

**CHAPTER 712A**  
**FORFEITURE**

Section

- 712A-1 Definitions
- 712A-2 Jurisdiction
- 712A-3 Venue
- 712A-4 Covered offenses
- 712A-5 Property subject to forfeiture; exemption
- 712A-5.5 Excessive forfeitures
- 712A-6 Seizure of property
- 712A-7 Powers and duties of law enforcement officers and agencies
- 712A-8 Notice of forfeiture proceedings
- 712A-9 Commencement of proceedings
- 712A-10 Administrative forfeiture
- 712A-11 Judicial forfeiture proceedings; general
- 712A-12 Judicial in rem forfeiture proceedings
- 712A-13 Judicial in personam forfeiture proceedings
- 712A-14 Supplemental remedies
- 712A-15 Disposition of claims by court
- 712A-16 Disposition of property forfeited
- 712A-17 Limitation of actions
- 712A-18 Victim restitution
- 712A-19 Construction
- 712A-20 Short title

## Note

L 2001, c 91, §4 purports to amend this chapter.

### COMMENTARY ON CHAPTER 712A

Act 104, Session Laws 1996, repealed the sunset provision of the Hawaii omnibus criminal forfeiture act to make the law permanent. The legislature found that forfeitures served a public purpose of removing assets that facilitated or were derived from illegal activity, and that the forfeited assets or their proceeds were being used for, inter alia, administering the forfeiture program and training and educating law enforcement personnel. The legislature also found that forfeitures served as an "immediate deterrent" against future illegal activity involving the forfeited assets or precluded further enjoyment of the forfeited assets. The legislature believed that the criminal forfeiture law was being appropriately applied to aid in the war against drugs. Senate Standing Committee Report No. 2731, House Standing Committee Report No. 409-96.

### Case Notes

Hawaii legislature intended administrative forfeitures and judicial in rem forfeiture proceedings under this chapter to be civil proceedings. 83 H. 141, 925 P.2d 311 (1996).

" **§712A-1 Definitions.** In this chapter, unless a different meaning plainly is required:

"Attorney general" means the attorney general or deputy attorneys general of the State of Hawaii.

"Contraband" means any property the possession of which is illegal.

"Controlled substances" means a drug, substance, or immediate precursor in schedules I through V of chapter 329, part II.

"Covered offense" means any crime set forth in section 712A-4 or any other offense for which forfeiture is provided by the law relating to a particular offense.

"Enterprise" includes any sole proprietorship, partnership, corporation, association, or any union or group of individuals associated for a particular purpose although not a legal entity.

"Interest-holder" means a person in whose favor there is a security interest or who is the beneficiary of a perfected encumbrance pertaining to an interest in property.

"Law enforcement officer" means any public servant, whether employed by the State or subdivisions thereof or by the United States, vested by law with a duty to maintain public order, to make arrests for offenses, or to enforce the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses. The attorney general, deputy attorneys general, county prosecuting attorneys, and deputy prosecuting attorneys engaged in the enforcement of criminal laws are included in the definition of the term law enforcement officer.

"Owner" means a person who is not a secured party within the meaning of section 490:9-102 and who has an interest in property, whether legal or equitable. A purported interest which is not in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value shall not be recognized as an interest against this State in an action pursuant to this chapter. An owner with power to convey property binds other owners, and a spouse binds the person's spouse, by any act or omission.

"Person" includes any individual or entity capable of holding a legal or beneficial interest in property.

"Person known to have an interest" means a person whose interest in property is reflected in the public records in which the person's interest is required by law to be recorded or reflected in order to perfect the person's interest. If a person's interest in property is not required by law to be reflected in public records in order to perfect the person's interest in the property, a person shall be known to have an interest only if such interest can be readily ascertained at the time of the commencement of the forfeiture action pursuant to this chapter.

"Proceeds" means anything of value, derived directly or indirectly from or realized through unlawful activity.

"Property" means real property, including things growing on, affixed to, and found on land; tangible and intangible personal property, including currency, instruments, vehicles, boats, aircraft or any other kind of conveyance; and all rights, privileges, interests, claims, and securities pertaining to such property.

"Prosecuting attorney" means the prosecuting attorney or deputy prosecuting attorneys of the various counties, or the attorney general or deputy attorneys general when engaged in the prosecution of a criminal offense.

"Seizing agency" means any department or agency of this State or its political subdivisions which regularly employs law enforcement officers, and which employed the law enforcement

officer who seized property for forfeiture, or such other agency as the seizing agency may designate in a particular case by its chief executive officer or designee.

"Seizure for evidence" means seizure of property by a law enforcement officer.

"Seizure for forfeiture" means seizure of property by a law enforcement officer coupled with an assertion by the seizing agency or by a prosecuting attorney that the property is subject to forfeiture. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; gen ch 1993; am L 1994, c 178, §1; am L 1996, c 104, §6; am L 2000, c 241, §7]

#### **COMMENTARY ON §712A-1**

Act 178, Session Laws 1994, amended this section by adding "seizure for evidence" as a new definition. Conference Committee Report No. 27.

Act 241, Session Laws 2000, amended this section by amending the definition of "owner" by changing the section referred to for the meaning of "secured party" from §490:9-105(1) to §490:9-102. This amendment was to make the UCC section referred to consistent with the new article 9, added by this Act.

" **§712A-2 Jurisdiction.** (1) The State may commence an in rem proceeding in the circuit court if the property for which forfeiture is sought is within this State at the time of the filing of the action.

(2) The State may commence a civil in personam proceeding in the circuit court if the courts of this State have in personam jurisdiction of an owner of or interest-holder in the property.

(3) The State may commence a criminal in personam proceeding in the court which has in personam jurisdiction of an owner of or interest-holder in the property. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1994, c 178, §2; am L 1996, c 104, §6]

#### **COMMENTARY ON §712A-2**

Act 178, Session Laws 1994, amended this section to specify when the State may commence in rem, civil in personam, and criminal in personam proceedings. The legislature recognized the importance of complying with federal case law pertaining to due process and of ensuring that the statutes are as clear as possible on the circumstances and procedures surrounding forfeiture. Conference Committee Report No. 27.

