
North Carolina Criminal Law Blog: New Limits on Forfeiture

By Jeff Welty

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On Friday, Attorney General Eric Holder announced major new limits on asset forfeiture. In a nutshell, he put a stop to the federal civil forfeiture of assets seized by state and local law enforcement and “adopted” under the Equitable Sharing program. The details are a little fuzzy, but this may be a very big deal in the world of forfeiture, for reasons I discuss below.

What the program was. For years, the federal government has used federal civil forfeiture law to obtain ownership of property seized by state and local law enforcement, and to give a portion of the value of that property back to the agency that made the seizure. For example, a local police officer in North Carolina might conduct a traffic stop, obtain consent to search the vehicle, and find \$20,000 in cash in the glove compartment. Suspecting the driver of drug activity, the officer might seize the cash. Regardless of whether the officer charged the driver with a crime, federal authorities might “adopt” the case and initiate forfeiture proceedings to obtain ownership of the cash, and might then return 80 percent of the cash to the officer’s agency. The program, called Equitable Sharing, is detailed in [United States Department of Justice, Guide to Equitable Sharing for State and Local Law Enforcement Agencies \(2009\)](#).

This has been a popular program for several reasons. First, once federal civil forfeiture proceedings begin, forfeiture is very likely to result. Compressing the law a bit, the government’s burden of proof in such proceedings is only a preponderance of the evidence that the property has a substantial connection to a criminal offense, [18 U.S.C. § 983\(c\)](#), a burden that smart, experienced federal lawyers are often able to meet. Second, the federal government handles all the legal work, removing that burden from state prosecutors and agency lawyers. Third, the assets that are “shared” back to the agency that made the seizure stay with that agency and may be used for virtually any law-enforcement related purpose, such as attending training and purchasing equipment. By contrast, any forfeiture made under state law is required to go to the public schools under the state constitution. [N.C. Const., Art. IX, Sec. 7](#).

Criticism of the program. Critics of the program argued that it provided an end run around states’ efforts to direct how forfeited assets should be used; that it created a financial incentive for state and local officers to seize assets, even in questionable cases; and that it resulted in abuses, particularly of citizens who carried large amounts of cash because they ran legitimate cash-based businesses. The *Washington Post* recently ran an influential investigative series that was generally critical of the program; one story in the series is [here](#).

The new limits on the program. The new policy eliminates federal “adoptions” of state and local seizures. (The [Department of Justice press release](#) on the subject and [the actual order mandating the changes](#) are both available online.)

However, there are two caveats to the new policy:

- There is an exception “for property that directly relates to public safety concerns, including firearms, ammunition, explosives and property associated with child pornography.”
- Federal forfeiture may still take place when the seizure is made by “joint operations involving both federal and state authorities.”

The public safety exception appears to be quite narrow. The scope of the “joint operation” doctrine is unclear and may be much broader. Jacob Sullum [at Reason’s Hit & Run Blog](#) breaks down some numbers and concludes that 86% of equitable sharing payments to state and local law enforcement agencies came from joint operations. By contrast, the [Washington Post reports](#) that less than half the payments came from joint operations. Radley Balko notes in [this analysis](#) that a key question is whether “the hundreds of multijurisdictional drug task forces around the country” count as joint operations. My guess is that the answer depends on the extent of the federal involvement in a particular task force,



including whether there are federal officers on the task force and whether federal prosecutors provide legal advice to the task force.

The impact on law enforcement agencies and their budgets. Many law enforcement officers and agencies aren't happy with the announcement. The National Sheriff's Association [states](#) that it is "deeply disappointed" with the new policy, which it predicts will reduce adoptive forfeiture cases by half. The executive director of the National Association of Police Organizations [told the Post](#) that "[t]here is . . . grave concern about the possible loss of significant funding" as a result of the order. The *Post* itself reported that "[f]or hundreds of police departments and sheriff's offices . . . seizure proceeds accounted for 20 percent or more of their annual budgets in recent years," though that is a small fraction of the thousands of state and local law enforcement agencies across the country. Not all agencies are greatly concerned. Locally, for example, the *Fayetteville Observer* [reports](#) that the Cumberland County Sheriff's Office does not believe that the new policy will have a major effect on its operations.

The future of forfeiture in North Carolina. Assuming (1) that this new policy remains in place after Holder leaves the Department of Justice, and (2) that the joint operations doctrine doesn't turn out to swallow most of the new rule, there may be a significant reduction in federal forfeiture of assets seized by state and local law enforcement officers. Perhaps that will result in an uptick in state forfeiture of such assets. My impression, based on the lack of appellate cases in the area and on the occasional question that I receive, is that state forfeiture law is rarely used and that there are few, if any, lawyers on either side who are expert in the relevant procedures. (If I'm wrong about that, I'd be interested to hear from anyone with substantial experience in state forfeiture matters.) Perhaps all need to review state forfeiture law in the near future.