

January 1993

## Montana's Real Property Forfeiture Statute: Will It Pass Constitutional Muster?

Jack F. Nevin

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Jack F. Nevin, *Montana's Real Property Forfeiture Statute: Will It Pass Constitutional Muster?*, 54 Mont. L. Rev. (1993).  
Available at: <https://scholarship.law.umt.edu/mlr/vol54/iss1/4>

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

# MONTANA'S REAL PROPERTY FORFEITURE STATUTE: WILL IT PASS CONSTITUTIONAL MUSTER?

Jack F. Nevin\*

## I. INTRODUCTION

Forfeiture has become one of the prosecutor's most effective weapons in the attack on illegal narcotics sales and other organized criminal activity. Forfeiture, along with undercover operations and electronic surveillance, is the latest weapon available to the government in the attack on organized crime and narcotics syndicates.<sup>1</sup>

The Montana drug forfeiture statute,<sup>2</sup> is closely modeled after

---

\* B.A., Washington State University, 1973; M.B.A., Gonzaga University, 1978; J.D., Gonzaga University, 1978; Jack Nevin is currently a Deputy Prosecuting Attorney at the Pierce County Prosecuting Attorney's office, Tacoma, Washington. He has been an Adjunct Professor at the University of Puget Sound Law School and at Pierce College at Fort Steilacoom. The author expresses special appreciation to legal assistants Marcia Bauer and Pat Macaluso for their assistance in the preparation of this article.

1. Kelly McClure, *Federal Civil Forfeiture of Assets: Why it Works and How it Must*, 11 U. BRIDGEPORT L. REV. 419, 420-23 (1991) (symposium on forfeiture under state and federal statutes); Robert P. Brouillard, *Civil Forfeiture Law in Oregon: Efforts Toward Effective and Equitable Change*, 25 WILLAMETTE L. REV. 455, 456-57 (1989).

2. MONT. CODE ANN. §§ 44-12-101 to -206 (1991). Section 44-12-102 provides that the following are subject to forfeiture:

- (a) all controlled substances that have been manufactured, distributed, prepared, cultivated, compounded, processed, or possessed in violation of Title 45, Chapter 9;
- (b) all money, raw materials, products, and equipment of any kind that are used or intended for use in manufacturing, preparing, cultivating, compounding, processing, delivering, importing, or exporting any controlled substances in violation of Title 45, Chapter 9, except items used or intended for use in connection with quantities of marijuana in amounts less than 60 grams;
- (c) except as provided in subsection (2)(d), all property that is used or intended for use as a container for anything enumerated in subsection (1)(a) of (1)(b);
- (d) except as provided in subsection (2), all conveyances, including aircraft, vehicles, and vessels, that are used or intended for use in any manner to facilitate the commission of a violation of Title 45, Chapter 9;
- (e) all books, records, and research products and materials, including formulas, microfilm, tapes, and data, that are used or intended for use in violation of Title 45, Chapter 9;
- (f) all drug paraphernalia as defined in 45-10-101;
- (g) everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of Title 45, Chapter 9; all proceeds traceable to such an exchange; and all money, negotiable instruments, and securities used or intended to be used to facilitate a violation of Title 45, Chapter 9;
- (h) any personal property constituting or derived from proceeds obtained directly or indirectly from a violation of Title 45, Chapter 9, that is punishable by more than 5 years in prison; and

the federal drug forfeiture statute.<sup>3</sup> Section 102(1)(i) of the Montana forfeiture statute allows for the seizure of real estate used to grow or process controlled substances. The procedures allowed under this statutory scheme are the same as those followed under the federal statute and provide for the seizure of real estate without pre-seizure notice to the land owner.<sup>4</sup> Litigants should look to

(i) real property, including any right, title, and interest in any lot or tract of land and any appurtenances or improvements, that is directly used or intended to be used in any manner or part to commit or facilitate the commission of or that is derived from or maintained by the proceeds resulting from a violation of Title 45, Chapter 9, that is punishable by more than 5 years in prison. An owner's interest in real property is not subject to forfeit by reason of any act or omission unless it is proved that the act or omission was the owner's or was with his actual knowledge or express consent. . . .

