) "Legislative body" means:

(a) (i) the Legislature, county commission, county council, city commission, city council, or town council that has fiscal oversight and budgetary approval authority over an agency; or

(ii) the agency's governing political subdivision; or

(b) the lead governmental entity of a multijurisdictional task force, as designated in a memorandum of understanding executed by the agencies participating in the task force.

(14) "Multijurisdictional task force" means a law enforcement task force or other agency comprised of persons who are employed by or acting under the authority of different governmental entities, including federal, state, county or municipal governments, or any combination of these agencies.

(15) "Owner" means any person or entity, other than an interest holder, that possesses a bona fide legal or equitable interest in real or personal property.

(16) (a) "Proceeds" means:

(i) property of any kind that is obtained directly or indirectly as a result of the commission of an offense that gives rise to forfeiture; or

(ii) any property acquired directly or indirectly from, produced through, realized through, or caused by an act or omission regarding property under Subsection (16)(a)(i).

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(b) "Proceeds" includes any property of any kind without reduction for expenses incurred in the acquisition, maintenance, or production of that property, or any other purpose regarding property under Subsection (16)(a)(i).

(c) "Proceeds" is not limited to the net gain or profit realized from the offense that gives rise to forfeiture.

(17) "Program" means the State Asset Forfeiture Grant Program established in Section 24-4-117.

(18) "Property" means all property, whether real or personal, tangible or intangible, but does not include contraband.

(19) "Prosecuting attorney" means:

(a) the attorney general and any assistant attorney general;

(b) any district attorney or deputy district attorney;

(c) any county attorney or assistant county attorney; and

(d) any other attorney authorized to commence an action on behalf of the state under this title.

(20) "Public interest use" means a:

(a) use by a government agency as determined by the legislative body of the agency's jurisdiction; or

(b) donation of the property to a nonprofit charity registered with the state.

(21) "Real property" means land and includes any building, fixture, improvement, appurtenance, structure, or other development that is affixed permanently to land.

Section 2. Section **24-2-103** is amended to read:

24-2-103. Property seized by a peace officer -- Custody and control of property.

(1) (a) When property is seized by a peace officer, the peace officer or the officer's employing agency shall provide a receipt to the person from whom the property was seized.

(b) The receipt shall describe the:

(i) property seized;

(ii) date of seizure; and

(iii) name and contact information of the officer's employing agency.

(c) In addition to the receipt, the person from whom the property was seized shall be provided with information regarding the forfeiture process, including:

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(i) important time periods in the forfeiture process;

(ii) what happens to the property upon conviction or acquittal; and

(iii) how to make a claim for the return of the property.

~~[(c)]~~ (d) A copy of the receipt shall be maintained by the agency.

~~[(d)]~~ (e) If custody of the property is transferred to another agency, a copy of the receipt under Subsection (1)(a) shall be provided with the property.

(2) The agency responsible for maintaining the property shall:

(a) hold all seized property in safe custody until it can be disposed of as provided in this title; and

(b) maintain a record of the property that includes:

(i) a detailed inventory of all property seized;

(ii) the name of the person from whom it was seized; and

(iii) the agency's case number.

(3) Property seized under this title is not recoverable by replevin, but is considered in the agency's custody subject only to the orders of the court or the official having jurisdiction.

(4) All controlled substances or other contraband that is seized by a peace officer may be processed for evidentiary or investigative purposes, including sampling or other preservation procedure prior to disposal or destruction.

(5) (a) An agency shall deposit property in the form of cash or other readily negotiable instruments into a separate, restricted, interest-bearing account maintained by the agency solely for the purpose of managing and protecting the property from commingling, loss, or devaluation.

(b) Each agency shall have written policies for the identification, tracking, management, and safekeeping of seized property, which shall include a prohibition against the transfer, sale, or auction of seized property to any employee of the agency.

(6) If a peace officer or the officer's employing agency records an interview of a minor child during an investigation of a violation of Section 76-5-402.1, 76-5-402.3, 76-5-403.1, or 76-5-404.1, the agency shall retain a copy of the recording for 18 years following the date of the last recording unless the prosecuting attorney requests in writing that the recording be retained for an additional period of time.

(7) Title 13, Chapter 32a, Pawnshop and Secondhand Merchandise Transaction

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Information Act, governs the disposition of property held by a pawn or secondhand business in the course of its business.

Section 3. Section **24-4-102** is amended to read:

24-4-102. Property subject to forfeiture.