" **[\$712A-3] Venue.** An action brought pursuant to this chapter may be brought in the county which the property is seized or in any county where an owner or interest-holder could be complained against for the conduct alleged to give rise to the forfeiture of the property. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **§712A-4 Covered offenses.** Offenses for which property is subject to forfeiture under this chapter are:

- (a) All offenses that specifically authorize forfeiture;
- (b) Murder, kidnapping, labor trafficking, gambling, criminal property damage, robbery, bribery, extortion, theft, unauthorized entry into motor vehicle, burglary, money laundering, trademark counterfeiting, insurance fraud, promoting a dangerous, harmful, or detrimental drug, commercial promotion of marijuana, methamphetamine trafficking, manufacturing of a controlled substance with a child present, promoting child abuse, promoting prostitution, sex trafficking, solicitation of a minor for prostitution, habitual solicitation of prostitution, or electronic enticement of a child that is chargeable as a felony offense under state law;
- (c) The manufacture, sale, or distribution of a controlled substance in violation of chapter 329, promoting detrimental drugs or intoxicating compounds, promoting pornography, promoting pornography for minors, or solicitation of prostitution near schools or public parks, which is chargeable as a felony or misdemeanor offense, but not as a petty misdemeanor, under state law; and
- (d) The attempt, conspiracy, solicitation, coercion, or intimidation of another to commit any offense for which property is subject to forfeiture. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §1; am L 1993, c 196, §1; am L 1996, c 104, §6; am L 1997, c 277, §3; am L 1998, c 155, §4 and c 307, §1; am L 1999, c 18, §19; am L 2002, c 200, §4 and c 240, §§5, 11; am L 2006, c 7, §1; am L 2011, c 146, §2; am L 2013, c 247, §4; am L 2016, c 206, §17]

#### COMMENTARY ON §712A-4

Act 277, Session Laws 1997, amended this section to include the offense of trademark counterfeiting in the offenses for which property is subject to forfeiture under the chapter. The legislature found that trademark counterfeiting was a recurring

problem in Hawaii for retail boutiques and trademark products of the University of Hawaii, and that tourists are often the target for the scams. The legislature believed that the Act would safeguard not only consumers from the sale of counterfeit products, but would also protect the reputation and quality of trademarks and ensure that trademarks are used for their legitimate and intended purposes. House Standing Committee Report No. 1620, Senate Standing Committee Report No. 759.

Act 155, Session Laws 1998, made insurance fraud an offense subject to the property forfeiture law. The purpose of Act 155 was to minimize insurance fraud and maximize savings to Hawaii's consumers by clarifying insurance fraud laws and strengthening effective enforcement. House Standing Committee Report No. 1259-98, Senate Standing Committee Report No. 2554.

Act 307, Session Laws 1998, amended this section to authorize forfeiture of a person's property if the person is caught breaking into a motor vehicle. The legislature found that forfeiture of property has proven to be a successful deterrent to criminal activity. Including unauthorized entry into a motor vehicle as one of the offenses under this section should provide an effective deterrent to the class C felony. Because unauthorized entry into a motor vehicle included the elements of theft, criminal property damage, and burglary, already covered by the forfeiture law, the legislature found that unauthorized entry into a motor vehicle should also be covered. Conference Committee Report No. 98.

Act 18, Session Laws 1999, amended this section by deleting the brackets around "trademark counterfeiting,". Act 277, Session Laws 1997, amended this section by adding trademark counterfeiting as an offense for which property is subject to forfeiture. Acts 155 and 307, Session Laws 1998, amended this section, adding new offenses for which property is subject to forfeiture; Act 155, insurance fraud and Act 307, unauthorized entry into motor vehicle. Act 155 amended the 1997 version of this section. However, Act 307 used the pre-1997 version of the section for amendment, omitting the reference to trademark counterfeiting. The deletion of the brackets around "trademark counterfeiting." by Act 18, Session Laws 1999, ratified the revisor's replacement of "trademark counterfeiting." House Standing Committee Report No. 900, Senate Standing Committee Report No. 1239.

Act 200, Session Laws 2002, amended this section to subject to forfeiture, property used in promoting child abuse and electronic enticement of a child. The legislature found that Act 200 addressed the problem of utilizing computer technology in committing crimes against children. Senate Standing

Committee Report No. 2867, Conference Committee Report No. 36-02.

Act 240, Session Laws 2002, amended this section by including sexual exploitation of a minor within covered offenses subject to forfeiture of property upon conviction. Conference Committee Report No. 79-02.

Act 7, Session Laws 2006, amended this section by adding unlawful methamphetamine trafficking and manufacturing of a controlled substance with a child present to the offenses that are subject to forfeiture. Act 7 clarified that the offenses were originally intended to be a part of the Penal Code's section on forfeiture. Senate Standing Committee Report No. 2559, House Standing Committee Report No. 1115-06.

Act 146, Session Laws 2011, amended this section by adding labor trafficking to the offenses for which property is subject to forfeiture.

Act 146 established, among other things, a class A and class B felony offense for labor trafficking, an offense for nonpayment of wages, and an offense for unlawful conduct with respect to documents. The legislature found that Hawaii is one of only five states without a specific labor trafficking statute, yet labor trafficking has occurred at an unprecedented level in the State. Act 146 sent an unmistakable warning to individuals and entities engaged in labor trafficking and provided a clearer and more structured means for law enforcement agencies to protect and aid trafficking victims. Also, Act 146 would be a catalyst for law enforcement agencies, service providers, and other state agencies and community organizations to engage in needed training and education on labor trafficking. Conference Committee Report No. 77.

Act 247, Session Laws 2013, amended this section by adding the offenses of promoting prostitution, solicitation of a minor for prostitution, habitual solicitation of prostitution, and solicitation of prostitution near schools or public parks under the State's forfeiture laws. The legislature found that Act 247 strengthened the laws and penalties for crimes that exploit children subjected to prostitution. Furthermore, by amending, among other things, the State's forfeiture laws, Act 247 discouraged individuals from engaging in solicitation of prostitution. Conference Committee Report No. 64.

Act 206, Session Laws 2016, amended this section to include the offense of sex trafficking in the list of covered offenses for which property is subject to forfeiture. Senate Standing Committee Report No. 3450.

#### **Case Notes**

Unless the offense is one of those enumerated in paragraphs (b) through (d), the offense must "specifically authorize forfeiture" as required by paragraph (a) in order to render the taking of the property lawful; thus, where neither Hawaii administrative rule §13-95-70 nor §13-95-71 specifically authorized forfeiture, appellate court erred in vacating circuit court's orders and judgments regarding forfeiture of boat. 119 H. 245, 195 P.3d 1177 (2008).

" **§712A-5 Property subject to forfeiture; exemption.** (1)

The following is subject to forfeiture:

- (a) Property described in a statute authorizing forfeiture;
  - (b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;
  - (c) Any firearm which is subject to forfeiture under any other subsection of this section or which is carried during, visible, or used in furtherance of the commission, attempt to commit, or conspiracy to commit a covered offense, or any firearm found in proximity to contraband or to instrumentalities of an offense;
  - (d) Contraband or untaxed cigarettes in violation of chapter 245, shall be seized and summarily forfeited to the State without regard to the procedures set forth in this chapter;
  - (e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;
  - (f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;
  - (g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;
  - (h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.
- (2) Except that:
- (a) Real property, or an interest therein, may be forfeited under the provisions of this chapter only in



- cases in which the covered offense is chargeable as a felony offense under state law;
- (b) No property shall be forfeited under this chapter to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge and consent of that owner;
  - (c) No conveyance used by any person as a common carrier in the transaction of a business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;
  - (d) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent; and
  - (e) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6; am am L 2000, c 249, §§11, 20(2); am L 2002, c 94, §3]

#### **COMMENTARY ON §712A-5**

Act 249, Session Laws 2000, amended this section by adding to the list of property subject to seizure and summary forfeiture any untaxed cigarettes violating the cigarette tax and tobacco tax law under chapter 245.