3. 21 U.S.C. § 881 (1988). This statute provides:

(a) SUBJECT PROPERTY.

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2) or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9). . . .

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year imprisonment, except that no property shall be forfeited under this paragraph, 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 or consent of that owner.

21 U.S.C. § 881(a)(1)-(7) (1988).

4. MONT. CODE ANN. § 44-12-103(2) (1991). Section 103(2) provides that "all property subject to forfeiture under 44-12-102 may be seized by a peace officer under a search warrant issued by a district court having jurisdiction over the property. . . ." Similarly, 21 U.S.C. § 881(b) provides that "[t]he government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as pro-

federal cases for guidance when interpreting section 102(1)(i) because it is similar to the federal statute and Montana lacks precedent.<sup>5</sup>

A large body of federal authority holds that federal real property forfeiture statutes are unconstitutional as applied, because no pre-seizure notice is given to landowners before their land is seized.<sup>6</sup> Since the federal and Montana statutes are similar, the abundance of authority indicates that Montana's Real Property Forfeiture statute is unconstitutional.

Throughout Montana there are no doubt landowners who are using their property to grow or otherwise process controlled substances.<sup>7</sup> These landowners run the risk of losing their land as a result of a forfeiture statute that may be unconstitutional in its application. Arguably, attorneys representing these landowners will have a good argument to defeat these seizures.

This article explores the constitutional issues raised by section 44-12-102(1)(i) of the Montana Code. The first section provides an overview of civil forfeiture and compares Title 44, Chapter 12 to 21 U.S.C. § 881. The second section explores the rationale behind the holding in the landmark case of *United States v. Premises and Real Property at 4492 South Livonia Road*<sup>8</sup> and its reliance on the case of *Fuentes v. Shevin*.<sup>9</sup> Section three examines how other federal courts have applied the *Livonia Road* principles. The fourth section analyzes *Connecticut v. Doebr*,<sup>10</sup> the United States Supreme Court case which extended the prejudgment attachment due process protection of *Fuentes* to real property. Finally, section five analyzes the government's argument which opposes the application of *Livonia Road*.

## II. THE CIVIL FORFEITURE SANCTION

The sanction of civil forfeiture supplements criminal penalties. This sanction has been defined as the government taking of private

---

vided for a search warrant under the Federal Rules of Criminal Procedure."

5. To date, research has revealed only two Montana forfeiture cases at the Supreme Court level, both of which involved personal property issues. *State v. 1978 LTD II*, 216 Mont. 401, 701 P.2d 1365 (1985); *State v. Baker*, 205 Mont. 244, 667 P.2d 416 (1983).

6. See Gregory W. Weircioch, Note, *Eviction Without Conviction: Public Housing Leasehold Forfeiture Under 21 U.S.C. Section 881*, 48 WASH & LEE L. REV. 1409, 1413 n.15 (1991).

7. See, e.g., *State v. Valley*, 1992 WL 5402 (Mont. 1992); *State v. Rydberg*, 778 P.2d 902, 239 Mont. 70 (1989).

8. 889 F.2d 1258 (2d Cir. 1989).

9. 407 U.S. 67 (1972).

10. 111 S. Ct. 2105, 2113 (1991).

property, illegally used or obtained, without compensation.<sup>11</sup>

One purpose of civil forfeiture statutes is to strip those who sell or process controlled substances of their operating tools and economic base, thereby making it more difficult for them to continue their illegal activity.<sup>12</sup> Civil forfeiture is exclusively a civil sanction, and the government may proceed without a criminal conviction.<sup>13</sup>

Both the federal drug forfeiture statute<sup>14</sup> and Montana's civil forfeiture statute allow for the seizure and forfeiture of (1) vehicles<sup>15</sup>, (2) money and other forms of proceeds<sup>16</sup> and (3) real estate.<sup>17</sup> The Montana Supreme Court has decided only a few civil forfeiture cases, all of which dealt with the forfeiture of personal property.<sup>18</sup> In deciding these cases, the court has relied on federal law.<sup>19</sup> Therefore, in interpreting sections 44-12-101 to -206, it is appropriate to look to the federal courts for guidance.