(1) Except as provided in Subsection (3), [aH] property that has been used to facilitate the commission of a federal or state criminal offense and any proceeds of criminal activity may be forfeited under this chapter, including:

(a) real property, including things growing on, affixed to, and found in land; and
(b) tangible and intangible personal property, including money, rights, privileges, interests, claims, and securities of any kind.

(2) If the property is used to facilitate a violation of Section 76-10-1204, 76-10-1205, 76-10-1206, or 76-10-1222, the property subject to forfeiture under this section is limited to property, the seizure or forfeiture of which would not constitute a prior restraint on the exercise of an affected party's rights under the First Amendment to the Constitution of the United States or Utah Constitution, Article I, Section 15, or would not otherwise unlawfully interfere with the exercise of those rights.

(3) A motor vehicle used in a violation of Section 41-6a-502, 41-6a-517, a local ordinance that complies with the requirements of Subsection 41-6a-510(1), Subsection 58-37-8(2)(g), or Section 76-5-207 may not be forfeited unless:

(a) the operator of the vehicle has previously been convicted of a violation, committed after May 12, 2009, of:

- (i) a felony driving under the influence violation under Section 41-6a-502;
- (ii) a felony violation under Subsection 58-37-8(2)(g); or
- (iii) automobile homicide under Section 76-5-207; or

(b) the operator of the vehicle was driving on a denied, suspended, revoked, or disqualified license; and

(i) the denial, suspension, revocation, or disqualification under Subsection (3)(b)(ii) was imposed because of a violation under:

- (A) Section 41-6a-502;
- (B) Section 41-6a-517;
- (C) a local ordinance that complies with the requirements of Subsection 41-6a-510(1);

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(D) Section 41-6a-520;

(E) Subsection 58-37-8(2)(g);

(F) Section 76-5-207; or

(G) a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one or more of the sections or ordinances described in Subsections (3)(b)(i)(A) through (F); or

(ii) the denial, suspension, revocation, or disqualification described in Subsections (3)(b)(i)(A) through (G):

(A) is an extension imposed under Subsection 53-3-220(2) of a denial, suspension, revocation, or disqualification; and

(B) the original denial, suspension, revocation, or disqualification was imposed because of a violation described in Subsections (3)(b)(i)(A) through (G).

Section 4. Section **24-4-104** is amended to read:

24-4-104. Civil forfeiture procedure.

(1) (a) The law enforcement agency shall promptly return seized property, and the prosecuting attorney may take no further action to effect the forfeiture of the property, unless within 75 days after the property is seized the prosecuting attorney:

(i) files a criminal [~~forfeiture~~] indictment or information under Subsection 24-4-105(2);

(ii) obtains a restraining order under Subsection 24-4-105(3);

(iii) files a petition under Subsection 24-4-114(1); or

(iv) files a civil forfeiture complaint.

(b) A complaint for civil forfeiture shall describe with reasonable particularity the:

(i) property that is the subject of the forfeiture proceeding;

(ii) date and place of seizure; and

(iii) factual allegations that constitute a basis for forfeiture.

(2) (a) After a complaint is filed, the prosecuting attorney shall serve a copy of the complaint and summons upon each claimant known to the prosecuting attorney within 30 days.

(b) The prosecuting attorney is not required to serve a copy of the complaint or the summons upon any claimant who has disclaimed, in writing, an ownership interest in the seized property.

(c) Service of the complaint and summons shall be by:

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(i) personal service;
(ii) certified mail, return receipt requested, to the claimant's known address; or
(iii) service by publication, if the prosecuting attorney demonstrates to the court that service cannot reasonably be made by personal service or certified mail.

(d) Service by publication shall be by publication of two notices, in two successive weeks, of the forfeiture proceeding:

(i) in a newspaper of general circulation in the county in which the seizure occurred;
and

(ii) on Utah's Public Legal Notice Website established in Subsection 45-1-101(2)(b).

(e) Service is effective upon the earlier of:

(i) personal service;

(ii) mailing of a written notice; or

(iii) publication.

(f) Upon motion of the prosecuting attorney and a showing of good cause, the court may extend the period to complete service under this section for an additional 60 days.

(3) (a) In any case where the prosecuting attorney files a complaint for forfeiture, a claimant may file an answer to the complaint.

(b) The answer shall be filed within 30 days after the complaint is served upon the claimant as provided in Subsection (2)(b).