Act 94, Session Laws 2002, by making the cigarette tax stamp law permanent, amended this and other sections. The legislature sought to ensure compliance with and enforcement of the cigarette tax stamp laws. House Standing Committee Report No. 502-02.

#### **Case Notes**

Cash was not subject to forfeiture where, despite suspicious packaging and shipment of money and positive dog sniff test for drugs, State failed to present sufficient evidence to support finding that defendant had committed a covered offense. 73 H. 229, 832 P.2d 256 (1992).

The State must prove the existence of a substantial connection between the currency being forfeited and the illegal activity; where \$1,300 of the subject currency was substantially connected

to appellant's illegal gambling activity and §712A-11(4) provides that the State need not trace the proceeds exactly, \$1,300 was properly ordered forfeited to the State. 104 H. 323, 89 P.3d 823 (2004).

Where State failed to prove, by a preponderance of the evidence, that the subject currency of \$1,900 seized from appellant's trousers was involved in appellant's gambling transactions, trial court erred in ordering currency forfeited to State; there was no evidence connecting currency to any illegal activity, and absent proof of a substantial connection between the illegal activity and the res, the currency was not subject to forfeiture. 104 H. 323, 89 P.3d 823 (2004).

" **[\$712A-5.5] Excessive forfeitures.** The court shall limit the scope of a forfeiture judgment issued pursuant to section [712A-5(1)(b)] to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct. In determining whether a forfeiture is grossly disproportionate, the court may consider:

- (1) The degree to which the property was used to facilitate the conduct that subjects property to forfeiture and the importance of the property to the conduct;
- (2) The gain received or expected by an owner from the conduct that subjects property to forfeiture and the value of the property subject to forfeiture;
- (3) The nature and extent of the owner's culpability; and
- (4) The owner's effort to prevent the conduct or assist in prosecution. [L 1996, c 104, §2]

#### **COMMENTARY ON §712A-5.5**

Act 104, Session Laws 1996, added this section which specifies the criteria that the court may consider in determining whether a forfeiture is grossly disproportionate to the nature and severity of the owner's conduct. The section applies only to forfeitures instituted under §712A-5(1)(b) dealing with property used to facilitate an offense or an instrumentality used in an offense. If property were the derivatives or the proceeds of an offense, the property would be tainted and consequently would be forfeited. House Standing Committee Report No. 409-96.

#### **Case Notes**

The State must prove the existence of a substantial connection between the currency being forfeited and the illegal activity; where \$1,300 of the subject currency was substantially connected

to appellant's illegal gambling activity and §712A-11(4) provides that the State need not trace the proceeds exactly, \$1,300 was properly ordered forfeited to the State. 104 H. 323, 89 P.3d 823 (2004).

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" **§712A-6 Seizure of property.** (1) Personal property subject to forfeiture under this chapter may be seized for forfeiture by a law enforcement officer:

- (a) On process issued pursuant to the rules of civil procedure or the provisions of this chapter including a seizure warrant;
- (b) By making a seizure for forfeiture on property seized on process issued pursuant to law; or
- (c) By making a seizure for forfeiture without court process as follows:
  - (i) The seizure for forfeiture is of property seized incident to an arrest or search;
  - (ii) The property subject to seizure for forfeiture has been the subject of a prior judgment in favor of the State or any other state or the federal government in forfeiture proceeding;
  - (iii) The law enforcement officer has probable cause to believe that the property seized for forfeiture is directly or indirectly dangerous to health or safety;
  - (iv) The law enforcement officer has probable cause to believe that the property is subject to forfeiture; or
  - (v) The seizure for forfeiture is of perishable natural resources seized and sold, pursuant to section 199-7, prior to forfeiture proceeding.

(2) Real property subject to forfeiture under this chapter may be seized for forfeiture by a law enforcement officer pursuant to court order following a pre-seizure hearing in the circuit court in the circuit in which the property is located with notice of the pre-seizure hearing to be made to the owners and interest-holders pursuant to section 712A-8. The court shall order the real property in question to be seized for forfeiture if it finds probable cause that the real property is

subject to forfeiture under any provision of the Hawaii Revised Statutes.

(3) In determining probable cause for seizure, the fact that a firearm, money, or any negotiable instrument was found in proximity to contraband or to instrumentalities of an offense gives rise to an inference that the money, or instrument was the proceeds of contraband or that the firearm, money or instrument was used or intended to be used to facilitate commission of the offense. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1994, c 178, §3; am L 1996, c 104, §6; am L 1999, c 233, §2]

#### **COMMENTARY ON §712A-6**

Act 178, Session Laws 1994, amended this section to allow real property subject to forfeiture to be seized pursuant to a court order following a pre-seizure hearing, with notice of the pre-seizure hearing given to owners and interest-holders. The purpose of the amendment was to codify due process requirements in regard to forfeiture pursuant to United States v. Good. Conference Committee Report No. 27.

#### **Rules of Court**

Applicability of Hawaii Rules of Civil Procedure, see HRCP rule 81(b).

Service, see HRCP rules 4, 5.

" **§712A-7 Powers and duties of law enforcement officers and agencies.** (1) In the event of a seizure for forfeiture under section 712A-6, the property is not subject to replevin, conveyance, sequestration, or attachment but is deemed to be in the custody of the law enforcement agency making the seizure for forfeiture. The seizing agency or the prosecuting attorney may authorize the release of the seizure for forfeiture on the property if forfeiture or retention is unnecessary, may transfer the property to any other county, state, or federal agency or may transfer the action to another prosecuting attorney by discontinuing forfeiture proceedings in favor of forfeiture proceedings initiated by the other agency or prosecuting attorney. An action pursuant to this chapter shall be consolidated with any other action or proceeding pursuant to this chapter relating to the same property upon motion by the prosecuting attorney in either action.

(2) If property is seized for forfeiture under section 712A-6 pending forfeiture and final disposition, the seizing agency may do any of the following:

- (a) Place the property under constructive seizure by posting notice of seizure for forfeiture on the property or by filing notice of seizure for forfeiture or notice of pending forfeiture in any appropriate public record relating to the property;
- (b) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, deposit it in an interest bearing account;
- (c) Remove the property to a place designated by the court; or
- (d) Provide for another agency to take custody of the property and remove it to an appropriate location within the jurisdiction of the court.

(3) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct an inventory and estimate the value of the property seized. Within twenty days after seizure for forfeiture the seizing agency shall make reasonable efforts to give notice of seizure for forfeiture in the manner provided in section 712A-8(a) or 712A-8(b) to all parties known to have an interest in the seized property.