Civil forfeiture is intended to be a harsh sanction for those who process or distribute illegal narcotics.<sup>20</sup> In addition to suffering criminal sanctions, the drug dealer faces the prospect of losing large quantities of personal and real property.<sup>21</sup> In order to seize a vehicle, the government need only show that the vehicle was "used or intended for use" in any manner to facilitate the commission of a violation of "offenses involving dangerous drugs."<sup>22</sup> According to one court's interpretation of "facilitate" a vehicle owner faces forfeiture if the owner so much as plans to use the vehicle to commit a controlled substance violation.<sup>23</sup> The Montana forfeiture victim fares no better with personal property under sections 44-12-101

11. *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

12. *See, e.g., Caplin and Drysdale v. United States*, 491 U.S. 617 (1989).

13. *See, e.g., United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977).

14. 21 U.S.C. § 881 (1988).

15. 21 U.S.C. § 881(a)(4) (1988); MONT. CODE ANN. § 44-12-102(1)(d) (1991).

16. 21 U.S.C. § 881(a)(6) (1988); MONT. CODE ANN. § 44-12-102(1)(g) (1991).

17. 21 U.S.C. § 881(a)(7) (1988); MONT. CODE ANN. § 44-12-102(1)(i) (1991).

18. *See, e.g., State v. 1978 LTD II*, 216 Mont. 401, 701 P.2d 1365 (1985); *State v. Baker*, 205 Mont. 244, 667 P.2d 416 (1983).

19. *1978 LTD II*, 216 Mont. at 403, 701 P.2d at 1368; *Baker*, 205 Mont. at 246, 667 P.2d at 418.

20. *United States v. One Parcel of Real Property, Described as Lot 4, Block 5 of the Eaton Acres*, 712 F. Supp. 810, 813 (D. Or. 1989).

21. Criminal prosecution, however, is not a prerequisite to forfeiture.

22. MONT. CODE ANN. § 44-12-102(1)(d) (1991). *See* MONT. CODE ANN. tit. 45, ch. 9 (1991) (listing offenses involving dangerous drugs).

23. *United States v. Premises Known as 3639 Second St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989).

to -206; the law recognizes a presumption of forfeiture.<sup>24</sup>

Section 44-12-102(1)(i),<sup>25</sup> the real property section of Montana's civil forfeiture statute, is a result of the 1989 amendments to sections 44-12-101 to -206<sup>26</sup> and was patterned after 21 U.S.C. § 881.<sup>27</sup> By including real property in the forfeiture statute, the Montana Legislature adopted the same sanction as the federal government and the states of Washington,<sup>28</sup> Idaho,<sup>29</sup> and Oregon.<sup>30</sup>

Including a real property forfeiture provision in the statute significantly increases the severity of the consequences for the alleged wrongdoers and their families. This addition extends the impact of civil forfeiture to family members who can also be physically removed from the wrongdoer's home when seizure occurs.<sup>31</sup>

24. MONT. CODE ANN. § 44-12-203(1) (1991).

25. MONT. CODE ANN. § 44-12-102(1)(i) (1991) provides that:

[R]eal property, including any right, title, and interest in any lot or tract of land and any appurtenances or improvements, that is directly used or intended to be used in any manner or part to commit or facilitate the commission of or that is derived from or maintained by the proceeds resulting from a violation of Title 45, Chapter 9, that is punishable by more than 5 years in prison. An owner's interest in real property is not subject to forfeit by reason of any act or omission unless it is proved that the act or omission was the owner's or was with his actual knowledge or express consent. . . .

26. 1989 MONT. LAWS § 2 ch. 652.

27. 21 U.S.C. § 881(a)(7) (1981 & Supp. 1992) provides that:

[A]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, 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 or consent of that owner.

28. WASH. REV. CODE § 69.50.505(a)(8) (1989).

29. IDAHO CODE § 37-2744 (1992).

30. 1989 OR. LAWS 791.