(c) When the property subject to forfeiture is valued at less than \$10,000, the agency that has custody of the property shall return the property to the claimant if:

(i) (A) the prosecuting attorney has filed a forfeiture complaint, and the claimant has filed an answer through an attorney or pro se, in accordance with Subsections (3)(a) and (b);
and

(B) the prosecuting attorney has not filed an information or indictment for criminal conduct giving rise to the forfeiture within ~~75~~60 days after the date that service of the forfeiture complaint on the claimant was completed, or has not timely moved a court of competent jurisdiction and demonstrated reasonable cause for an extension of time to file such an information or indictment; or

(ii) the information or indictment for criminal conduct giving rise to the forfeiture was dismissed and the prosecuting attorney has not refiled the information or indictment within

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seven days of the dismissal.

(d) The return of property to the claimant under Subsection (3)(c) does not include any expenses, costs, or attorney fees.

(e) The time limitations in Subsection (3)(c)(i) ~~shall~~ may be ~~tolled~~ extended for up to 15 days if a claimant timely seeks
to recover possession of seized property pursuant to ~~Section~~ Subsection 24-4-107(8), but shall resume
immediately upon the seizing agency's or prosecuting attorney's timely denial of the claim
on the merits, or on the 16th day after the seizing agency's or prosecuting attorney's timely denial for the claimant's failure to provide the information required by statute.

(4) Except as otherwise provided in this chapter, forfeiture proceedings are governed by the Utah Rules of Civil Procedure.

(5) The court shall take all reasonable steps to expedite civil forfeiture proceedings and shall give these proceedings the same priority as is given to criminal cases.

(6) In all suits or actions brought under this section for the civil forfeiture of any property, the burden of proof is on the prosecuting attorney to establish by clear and convincing evidence [the extent to which, if any, the property is subject to forfeiture] that the claimant engaged in conduct giving rise to the forfeiture.

(7) A claimant may file an answer to a complaint for civil forfeiture without posting bond with respect to the property subject to forfeiture.

(8) Property is subject to forfeiture under this chapter if the prosecuting attorney establishes that:

(a) the claimant has engaged in conduct giving rise to forfeiture;

(b) the property was acquired by the claimant during that portion of the conduct that gives rise to forfeiture, or within a reasonable time after that conduct is committed; and

(c) there is no likely source for the purchase or acquisition of the property other than the conduct that gives rise to forfeiture.

(9) A finding by the court that property is the proceeds of conduct giving rise to forfeiture does not require proof that the property was the proceeds of any particular exchange or transaction.

(10) If the prosecutor establishes that the property is subject to forfeiture, but the

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claimant is subsequently criminally charged with the conduct giving rise to the forfeiture and is acquitted of that charge on the merits:

(a) the property subject to the forfeiture or the open market value of the property, if the property has been disposed of under Subsection 24-4-108(13), shall be returned to the claimant; and

(b) any payments required under this chapter regarding the costs of holding the property shall be paid to the claimant.

Section 5. Section **24-4-107** is amended to read:

24-4-107. Innocent owners.

(1) An innocent owner's interest in property may not be forfeited.

(2) In a forfeiture proceeding under this chapter, the prosecuting attorney has the burden of establishing evidence that ~~{}~~a claimant~~{}~~ an innocent owner:

~~{}~~(a) is responsible for the conduct giving rise to the forfeiture, subject to Subsection (4);~~{}~~

~~{}~~(b)~~{}~~ ~~{(a)}~~ knew of the conduct giving rise to the forfeiture, and allowed the property to be used in furtherance of the conduct;

~~{}~~(c)~~{}~~ ~~{(b)}~~ acquired the property with notice of its actual or constructive seizure for forfeiture under this chapter;

~~{}~~(d)~~{}~~ ~~{(c)}~~ acquired the property knowing the property was subject to forfeiture under this chapter; or

~~{}~~(e)~~{}~~ ~~{(d)}~~ acquired the property in an effort to conceal, prevent, hinder, or delay its lawful seizure or forfeiture under any provision of state law.

(3) (a) ~~{}~~A claimant~~{}~~ An innocent owner under this chapter is not required to take steps to prevent illegal use or criminal activity regarding the property that the ~~{}~~claimant~~{}~~ innocent owner reasonably believes would be likely to result in physical harm or danger to any person.