(4) In the event of a seizure for forfeiture under section 712A-6, the seizing agency shall send to a prosecuting attorney a written request for forfeiture within thirty days, which shall include a statement of facts and circumstances of the seizure, the appraised or estimated value of the property, and a summary of the facts relied on for forfeiture. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §2; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **§712A-8 Notice of forfeiture proceedings.** Unless otherwise provided, whenever notice is required under this chapter it shall be given in one of the following ways:

- (a) If the owner's or interest-holder's name and current address are known:
  - (i) By personal service; or
  - (ii) By mail;
- (b) If the owner's or interest-holder's interest is required by law to be on record with a state or federal agency in order to perfect an interest in the property, but the person's current address is not known, by mailing a copy of the notice by certified mail to any address on the record; or
- (c) If the owner's or interest-holder's address is not known, and is not on record pursuant to paragraph (b), or if the person's interest is not known, by publication in one issue of a newspaper of general circulation in the county in which the seizure occurs.

[L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §3; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **§712A-9 Commencement of proceedings.** (1) The prosecuting attorney shall determine whether it is probable that the property is subject to forfeiture and, if so, shall initiate administrative or judicial proceedings against the property within forty-five days of receipt of a written request for forfeiture from a seizing agency. If, on inquiry and examination, the prosecuting attorney determines, with sole discretion, that the proceedings probably cannot be sustained or that justice does not require the institution of proceedings, the prosecuting attorney shall notify the seizing agency, and as soon as practicable authorize the release of the seizure for forfeiture on the property or on any specified interest in it. A determination by the prosecuting attorney to forego initiation of proceedings shall not be a bar to initiation of proceedings against the same property based on the same circumstances at a later time.

(2) If the property sought to be forfeited is real property, including fixtures, the prosecuting attorney shall file a lis pendens with respect to the property but shall not be required to pay a filing fee. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §4; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **§712A-10 Administrative forfeiture.** The prosecuting attorney may initiate administrative forfeiture of property other than real property, the estimated value of which is less than \$100,000, or of any vehicle or conveyance, regardless of value. Administrative forfeiture shall be processed in the following manner:

- (1) The prosecuting attorney shall file a petition with the attorney general, pursuant to rules adopted by the attorney general.
- (2) The prosecuting attorney shall give notice of pending forfeiture by making reasonable efforts to serve a copy of the petition in a manner provided in section 712A-8(a) or 712A-8(b) on all persons known to have an interest in the property, together with instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation.
- (3) The attorney general shall give notice of intention to forfeit the property administratively by publication in the manner provided in section 712A-8(c). Notice by publication shall include:

- (a) A description of the property;
  - (b) The estimated value of the property;
  - (c) The date and place of the seizure;
  - (d) The offense for which the property is subject to forfeiture;
  - (e) Instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation; and
  - (f) Notice that the property will be forfeited to the State if a claim and cost or in pauperis bond or petition for remission or mitigation is not filed in substantial compliance with this section.
- (4) Persons claiming an interest in the property may file either a petition for remission or mitigation of forfeiture, or a claim and cost or in pauperis bond, but not both, with the attorney general, within thirty days of notice by publication or receipt of written notice, whichever is earlier. Notwithstanding section 1-29, the thirty-day time period prescribed herein is computed by excluding the first day and including the last day, unless the last day is a Saturday, Sunday, or holiday and then it is also excluded, and the thirty-day time period runs until the end of the next day which is not a Saturday, Sunday, or a holiday. "Holiday" includes any day designated as a holiday pursuant to section 8-1.
- (5) Any person claiming seized property may seek remission or mitigation of the forfeiture by timely filing a petition with the attorney general. A petition for remission or mitigation shall not be used to challenge the sufficiency of the evidence to support the forfeiture or the actions of any government official but shall presume a valid forfeiture and ask the attorney general to invoke the executive power to pardon the property, in whole or in part. The petition shall be signed by the petitioner and sworn on oath before a notary public and shall contain the following:
- (a) A reasonably complete description of the property;
  - (b) A statement of the interest of the petitioner in the property, as owner or interest-holder which may be supported by bills of sale, contracts, or mortgages, or other documentary evidence; and
  - (c) Facts and circumstances sufficient to show whether the petitioner:

- (i) Owns or holds an interest in the seized property as defined by section 712A-1;
- (ii) Had any knowledge that the property was or would be involved in any violation of the law;
- (iii) Had any knowledge of the particular violation which subjected the property to seizure and forfeiture;
- (iv) Had any knowledge that the user of the property had any record, including arrests, except when the person was acquitted or the charges dismissed due to lack of evidence, for the violation which subjected the property to seizure and forfeiture or for any crime which is similar in nature.

Any subsequent pleadings or written communications alleging matters pertaining to [subparagraph] (b) or (c) of this [paragraph] must also be signed by the petitioner and sworn on oath before a notary public.

- (6) If the attorney general, with sole discretion, determines that remission is not warranted, the attorney general may discretionarily mitigate the forfeiture where the petitioner has not met the minimum requirements for remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum requirements for remission have been met but the overall circumstances are such that the attorney general determines that complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner which shall be deposited into the criminal forfeiture fund established under section 712A-16. Extenuating circumstances include:
  - (a) Language or culture barrier;
  - (b) Humanitarian factors such as youth or extreme age;
  - (c) Presence of physical or mental disease, disorder, or defect;
  - (d) Limited or peripheral criminal culpability;
  - (e) Cooperation with the seizing agency or the prosecuting attorney; and
  - (f) Any contributory error on the part of government officials.
- (7) It shall be the duty of the attorney general to inquire into the facts and circumstances alleged in a



petition for remission or mitigation of forfeiture. However, no petitioner is entitled to a hearing on the petition for remission or mitigation. Hearings, if any, shall be held at the discretion of the attorney general.

- (8) The attorney general shall provide the seizing agency and the petitioner a written decision on each petition for remission or mitigation within sixty days of receipt of the petition unless the circumstances of the case require additional time, in which case the attorney general shall notify the petitioner in writing and with specificity within the sixty-day period that the circumstances of the case require additional time and further notify the petitioner of the expected decision date.
- (9) Any person claiming seized property may seek judicial review of the seizure and proposed forfeiture by timely filing with the attorney general a claim and bond to the State in the amount of ten per cent of the estimated value of the property or in the sum of \$2,500, whichever is greater, with sureties to be approved by the attorney general, upon condition that if the claimant fails to prove that claimant's interest is exempt from forfeiture under section 712A-5, the claimant shall pay the State's costs and expenses, including reasonable attorneys fees incurred in connection with a judicial proceeding. In lieu of a cost bond, a claimant may file an in pauperis bond sworn on oath before a notary public. An in pauperis bond shall be in the form set out in the appendix to the rules of penal procedure. The claim shall be signed by the claimant and sworn on oath before a notary public and shall comply with the requirements of section 712A-12(5). Upon receipt of the claim and bond, the attorney general shall notify the prosecuting attorney who may discretionarily continue to seek forfeiture by petitioning the circuit court for forfeiture of the property within forty-five days of receipt of notice that a proper claim and bond has been filed. The prosecuting attorney may also elect to honor the claim in which case the prosecuting attorney shall notify the seizing agency and authorize the release of the seizure for forfeiture on the property or on any specified interest in it.
- (10) If a judicial forfeiture proceeding is instituted subsequent to notice of administrative forfeiture pursuant to paragraph (9), no duplicate or repetitive

notice shall be required. The judicial proceeding, if any, shall adjudicate all timely filed claims. At the judicial proceeding, the claimant may testify, present evidence and witnesses on the claimant's behalf, and cross-examine witnesses who appear at the hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. The State has the initial burden of showing by a preponderance of the evidence that the claimant's interest in the property is subject to forfeiture. On such a showing by the State, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