31. Section 44-12-102(1)(i) allows that "an owner's interest in real property is not subject to forfeit by reason of any act or omission unless it is proved that the act or omission was the owner's or was with his actual knowledge or express consent . . ." This is substantially the same language as contained in the "innocent owner" defense at § 21 U.S.C. 881(a)(6). While this may appear to protect spouses and families, the practical reality is that when fifty percent of a family's equity in real estate is forfeited, and (as is often the case) the family head is incarcerated, the family is effectively removed from the property. Usually the family is unable to maintain payments. Additionally the family must deal with the state who now owns half of the property. Although section 44-12-102(1)(i) has this protective language, it does not make specific reference to the property rights of innocent spouses, nor does it specify what constitutes "actual knowledge." It does not indicate whether constructive knowledge will suffice. A wife who knows of her husband's controlled substance activities yet strongly disapproves, will be faced with a dilemma under section 44-12-102(1)(i); either she reports his activity, which will lead to prosecution or she does nothing which will result in the forfeiture of her interest in the property as well. Such a choice for an otherwise innocent spouse is no choice at all. See Derrick Wilson, *Drug Asset Forfeiture: In the War*

Section 44-12-102(1)(i) does not differentiate between innocent family members and the wrongdoer.

An examination of section 44-12-102(1)(i) to -206 reveals that, while the legislature added real property to the statute, the legislature failed to add procedural safeguards providing for pre seizure notice to the landowner. Section 44-12-103(2) establishes the criteria for when property is subject to forfeiture and may be seized—criteria currently existing for execution of search warrants.<sup>32</sup>

Arguably then, under section 44-12-102(1)(i), as under 21 U.S.C. § 881, families can be ejected from their homes based upon law enforcement's *ex parte* showing of probable cause.<sup>33</sup> The possibility of people being removed from their land without pre seizure notice and hearing raises the serious question of whether section 44-12-102(1)(i) can withstand constitutional challenge.

A review of sections 44-12-101 to -206 and 21 U.S.C. § 881 shows substantially the same wording. Montana courts have, in fact, cited to federal precedent in cases interpreting personal property issues in sections 44-12-101 to -206.<sup>34</sup> First,<sup>35</sup> Second,<sup>36</sup> Third,<sup>37</sup> and Ninth<sup>38</sup> Circuit Courts of Appeal, as well as District Courts within the Fourth,<sup>39</sup> Sixth<sup>40</sup> and Seventh<sup>41</sup> Circuits, inter-

*on Drugs is the Innocent Spouse the Loser?*, 30 J. FAM. L. 135-37, 139-49 (1992); Beverly L. Jacklin, Annotation, *Who is Exempt From Forfeiture of Real Property Under "Innocent Owner" Provisions of 21 U.S.C.S. § 881(a)(7)?*, 110 ALR FED. 569, 598-605 (1992).

32. MONT. CODE ANN. § 44-12-103(2) (1991) provides that: "All property subject to forfeiture under 44-12-102 may be seized by a peace officer under a search warrant issued by a district court having jurisdiction over the property."

33. The federal counterpart of section 44-12-101 to -206 of the Montana Code is 21 U.S.C. § 881. This section provides:

Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property . . . The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

21 U.S.C. § 881(b) (1988 & Supp. 1992).

34. *State v. 1978 LTD II*, 216 Mont. 401, 404, 701 P.2d 1365, 1367 (1985); *State v. Baker*, 205 Mont. 244, 252-53, 667 P.2d 416, 420 (1983).

35. *In re Kingsley*, 802 F.2d 571, 580-83 (1st Cir. 1986) (Coffin, J., concurring and Torruella, J., dissenting).

36. *United States v. Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989).

37. *United States v. Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3d Cir. 1991).

38. *United States v. James Daniel Good Property*, 971 F.2d 1376, 1383-84 (9th Cir. 1992).

39. *Richmond Tenants Org., Inc. v. Kemp*, 753 F. Supp. 607, 609 (E.D. Va. 1990).

preting the provisions of the Federal Statute 21 U.S.C. § 881, have recognized that an *ex parte* seizure of real property without pre-seizure notice to the landowner could violate due process. In each of these cases the government had obtained *ex parte*, a warrant allowing for the seizure of property. That procedure was later found to be inadequate to satisfy due process. These courts have used the case of *United States v. The Premises and Real Property at 4492 South Livonia Road* as their foundational holding.<sup>42</sup> There, the Second Circuit Court of Appeals held that an *ex parte* seizure of real estate violated due process.<sup>43</sup>

Although there are legitimate arguments that these procedures do not violate due process,<sup>44</sup> current authority at the federal level overwhelmingly finds a due process violation.<sup>45</sup> The federal precedent of *Livonia Road* and subsequent cases suggest that section 44-12-102(i) is unconstitutional as applied.