(b) ~~{}~~A claimant~~{}~~ An innocent owner may demonstrate that the ~~{}~~claimant~~{}~~ innocent owner took reasonable action to prohibit the illegal use of the property by:

(i) making a timely notification to a law enforcement agency of information that led the ~~{}~~claimant~~{}~~ innocent owner to know that conduct subjecting the property to seizure would occur, was occurring, or has occurred;

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(ii) timely revoking or attempting to revoke permission to use the property regarding those engaging in the illegal conduct; or

(iii) taking reasonable actions to discourage or prevent the illegal use of the property.

~~§§~~(4) If the state relies on Subsection (2)(a) to establish that a claimant is not an innocent owner, and if the claimant is criminally charged with the conduct giving rise to the forfeiture and is acquitted of that charge on the merits: ~~§§~~

~~§§~~(a) the property subject to the forfeiture or the open market value of the property, if the property has been disposed of under Subsection 24-4-108(13), shall be returned to the claimant; and ~~§§~~

~~§§~~(b) any payments required under this chapter regarding holding the property shall be paid to the claimant. ~~§§~~

~~§§~~(5) ~~§§(4)~~ A person may not assert under this chapter an ownership interest in contraband.

~~§§~~(6) Property is presumed to be subject to forfeiture under this chapter if the prosecuting attorney establishes that: ~~§§~~

~~§§~~(a) the claimant has engaged in conduct giving cause for forfeiture; ~~§§~~

~~§§~~(b) the property was acquired by the claimant during that period of the conduct giving cause for forfeiture or within a reasonable time after that period; and ~~§§~~

~~§§~~(c) there was no likely source for the purchase or acquisition of the property other than the conduct giving cause for forfeiture. ~~§§~~

~~§§~~(7) A finding that property is the proceeds of conduct giving cause for forfeiture does not require proof that the property was the proceeds of any particular exchange or transaction. ~~§§~~

~~(5)8~~ (a) An innocent owner may recover possession of seized property that is subject to forfeiture by contacting the seizing agency or prosecuting attorney within 30 days of the seizure and providing to the seizing agency or prosecuting attorney:

(i) evidence that establishes proof of ownership; and

(ii) a brief description of the date, time, and place that the innocent owner mislaid or relinquished possession of the seized property.

(b) A seizing agency or prosecuting attorney who receives a claim from a potentially innocent owner utilizing the procedure in Subsection (~~(5)8~~)(a) shall issue a written response to

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that claim within ~~{45}~~30 days of receipt, indicating whether the claim has been granted, denied on the merits, or denied for failure to provide the information required by statute subject to the following:

(i) if the claim is denied for failure to provide the information required by statute, the potentially innocent owner has 15 days from the date of denial to submit additional information before the prosecuting attorney may commence a civil action seeking to forfeit the property; and

(ii) if the seizing agency or prosecuting attorney fails to issue a written response within ~~{45}~~30 days the property shall be returned.

(c) Any property returned under Subsection (~~{5}~~8)(b), either because the claim was granted or because the seizing agency or prosecuting attorney failed to respond within ~~{45}~~30 days may not include any expenses, costs, or attorney fees.

(d) ~~{Notwithstanding Subsection 24-4-110(2), an innocent owner}~~A claimant who utilizes the procedures in Subsection (~~{5}~~8)(a) and whose claim is denied on the merits by the seizing agency or prosecuting attorney, but who is later determined by a court of competent jurisdiction in a civil forfeiture action to be an innocent owner within the meaning of Section 24-4-107, may collect reasonable attorney fees and court costs from the date on which the seizing agency or prosecuting attorney denied the claim. Legal costs and attorney fees collected pursuant to this Subsection are not subject to the 50% cap set forth in Subsection 24-4-110(2).

(e) All communications between the parties in connection with a claim submitted pursuant to Subsection (8) are subject to the Utah Rules of Evidence, Rules 408 and 410.

Section 6. Section 24-4-110 is amended to read:

24-4-110. Attorney fees and costs.

(1) In any forfeiture proceeding under this chapter, the court shall award a prevailing property owner reasonable:

(a) legal costs; and

(b) attorney fees.

(2) The legal costs and attorney fees awarded by the court to the prevailing party may not exceed [~~20%~~] 50% of the value of the seized property.

(3) A [~~property owner that~~] claimant who prevails only in part is entitled to recover reasonable legal costs and attorney fees only on those issues on which the party prevailed, as

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determined by the court.