- (11) In the event a claim and bond has not been filed in substantial compliance with this section, or if the attorney general, with sole discretion, determines that remission or mitigation is not warranted, the attorney general shall order forfeited all property seized for forfeiture. In the event the attorney general, with sole discretion, determines that remission or mitigation is warranted, the attorney general shall notify the seizing agency and the prosecuting attorney and order the release of the seizure for forfeiture on the property or on any specified interest in it. There shall be no appeal from the attorney general's decision or order of forfeiture or remission or mitigation.
- (12) Administrative proceedings and the adoption of rules under this section are exempt from the requirements of chapter 91, the Hawaii administrative procedure act, and are adjudicatory functions for the purposes of applicable sections of the Hawaii Revised Statutes. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §5; am L 1993, c 196, §1; am L 1994, c 178, §4; am L 1996, c 104, §§3, 6]

#### **COMMENTARY ON §712A-10**

Act 178, Session Laws 1994, amended this section to clarify how the thirty-day time period for filing a petition for remission or mitigation of forfeiture is computed, and to require that subsequent pleadings or written communications alleging certain matters regarding a petition for remission or mitigation be signed by the petitioner and sworn on oath before a notary public. The legislature recognized the importance of

complying with federal case law pertaining to due process and of ensuring that the statutes are as clear as possible on the circumstances and procedures surrounding forfeiture. Conference Committee Report No. 27.

Act 104, Session Laws 1996, amended this section to allow both the State and the defendant to present evidence and witnesses, and to cross-examine witnesses, in a forfeiture proceeding. Act 104 also repealed the sunset provision of the Hawaii omnibus criminal forfeiture act to make the law permanent. The purpose of Act 104 was to make the omnibus criminal forfeiture act permanent and to ensure that it was fair to persons claiming an interest in the property subject to forfeiture. Conference Committee Report No. 122.

### **Case Notes**

Administrative and judicial in rem forfeitures under this section and §712A-12 respectively, are remedial civil sanctions, rather than criminal punishments. 83 H. 141, 925 P.2d 311 (1996).

Jeopardy did not attach where defendant failed to file a timely claim for forfeited property pursuant to paragraph (4). 83 H. 141, 925 P.2d 311 (1996).

" **§712A-11 Judicial forfeiture proceedings; general.** (1) In any judicial or administrative proceeding pursuant to this chapter, the court, on application of the State, may enter any restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, appraisers, accountants or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this chapter, including a warrant for its seizure, whether before or after the filing of a petition for forfeiture, complaint, or indictment.

(2) If property is seized for forfeiture without a seizure warrant, a prior judicial order of forfeiture, or a hearing pursuant to section 712A-13, a court, on an application filed by an owner or interest-holder within fifteen days after notice of its seizure for forfeiture or actual knowledge of it, whichever is earlier, and complying with the requirements for claims in section 712A-12, may issue an order to show cause to the seizing agency, with thirty days' notice to the prosecuting attorney, for a hearing on the issue of whether probable cause for forfeiture of the applicant's interest then exists, provided that, the order to show cause shall be set aside upon the filing of a petition for either administrative or judicial forfeiture

prior to the hearing, in which event forfeiture proceedings shall be in accordance with this chapter.

(3) There shall be a rebuttable presumption that any property of a person is subject to forfeiture under this chapter if the State establishes, by the standard of proof applicable to that proceeding, all of the following:

- (a) That the person has engaged in criminal conduct for which property is subject to forfeiture;
- (b) That the property was acquired by the person during the period of the criminal conduct or within a reasonable time after that period; and
- (c) That there was no likely source for the property other than the criminal conduct giving rise to forfeiture.

(4) A finding that property is the proceeds of criminal conduct giving rise to forfeiture does not require proof that the property is the proceeds [of] any particular exchange or transaction.

(5) A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this chapter. For the purposes of this chapter, a conviction may result from a verdict or plea, including a no contest plea, or deferred acceptance of guilty plea, or no contest plea.

(6) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this chapter.

(7) In any judicial forfeiture proceeding pursuant to this chapter, if a defense is based on an exemption provided for in this chapter, the burden of proving the existence of the exemption is on the claimant or party raising the defense, and it is not necessary to negate the exemption in any petition, application, complaint, or indictment.

(8) For good cause shown, on motion by the prosecuting attorney, the court may stay discovery against the State in civil forfeiture proceedings prior to trial on a criminal complaint or indictment arising from the same conduct and against a claimant who is a defendant in the criminal proceeding after making provision to prevent loss to any party resulting from the delay. The stay provided by this subsection shall not be available pending appeal of any order or judgment in the criminal proceeding.

(9) The court shall receive and consider, at any hearing held pursuant to this chapter, except the hearing on claims pursuant to sections 712A-12(4) through (8) and 712A-13(7), evidence and information which would be admissible under the rules of penal procedure relating to preliminary hearings.

(10) All property, including all interest in such property, declared forfeited under this chapter vests in this State on the commission of the act or omission giving rise to forfeiture under this chapter together with the proceeds of the property after the act or omission. Any property or proceeds transferred to any person after the act or omission are subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing pursuant to this chapter the showings set out in section 712A-5(2). [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §6; am L 1993, c 196, §1; am L 1996, c 104, §6]

### Case Notes

The State must prove the existence of a substantial connection between the currency being forfeited and the illegal activity; where \$1,300 of the subject currency was substantially connected to appellant's illegal gambling activity and subsection (4) provides that the State need not trace the proceeds exactly, \$1,300 was properly ordered forfeited to the State. 104 H. 323, 89 P.3d 823 (2004).

Where State failed to prove, by a preponderance of the evidence, that the subject currency of \$1,900 seized from appellant's trousers was involved in appellant's gambling transactions, trial court erred in ordering currency forfeited to State; there was no evidence connecting currency to any illegal activity, and absent proof of a substantial connection between the illegal activity and the res, the currency was not subject to forfeiture. 104 H. 323, 89 P.3d 823 (2004).