### III. LIVONIA ROAD: A DUE PROCESS VIOLATION IN GOVERNMENT REAL PROPERTY SEIZURES

In 1989, the Second Circuit Court of Appeals in *Livonia Road* was confronted for the first time with the question of whether the due process clause favors the homeowner or the government when the property seized is a private residence.<sup>46</sup> At issue was the balance between an individual's right to occupy his home and the government's efforts to curtail drug selling from residences in urban areas.<sup>47</sup> In *Livonia Road* the court held that the *ex parte* seizure of a residence, without notice to the homeowner and opportunity for a pre-seizure adversarial hearing, violated due process.<sup>48</sup> The court

40. *United States v. 14128 S. Sch. St., Riverdale, Ill.*, 774 F. Supp. 475, 478-80 (N.D. Ill. 1991); *United States v. Property at 850 S. Maple, Ann Arbor, Mich.*, 743 F. Supp. 505, 509-10 (E.D. Mich. 1990); *United States v. Parcel I Beginning at a Stake*, 731 F. Supp. 1348, 1353-54 (S.D. Ill. 1990).

41. *United States v. Certain Real Property Located on Hanson Brook, Town House Rd.*, 770 F. Supp. 722, 728-30 (D. Me. 1991); *United States v. Two Parcels of Property Located at 185 and 191 Whalley Ave., New Haven, Conn.*, 774 F. Supp. 87, 89-91 (D. Conn. 1991).

42. 889 F.2d 1258 (2d Cir. 1989).

43. *Id.* at 1265, 1266.

44. See Recent Development, *Fifth Amendment—Seizures and Forfeiture of Property—Federal Court Upholds Preseizure Notice and Forfeiture of Real Property Used for Narcotic Trafficking. United States v. 141 Street Corp.*, (2d Cir. 1990), 104 HARV. L. REV. 1139-46 (1991).

45. Weircioch, *supra* note 6, at 1413 n.15. See also *supra* notes 35-41 and accompanying text.

46. 889 F.2d at 1263.

47. *Id.* at 1265-66.

48. *Id.* (citing 21 U.S.C. § 881(a)(7) (1988)).



found that, as a general rule, absent an "extraordinary situation" that justifies postponing notice and opportunity for hearing, due process requires notice and an opportunity to be heard prior to the deprivation of a property interest.<sup>49</sup> Curiously, the court relied on three personal property cases in justifying its analysis:<sup>50</sup> *Fuentes v. Shevin*,<sup>51</sup> *Goldberg v. Kelly*,<sup>52</sup> and *Sniadach v. Family Finance Corp.*<sup>53</sup>

The "extraordinary situation" exception to *Livonia Road's* due process requirement comes from *Fuentes*.<sup>54</sup> The exception applies when three criteria have been met:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for a very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.<sup>55</sup>

The requirement that only an "extraordinary situation" can justify the failure to provide a pre-seizure hearing applies even in the context of a civil in rem personal property forfeiture proceedings.<sup>56</sup> In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court applied the three *Fuentes* criteria to the seizure of a pleasure yacht pursuant to a Puerto Rican drug forfeiture statute.<sup>57</sup> The Court held that "this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process"<sup>58</sup> because the second *Fuentes* criterion" had been met:

Preseizure notice and hearing might frustrate the interests served by the statutes since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.<sup>59</sup>

---

49. *Id.* at 1263.

50. *Id.*

51. 407 U.S. 67 (1972).

52. 397 U.S. 254 (1970).

53. 395 U.S. 337 (1969).

54. *Fuentes*, 407 U.S. at 81-82.

55. *Id.* at 91.

56. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

57. *Id.* at 679-80.

58. *Id.*

59. *Calero-Toledo*, 416 U.S. at 679.

