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Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§1961-1968) or AZRAC (for Arizona's laws A.R.S. §13-2301 et seq.). AZRAC basically provides for the forfeiture of assets when racketeering is involved, which is defined as a criminal act for financial gain punishable by imprisonment for more than a year. The statute, A.R.S. §13-2301 (D)(4) lists 27 crimes, but each crime type includes other similar crimes. For example, the crime of "robbery" includes robbery, aggravated robbery and armed robbery. Therefore, more than 80 crimes may be involved.

A separate chapter in the criminal code (A.R.S. §13-4301 et seq.) addresses the forfeiture of assets when racketeering is not involved. However, the basis for forfeiture under these statutes is any one or more of the 80 offenses that are included in the racketeering list.

Under the forfeiture statutes, property or assets involved in the violation of the 80 crimes listed may be seized by a law enforcement officer at the time of arrest or search. (A warrant is not required to seize property, although it may be used). Property and assets may be seized based on the "probable cause" belief that the property is subject to forfeiture. For example, if money is found in proximity to contraband, it is presumed that the money was used to facilitate the offense, and thus there is probable cause to seize the money. Arizona law does not require that criminal charges ever be filed against the suspect in order to seize or forfeit assets.

Forfeiture statutes do not necessarily target the serious offenders. For example, the breadth of Arizona forfeiture laws encompass possession of a useable quantity of drugs, including marijuana, as a crime subject to the forfeiture laws. Further, no pattern of criminal activity must occur; a prosecutor has only to establish that a single crime occurred. The effects of these laws are demonstrated in the following examples.

- While attending a local concert, a man and his friends were cited for drinking in the parking lot. Upon further investigation, a small amount of cocaine was found in the man's shirt pocket. The man was arrested and a title and registration check were performed to determine the ownership of the vehicle used to transport the group to the concert. At the time of the drug discovery, the vehicle was parked and the man was not in the vehicle. According to the law enforcement agency involved, an ownership check was conducted because the arrest involved drugs. Thus, the vehicle was subject to seizure. However, because the vehicle belonged to a relative of the man arrested, it was not seized. According to the law enforcement agency, if the vehicle had belonged to the man arrested, an asset forfeiture request would have been solicited.
- A high school student was driving the family car when arrested for possession of marijuana. The vehicle was seized and held for 90 days before the prosecutor was convinced that there was no basis for forfeiture since the parents, and not the juvenile, owned the vehicle.

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## Current Arizona Laws Have Potential For Abuse

The current laws as written and applied can result in abuse and unfairness. In fact, a 1983 Arizona Supreme Court opinion raised concern regarding potential abuse of the RICO laws stating "... we are cognizant of the criticism that has been directed at this legislation and share the apprehension of the potential for abuse in a statute that sweeps so broadly."<sup>(1)</sup>

**Controls over process are weak** - Not only are the current laws broad, but there are few, if any, controls over the process. First, the parties involved in seizures stand to benefit directly from those seizures. Although the forfeiture laws initially resulted in seized assets being forfeited to the general fund of the State or county, amendments to the law now allow all forfeited assets to remain with the law enforcement agencies and prosecutors. Because assets do not revert to the general fund, the law enforcement agencies and prosecutors benefit significantly from forfeitures. For example, in fiscal year 1991, DPS received \$1.5 million in State receipts.<sup>(2)</sup> Forfeiture receipts statewide were over \$15 million.

Because law enforcement agencies may now benefit directly, there is a danger they will target suspects based on the value of the suspect's assets and/or target assets for seizures before an investigation is begun or charges are filed. The following examples were discovered while reviewing DPS investigator files.

- An internal memo to a file stated that a particular business "...has many assets and would be an excellent target for a continued conspiracy investigation."
- An agreement was made during the preliminary phases of an investigation between a DPS sergeant and a county sheriff's officer regarding the disposition of two automobiles, although at that point in the investigation, no suspects had been arrested or charged. According to the DPS investigator, the sheriff's office would receive a new Lincoln Continental and DPS would receive a Chevy pick-up truck, if the pending investigation was successful.

**Costs to Challenge forfeitures may be prohibitive** - While law enforcement agencies stand to benefit from seizures, property owners must consider the costs of challenging the seizures. Once property is seized, the owner has to prove in court the property is exempt from forfeiture. The procedures for asserting a claim or petition are detailed and are subject to strictly enforced deadlines - it is not an area which lends itself to flexibility and probably cannot be effectively handled by a nonlawyer. Further, because forfeiture proceedings are civil, an indigent claimant is not entitled to court appointed counsel. The economic reality of this provision is that a person with a legitimate claim has to weigh the cost of obtaining legal representation against the value of their property. This is a significant point to consider because the value

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(1) State ex rel. Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (1983) p. 1311.

(2) DPS also received \$2.1 million in fiscal year 1991 from Federal RICO forfeitures.

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of the assets seized may often be considerably less than the cost of obtaining legal representation. Further, the forfeiture statutes generally do not provide for the award of attorney's fees and costs to successful claimants.<sup>(1)</sup> In fact, under the forfeiture statutes which are probably the most commonly used (A.R.S. §13-4301 et seq.) a claimant is specifically precluded from obtaining costs or damages where there was reasonable cause for the seizure even though there may not have been a basis for forfeiture.