" **§712A-12 Judicial in rem forfeiture proceedings.** (1) If a forfeiture is authorized by law, it shall be ordered by a court on an action in rem brought by the prosecuting attorney on a verified petition for forfeiture filed in the criminal or civil division of the circuit court.

(2) A civil in rem action may be brought in addition to or in lieu of the civil and criminal in personam forfeiture procedures set forth in sections 712A-13 and 712A-14 or the administrative forfeiture as set forth in section 712A-10. Judicial in rem forfeiture proceedings are in the nature of an action in rem and are governed by the rules of civil procedure whether brought in the criminal or civil division of the circuit court, unless a different procedure is provided by law.

(3) On the filing of a civil in rem action by the State in circuit court the clerk of the court in which the action is filed shall give, and the attorney for the State may give, notice of the filing of the action in the manner provided by

section 712A-8 unless the files of the clerk of the court reflect that notice has previously been given.

(4) An owner of or interest-holder in the property may file a claim against the property, within thirty days after the notice, for a hearing to adjudicate the validity of the claimed interest in the property. The hearing shall be held by the court without a jury.

(5) The claim shall be signed by the claimant and sworn on oath before a notary public and shall set forth all the following:

- (a) The name of the claimant;
- (b) The address at which the claimant will accept future mailings from the court or the prosecuting attorney;
- (c) The nature and extent of the claimant's interest in the property;
- (d) The time, transferor and circumstances of the claimant's acquisition of the interest in the property;
- (e) The specific provisions of this chapter relied on in asserting that the property seized for forfeiture is not subject to forfeiture;
- (f) Facts supporting each assertion that the property is not subject to forfeiture;
- (g) Any additional facts supporting the claimant's claim; and
- (h) The precise relief sought.

Copies of the claim shall be mailed to the seizing agency and to the prosecuting attorney. One extension of thirty days for filing of the claim may be granted upon a written request demonstrating good cause provided that the request is received within the thirty-day period for filing of a claim.

(6) The hearing on the claim, to the extent practicable and consistent with the interest of justice, shall be held within sixty days after the filing of the petition. The court may consolidate the hearing on the claim with a hearing on any other claim concerning the same property.

(7) At the hearing, the claimant may testify, present evidence and witnesses on the claimant's behalf, and cross-examine witnesses who appear at the hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing.

(8) The State has the initial burden of showing by a preponderance of the evidence that the claimant's interest in the property is subject to forfeiture. On such a showing by the State, the claimant has the burden of showing by a preponderance

of the evidence that the claimant's interest in the property is not subject to forfeiture.

(9) In accordance with its findings at the hearing, the court shall order an interest in property returned or conveyed to the claimant, if any, who has established by a preponderance of the evidence that the claimant's interest is not subject to forfeiture. The court shall order all other property, including all interests in the property, forfeited to the State and proceed pursuant to sections 712A-15 and 712A-16. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1991, c 166, §7; am L 1993, c 196, §1; am L 1996, c 104, §§4, 6]

#### **COMMENTARY ON §712A-12**

Act 104, Session Laws 1996, amended this section to change the State's initial burden of proof standard from "probable cause" to the higher standard of "preponderance of the evidence" that a defendant's property is subject to forfeiture. Act 104 also repealed the sunset provision of the Hawaii omnibus criminal forfeiture act to make the law permanent. The purpose of the Act was to make the omnibus criminal forfeiture act permanent and to ensure that it was fair to persons claiming an interest in the property subject to forfeiture. Conference Committee Report No. 122.

#### **Case Notes**

State lacked probable cause to support seizure of cash where trained police dog alerted presence of drugs but no identifiable traces of drugs were discovered. 73 H. 229, 832 P.2d 256 (1992).

Administrative and judicial in rem forfeitures under §712A-10 and this section respectively, are remedial civil sanctions, rather than criminal punishments. 83 H. 141, 925 P.2d 311 (1996).

#### **" §712A-13 Judicial in personam forfeiture proceedings. (1)**

If a forfeiture is authorized by law, it shall be ordered by a court on a petition for forfeiture filed by the prosecuting attorney in an in personam civil or criminal action. In any civil in personam action brought under this section, the owner or interest-holder may testify, present evidence and witnesses on the owner or interest-holder's behalf, and cross-examine witnesses who appear at the hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. The State has the initial burden of showing by a

preponderance of the evidence that the owner or interest-holder's interest in the property is subject to forfeiture. On such a showing by the State, the owner or interest-holder has the burden of showing by a preponderance of the evidence that the owner or interest-holder's interest in the property is not subject to forfeiture.

(2) In any proceeding pursuant to this section, the court, on application of the prosecuting attorney, may enter any order authorized by section 712A-11 or take any other action to seize, secure, maintain or preserve the availability of property subject to forfeiture under this chapter, including a warrant for its seizure, whether before or after the filing of a petition for forfeiture, complaint, or indictment.

(3) A temporary restraining order under this section may be entered on petition of the State without notice or an opportunity for a hearing if the State demonstrates that:

(a) There is probable cause to believe that the property with respect to which the order is sought would, in the event of final judgment or conviction, be subject to forfeiture; and

(b) Provision of notice will jeopardize the availability of the property subject to forfeiture.

A temporary restraining order expires within ten days after the date on which it is entered unless the party against whom it is entered consents to an extension for a longer period or unless after commencing a hearing the court enters or is considering a preliminary injunction.

(4) Notice of the issuance of the temporary restraining order and an opportunity for a hearing shall be afforded to persons known to have an interest in the property. The hearing, however, is limited to the issues required to be demonstrated in subsection 3(a) and (b) of this section.

(5) A hearing requested by any owner or interest-holder concerning a temporary restraining order entered under this section shall be held at the earliest practicable time and before the expiration of a temporary order.

(6) On a determination of liability or the conviction of a person for conduct giving rise to forfeiture under this title, the court shall enter a judgment of forfeiture of the property described in the petition for forfeiture, and shall also authorize the prosecuting attorney or attorney general, their agents or any other law enforcement officer to seize all property ordered forfeited that was not previously seized or is not then under seizure. Following the entry of an order declaring the property forfeited, the court, on application of the State, may enter any order authorized by section 712A-11 or take any other action to protect the interest of the State or a



political subdivision in the property ordered forfeited. The filing of the order of forfeiture in the appropriate public records perfects the interest of the State in the property described in the order as of the date that a notice of pending forfeiture or racketeering lien was first filed in the records, which entitles the State to all rights of a secured party as to that property in addition to any other rights or remedies of the State in relation to the property. Any income accruing to, or derived from, an enterprise or any interest in an enterprise or other property interest that is forfeited under this chapter is also forfeited from the time of the conduct giving rise to forfeiture. Such income may be used pending procedures subsequent to a verdict or finding of liability to offset ordinary and necessary expenses of the enterprise or property as required by law or that are necessary to protect the interests of the State or a political subdivision.