The court in *Livonia Road* applied the federal forfeiture statute to the facts and found that two basic constitutional principles were implicated.<sup>60</sup> First, notice and an opportunity for hearing, as required by *Fuentes*, should generally precede the taking of an individual's property.<sup>61</sup> Second, an individual's expectation of privacy and freedom from governmental intrusion in the home merits special constitutional protection.<sup>62</sup> The court then held that:

[T]he constitutional adequacy of the pre-seizure *ex parte* procedure afforded the homeowner turned on the balancing of three considerations: (1) the significance of the property interest at stake; (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest in pre-seizure notice, including the avoidance of burdensome additional procedures.<sup>63</sup>

The *Livonia Road* court next turned to the ultimate question of whether the due process balance favors the homeowner or the government where the property seized is a residence.<sup>64</sup> The court analyzed whether sufficient exigent circumstances existed to warrant postponing notice and the opportunity for an adversarial hearing.<sup>65</sup> The court ruled in favor of the homeowner and held that "[a]s a general matter, a showing of exigent circumstances seems unlikely when a person's home is at stake, since, unlike some forms of property, a home cannot be readily moved or dissipated."<sup>66</sup> In *Livonia Road* we see the first in a series of modern cases that finds in favor of the homeowner by requiring notice and opportunity to be heard before a government seizure can take place. *Livonia Road* set the standard for subsequent cases by extending the due process analysis of *Fuentes* to government seizures of real property.

#### IV. FEDERAL COURTS FOLLOW THE *LIVONIA ROAD* APPROACH

The majority of federal circuit courts that have considered the issues raised in *Livonia Road* have followed its reasoning and concluded that the seizure of real property without pre-seizure notice and hearing violates fundamental fairness and due process of law.<sup>67</sup>

---

60. *Livonia Road*, 889 F.2d at 1264 (citing 21 U.S.C. § 881(a)(7) (1988)).

61. *Id.*

62. *Id.* See generally *United States v. Karo*, 468 U.S. 705 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

63. *Livonia Road*, 889 F.2d at 1264 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

64. *Id.* at 1265.

65. *Id.*

66. *Id.*

67. See, e.g., *United States v. 92 Buena Vista Avenue*, 937 F.2d 98 (3d Cir. 1991), cert.

Most recently, the Ninth Circuit Court of Appeals in *United States v. James Daniel Good Property* adopted the *Livonia Road* due process analysis, holding that the federal forfeiture statute requires notice and an opportunity to be heard prior to the seizure of real property.<sup>68</sup>

[The homeowner] has a substantial and unique interest in his home. The government's interest in avoiding a pre-seizure hearing is not significant in this case. The house is not going anywhere. It is not going to be 'removed to another jurisdiction, destroyed or concealed.' Any legitimate interest the government has may be protected through means less restrictive than seizure. . . . The government does have a strong interest in seeing that the property is no longer used for illegal purposes, but this interest can be met through means less drastic than seizure of the real property. On the facts of this case we find that the statute [21 U.S.C. § 881], as applied, violated . . . [defendant's] rights to due process.<sup>69</sup>

Numerous United States District Courts that have considered the forfeiture issue in the context of the federal forfeiture statute have followed an analysis similar to *Livonia Road* and reached the same conclusion.<sup>70</sup> In a case of first impression in the Seventh Circuit, the court in *United States v. Parcel I* recently held that the *ex parte* seizure of real property violates due process.<sup>71</sup> The court applied the three factor analysis set forth in *Mathews v. El-bridge*,<sup>72</sup> and noted the "unique interests" persons hold in their homes. The court further stated:

Most importantly, the governmental interest in providing mini-

---

*granted on other grounds*, 113 S. Ct. 17 (1992); *United States v. James Daniel Good Property*, 971 F.2d 1376 (9th Cir. 1992). See also *In re Kingsley*, 802 F.2d 571 (1st Cir. 1986) (a case pre-dating *Livonia Road*, where the court stated that due process requires more than an *ex parte* probable cause review by a judicial officer). The majority in *Kingsley* concluded that the government must make the following three showings in an *ex parte* proceeding: (1) that there exists probable cause to seize the property; (2) that pre-seizure notice to interested parties would be likely to render the property unavailable for forfeiture; and (3) that less restrictive means, i.e., bond, restraining order, or *lis pendens*, will not suffice to protect the government's interest. *Id.* at 571 n.32.