## **Other Aspects Warrant Review**

Forfeiture laws may be operating in ways that were not originally intended. *First*, the forfeiture penalty may be far more severe than criminal penalty for the same crime - especially for minor drug offenses. For example, a \$25 drug buy may result in the forfeiture of the vehicle, cash and other assets. However the criminal charges may result in the suspect attending a drug diversion program, a fine, or pleading to a lesser charge.

*Secondly*, seizures may be more encompassing than originally intended. We found instances in which a laundry list of property was seized that appeared to have little or no relationship to the crime and was of a limited economic value, as shown by the following.

- Two suspects were arrested for the sale of \$350 of illegal drugs. As a result of the drug buy, officers seized \$520 in cash, a 1979 Cadillac, and certain other property, (including a stereo component system, 17 compact discs, a VCR, a color television, and a Nintendo computer game). All items, except the Nintendo game, were later forfeited to DPS as a result of a court order. The Nintendo game still remains with the DPS property section.

We found another example of property being seized from seven suspects even though the suspects were never charged or were released after arrest; however, DPS never returned these suspects' property. According to the DPS evidence supervisor, it is the responsibility of the owner or investigator to contact his section requesting that property be returned. Thus, seized assets and property are not automatically returned when forfeitures are denied or a case is never filed.

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(1) Under legislation enacted in 1992, there is provision for an award of costs or attorney's fees against the State if the State is unsuccessful in its attempt to forfeit property pursuant to a *racketeering* claim. If a racketeering lien was filed, a claimant must establish that probable cause did not exist to support the filing of the lien or forfeiture action and the State's lawsuit was not well grounded in fact.

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*Third*, assets may not be properly safeguarded prior to a final decision regarding forfeiture. We contacted two attorneys who specialize in forfeiture defense. The attorneys conveyed cases in which assets were improperly cared for, sometimes resulting in damage to the assets, yet the damages were not compensable under forfeiture laws. The following cases illustrate the problem.

- An 85 year old woman had a late model foreign made vehicle that was seized and was successfully forfeited by the State in contested proceedings. She appealed and filed the required cost bond. During the pendency of the appeal, the agency in possession of the vehicle, without an order from court and without consent or knowledge of the woman, had the Motor Vehicle Division transfer title to the agency. It then used the vehicle, putting 85,000 miles on it and "trashing" the interior. The woman's appeal was successful. The agency offered the woman \$2,000 for the use of the vehicle and its return.
- A vehicle was seized for forfeiture. During the pendency of the forfeiture proceedings, the owner who resided in southern Arizona began receiving parking tickets from the City of San Diego, California.
- While a seized vehicle was in the possession of a law enforcement agency, its motor was stolen. The vehicle was subsequently returned to its owner, without the motor and without compensation for the loss.

## **Other States Reviewing Laws**

We identified at least two states which are reviewing their forfeiture laws. Because of concerns about the application of RICO laws in Florida, the Governor of Florida recently commissioned a panel to review the actions of its law enforcement agencies.<sup>(1)</sup> An investigative newspaper report indicated that a local county police department had seized over \$8 million in property from 262 people stopped for minor traffic violations. The newspaper also indicated that 197 of these people were never charged and only 16 received traffic tickets. Those losing money included a lottery winner with a check to prove it and a woman en route to buy \$19,000 in materials to fix her home damaged in a hurricane. The police department kept the money for its budget and used it to purchase items such as a plane, cellular telephones, and police uniform equipment. The panel will review the alleged abuses and examine Florida's law to determine if changes are needed.

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(1) The panel has nine members, including representatives from the law enforcement community, defense attorneys, the State's General Counsel, and a lay person.

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Oregon has also reviewed and modified its forfeiture laws. In 1989, Oregon enacted forfeiture laws relating to drug-related crimes. At the time of enactment, the laws were given a 1993 sunset date. Further, the laws established a twelve member Asset Forfeiture Oversight Advisory Committee to monitor the forfeitures made under the new laws. The Committee was to *"prepare reports detailing the number and nature of forfeitures carried out . . . including the disposition and use of the proceeds from the forfeitures. . . "* Further, the Committee was asked to prepare a final report for the legislature which *"may contain recommendations to increase the effectiveness, fairness and efficiency of forfeiture actions brought"* under the laws.

In order to monitor the forfeitures being made, the Committee developed a reporting form for use by the 50 forfeiture counsels who represented the 230 Oregon law enforcement agencies in forfeiture cases. The reporting forms requested information regarding the circumstances of each seizure, the quantity of drugs involved, a listing of the assets and property seized, and whether any charges were brought. The Committee tabulated the information quarterly for submission to the Oregon legislature. The Committee found that the laws, in substantial respects, were overreaching. Some of the problems identified by the Committee included:


- The laws did not provide adequate due process to claimants, especially with respect to establishing "probable cause" and shifting the burden of proof to the claimant.
- Assets and property were sold prior to court decisions granting forfeiture.
- Prevailing claimants incurred substantial legal costs.
- In cases where commercial properties were seized (such as restaurants or bars), denial of continued access and operation resulted in unrecoverable costs and bankruptcy even when the claimant was successful.

The Oversight Committee recommended more than 20 amendments to the laws.

We recommend that the Legislature require a comprehensive evaluation of Arizona's forfeiture statutes.

My staff and I will be pleased to discuss this recommendation or clarify any items in this report.

This report will be released to the public on January 22, 1993.

  
Douglas R. Norton  
Auditor General