(7) Procedures subsequent to the verdict or finding of liability and order of forfeiture shall be as follows:

- (a) Following the entry of an order of forfeiture, the clerk of the court shall give notice of pending forfeiture to owners and interest-holders who have not previously been given notice, if any, in the manner provided in section 712A-8;
- (b) Any owner or interest-holder, other than a party or a defendant in the underlying in personam action, asserting an interest in property that has been ordered forfeited pursuant to such action, within thirty days after initial notice of pending forfeiture or after notice under paragraph (a) of this subsection, whichever is earlier, may file a claim as described in section 712A-12(5), in the court for a hearing to adjudicate the validity of the person's claimed interest in the property;
- (c) The hearing on the claim, to the extent practicable and consistent with the interest of justice, shall be held within sixty days after the order of forfeiture. The court may consolidate the hearing on the claim with a hearing on any other claim filed by a person other than a party or defendant in the underlying action and concerning the same property;
- (d) The hearing shall be conducted in the manner provided for in rem judicial forfeiture actions including the provisions of section 712A-12(7) and (8). In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the underlying civil or criminal action that resulted in the order of forfeiture; and

- (e) In accordance with its findings at the hearing, the court may amend the order of forfeiture if it determines that any claimant has established by a preponderance of the evidence that the claimant has a legal interest in the property, and the claimant's interest is property designated as not subject to forfeiture by section 712A-5.
- (8) Except as provided in section 712A-11(2) and subsection (7)(b) of this section, a person claiming an interest in property subject to forfeiture under this section may not:
  - (a) Intervene in a trial or an appeal of a criminal or in personam civil case involving the forfeiture of such property; or
  - (b) Commence or maintain any action against the State concerning the validity of the alleged interest other than as provided in this chapter.
- (9) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of filed or subsequent claims pursuant to this section the court, on application of the State, may order that the testimony of any witness relating to the property forfeited or alleged to be subject to forfeiture be taken by deposition and that any designated book, paper, document, record, recording, electronic or otherwise, or other material which is not privileged be produced at the same time and place and in the same manner as that provided for the taking of depositions under the rules of civil procedure. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §§5, 6]

#### **Revision Note**

Throughout this section, "section" or "subsection" substituted for "\$" or "paragraph".

#### **COMMENTARY ON §712A-13**

Act 104, Session Laws 1996, amended this section to allow both the State and the defendant to present evidence and witnesses, and to cross-examine witnesses, in a forfeiture proceeding. Act 104 also repealed the sunset provision of the Hawaii omnibus criminal forfeiture act to make the law permanent. The purpose of Act 104 was to make the omnibus criminal forfeiture act permanent and to ensure that it was fair to persons claiming an interest in the property subject to forfeiture. Conference Committee Report No. 122.

" **[\$712A-14] Supplemental remedies.** (1) The court shall order the forfeiture of any other property of an in personam civil or criminal defendant up to the value of the subject property if any of the property subject to forfeiture:

- (a) Cannot be located;
- (b) Has been transferred or conveyed to, sold to, or deposited with a third party;
- (c) Has been placed beyond the jurisdiction of the court;
- (d) Has been substantially diminished in value by any act or omission of a defendant, or a defendant's agent or assignee; or
- (e) Has been commingled with other property which cannot be divided without difficulty.

(2) In addition to any other remedy provided for by law, if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a racketeering lien notice or provision of notice of pending forfeiture or after the filing and notice of a civil proceeding or criminal proceeding alleging forfeiture under this chapter, whichever is earlier, the State or seizing agency, on behalf of the State, may institute an action in circuit court against the person named in the racketeering lien or notice of pending forfeiture or the defendant in the civil proceeding or criminal proceeding, and the court shall enter final judgment against the person named in the racketeering lien or notice of pending forfeiture or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with reasonable investigative expenses and attorney fees. If a civil proceeding is pending, such action shall be filed only in the court where the civil proceeding is pending.

(3) This section does not limit the right of the State to obtain any order or injunction, receivership, writ, attachment, garnishment, or other remedy authorized under this chapter or appropriate to protect the interests of the State or available under other applicable law. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **[\$712A-15] Disposition of claims by court.** (1) Following the court's disposition of all claims filed under this chapter, or if no such claims are filed, following the expiration of the period provided in this chapter for the filing of such claims, the State has clear title to property that is the subject of the in rem or in personam petition and the court shall so order. Title to the forfeited property and its proceeds is deemed to have vested in the State on the commission of the act or omission giving rise to the forfeiture.

(2) The court, on motion of the prosecuting attorney, may release or convey forfeited personal property to an interest-holder who has satisfied both the prosecuting attorney and the court that all of the following are true:

- (a) The interest-holder has an interest which was acquired in the regular course of business as a financial institution and which is not subject to forfeiture pursuant to section 712A-5;
- (b) The amount of the interest-holder's encumbrance and the fair market value of the property are readily determinable and both amounts have been reasonably established by proof made available by the attorney for the State to the court;
- (c) There are no encumbrances on the property other than encumbrances held by the interest-holder seeking possession; and
- (d) The interest-holder has satisfied the State's interest by tendering the fair market value of the property and the expenses of its sale or disposal by the interest-holder.

(3) Upon order of the court forfeiting the subject property the attorney general may transfer good and sufficient title to any subsequent purchaser or transferee, and the title shall be recognized by all courts, by this State, and by all departments and agencies of this State and any political subdivision thereof.

(4) Upon entry of judgment for a claimant or claimants in any proceeding to forfeit property under this chapter such property or interest in property shall be returned or conveyed to the claimant or claimants designated by the court. If it appears that there was reasonable cause for the seizure for forfeiture or the filing of the complaint, the court shall cause a finding to be entered, and the claimant is not, in such case, entitled to costs or damages. Nor, in such case, is the person or seizing agency, or its agents, who made the seizure, or the prosecuting attorney or the attorney general liable to suit or judgment on account of such seizure, suit, or prosecution.

(5) The court shall order any claimant who fails to establish that the claimant's entire interest is exempt from forfeiture under section 712A-5 to pay the costs of any claimant who establishes that the entire interest is exempt from forfeiture under section 712A-5, and the State's costs and expenses of the investigation and prosecution of the matter, including reasonable attorney fees. [L 1988, c 260, pt of §1, §7; am L 1990, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **§712A-16 Disposition of property forfeited.** (1) All property forfeited to the State under this chapter shall be transferred to the attorney general who:

- (a) May transfer property, other than currency, which shall be distributed in accordance with subsection (2) to any local or state government entity, municipality, or law enforcement agency within the State;
- (b) May sell forfeited property to the public by public sale; provided that for leasehold real property:
  - (i) The attorney general shall first offer the holder of the immediate reversionary interest the right to acquire the leasehold interest and any improvements built or paid for by the lessee for the then fair market value of the leasehold interest and improvements. The holder of the immediate reversionary interest shall have thirty days after receiving written notice within which to accept or reject the offer in writing; provided that the offer shall be deemed to be rejected if the holder of the immediate reversionary interest has not communicated acceptance to the attorney general within the thirty-day period. The holder of the immediate reversionary interest shall have thirty days after acceptance to tender to the attorney general the purchase price for the leasehold interest and any improvements, upon which tender the leasehold interest and improvements shall be conveyed to the holder of the immediate reversionary interest.
  - (ii) If the holder of the immediate reversionary interest fails to exercise the right of first refusal provided in subparagraph (i), the attorney general may proceed to sell the leasehold interest and any improvements by public sale.
  - (iii) Any dispute between the attorney general and the holder of the immediate reversionary interest as to the fair market value of the leasehold interest and improvements shall be settled by arbitration pursuant to chapter 658A;
- (c) May sell or destroy all raw materials, products, and equipment of any kind used or intended for use in manufacturing, compounding, or processing a controlled substance or any untaxed cigarettes in violation of chapter 245;

- (d) May compromise and pay valid claims against property forfeited pursuant to this chapter; or
- (e) May make any other disposition of forfeited property authorized by law.

(2) All forfeited property and the sale proceeds thereof, up to a maximum of three million dollars per year, not previously transferred pursuant to [subsection] (1)(a) of this section, shall, after payment of expenses of administration and sale, be distributed as follows:

- (a) One quarter shall be distributed to the unit or units of state or local government [whose] officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture;
- (b) One quarter shall be distributed to the prosecuting attorney who instituted the action producing the forfeiture; and
- (c) One half shall be deposited into the criminal forfeiture fund established by this chapter.

(3) Property and money distributed to units of state and local government shall be used for law enforcement purposes, and shall complement but not supplant the funds regularly appropriated for such purposes.

(4) *[Subsection effective July 1, 2017. For subsection effective until June 30, 2017, see main volume. Repeal and reenactment on June 30, 2022. L 2016, c 161, §7(3).]* There is established in the department of the attorney general a revolving fund to be known as the criminal forfeiture fund, hereinafter referred to as the "fund" in which shall be deposited one-half of the proceeds of a forfeiture and any penalties paid pursuant to section 712A-10(6). All moneys in the fund shall be expended by the attorney general and are appropriated for the following purposes:

- (a) The payment of any expenses necessary to seize, detain, appraise, inventory, safeguard, maintain, advertise, or sell property seized, detained, or forfeited pursuant to this chapter or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property and such contract services and payments to reimburse any federal, state, or county agency for any expenditures made to perform the foregoing functions;
- (b) The payment of awards for information or assistance leading to a civil or criminal proceeding;
- (c) The payment of supplemental sums to state and county agencies for law enforcement purposes;
- (d) The payment of expenses arising in connection with programs for training and education of law enforcement officers;

- (e) The payment of expenses arising in connection with enforcement pursuant to the drug nuisance abatement unit in the department of the attorney general; and
- (f) The payment of expenses arising in connection with the law enforcement officer independent review board in the department of the attorney general.

(5) The attorney general may, without regard to the requirements of chapter 91, promulgate rules and regulations concerning the disposition of property, the use of the fund, and compromising and paying valid claims against property forfeited pursuant to this chapter.

(6) Not less than twenty days prior to the convening of each regular session, the attorney general shall provide to the legislature a report on the use of the Hawaii omnibus criminal forfeiture act during the fiscal year preceding the legislative session. The report shall include:

- (a) The total amount and type of property seized by law enforcement agencies;
- (b) The total number of administrative and judicial actions filed by prosecuting attorneys and the disposition thereof;
- (c) The total number of claims or petitions for remission or mitigation filed in administrative actions and the dispositions thereof;
- (d) The total amount and type of property forfeited and the sale proceeds thereof;
- (e) The total amount and type of property distributed to units of state and local government;
- (f) The amount of money deposited into the criminal forfeiture fund; and
- (g) The amount of money expended by the attorney general from the criminal forfeiture fund under subsection (5) and the reason for the expenditures. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1, §2; am L 1991, c 166, §8; am L 1992, c 112, §2; am L 1993, c 196, §1; am L 1996, c 104, §6; am L 2000, c 249, §§12, 20(2); am L 2001, c 265, §4; am L 2002, c 16, §31 as superseded by c 94, §3; am L 2003, c 63, §2; am L 2016, c 161, §2]

#### **Note**

Transfer of certain interest earnings to general fund until June 30, 2015. L 2009, c 79, §30(a)(41).

Act 197, Session Laws 1990, amended this section to require the attorney general to prepare a report to the legislature on the use of the Hawaii omnibus criminal forfeiture act. The legislature felt it was important to be kept well-informed about the use of this powerful tool. Senate Standing Committee Report No. 2900.

Act 112, Session Laws 1992, amended this section to provide that the holder of the immediate reversionary interest in leasehold real property forfeited to the State under chapter 712A is to be offered the first opportunity to acquire the remaining leasehold interest and any improvements on the property built or paid for by the lessee. The legislature felt that this amendment adequately protects the rights of innocent property owners and other interest holders while facilitating the disposition of forfeited leasehold properties. Senate Standing Committee Report No. 2482.

Act 249, Session Laws 2000, amended this section by adding to the list of property which the attorney general is authorized to sell or destroy under subsection (1)(c) any untaxed cigarettes forfeited to the State and transferred to the attorney general for violating the cigarette tax and tobacco tax law under chapter 245.

Act 94, Session Laws 2002, by making the cigarette tax stamp law permanent, amended this and other sections. The legislature sought to ensure compliance with and enforcement of the cigarette tax stamp laws. House Standing Committee Report No. 502-02.

Act 63, Session Laws 2003, amended this section by providing that the drug nuisance abatement unit expenses be paid out of the criminal forfeiture fund in the department of the attorney general. Conference Committee Report No. 31.

Act 161, Session Laws 2016, amended this section to authorize the expenditure of moneys in the criminal forfeiture fund for the payment of expenses arising in connection with the law enforcement officer independent review board established by Act 161. Senate Standing Committee Report No. 2471.

" **[\$712A-17] Limitation of actions.** Notwithstanding any other provision of law, forfeiture proceedings under this chapter may be commenced at any time within the period in which a criminal proceeding may be instituted for a covered offense pursuant to section 701-108. [L 1988, c 260, pt of §1; §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **[\$712A-18] Victim restitution.** Nothing herein precludes a court from ordering restitution or reparation to a victim by the defendant as part of a sentence imposed for a violation of a



covered offense. The State shall not be compelled to provide funds for victim restitution or reparation under this chapter. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **[\$712A-19] Construction.** It is the intent of the legislature that this chapter be liberally construed so as to effect the purposes of this chapter. [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]

" **[\$712A-20] Short title.** This chapter may be cited as the "Hawaii omnibus criminal forfeiture act". [L 1988, c 260, pt of §1, §7; am L 1990, c 197, §1; am L 1993, c 196, §1; am L 1996, c 104, §6]