68. *James Daniel Good Property*, 971 F.2d at 1384.

69. *Id.* (citation omitted).

70. See, e.g., *United States v. 14128 S. Sch. St.*, 774 F. Supp. 475 (N.D. Ill. 1991); *United States v. Hanson Brook, Town House Road*, 770 F. Supp. 722 (D. Me. 1991); *United States v. 185 and 191 Whalley Ave.*, 774 F. Supp. 87 (D. Conn. 1991); *Richmond Tenants Org. v. Kemp* 753 F. Supp. 607 (E.D. Va. 1990); *United States v. 850 S. Maple*, 743 F. Supp. 505 (E.D. Mich. 1990); *United States v. Parcel I*, 731 F. Supp. 1348 (S.D. Ill. 1990).

71. *United States v. Parcel I*, 731 F. Supp. 1348, 1353-54 (S.D. Ill. 1990) (citing 21 U.S.C. § 881 (1988)).

72. 424 U.S. 319, 334-35 (1976). See also *Livonia Road*, 889 F.2d at 1264.

mal due process is, in the balance, scant when compared with the claimants' overriding interest in their homes. . . . The government interest in foregoing burdensome proceedings will not be advanced since the claimants can, and did, invoke adversary procedures after seizure. Furthermore, the claimants' homes cannot be readily dissipated or concealed and, in any event, the governmental interest can be adequately protected by the filing of a *lis pendens*. Also, the government has not demonstrated to the [c]ourt that it feared the claimants' homes would be used to further facilitate drug activity.<sup>73</sup>

In both *Richmond Tenants Organization v. Kemp*, and *United States v. 850 South Maple*, the courts extended the *Livonia Road* analysis to the civil forfeiture of tenancies in public housing.<sup>74</sup> In *Richmond Tenants* and *850 South Maple*, federal forfeiture proceedings were initiated against the tenancies of residents of public housing projects.<sup>75</sup> In these cases, the government obtained writs of entry based upon *ex parte* representations to an independent magistrate, and used them as a basis to evict the tenants.<sup>76</sup> The court in *Richmond Tenants* adopted an analysis similar to *Livonia Road* and commented on the distinction between homes and other forms of property:

[N]umerous courts have determined that *homes* are distinctly different legal entities in the property forfeiture context. Unlike cars, yachts, and airplanes, more typical examples of property confiscated in order to prevent continued drug activity, a home is immobile, and thus not likely to be hidden or moved after notice. Consequently, "exigent circumstances could virtually never exist which required the seizure of a home prior to notice and a hearing."<sup>77</sup>

Likewise, in *850 South Maple*, the federal district court held that the seizure of a home, without prior notice and hearing, violated the constitutional right of due process.<sup>78</sup>

---

73. *Parcel I*, 731 F. Supp. at 1354 (citations omitted).

74. *Richmond Tenants*, 753 F. Supp. at 609; *850 S. Maple*, 743 F. Supp. at 509.

75. In both of these cases the tenants were suspected of dealing drugs from their public housing project apartments. As part of the National Public Housing Asset Forfeiture Project, which allows for the forfeiture of leaseholds pursuant to 21 U.S.C. § 881(a)(7), both federal and local housing authorities sought to eradicate the high incidence of drug-related crime in public housing projects.

76. *Richmond Tenants*, 753 F. Supp. at 610; *850 S. Maple*, 743 F. Supp. at 508.

77. *Richmond Tenants*, 753 F. Supp. at 609 (quoting *850 S. Maple*, 743 F. Supp. at 510) (citations omitted) (emphasis added).

78. *850 S. Maple*, 743 F. Supp. at 510 (citing 21 U.S.C. § 881 (1988)). See also *United States v. 14128 S. Sch. St.*, 774 F. Supp. 475 (N.D. Ill. 1991); *United States v. Hanson Brook*, 770 F. Supp. 722 (D. Me. 1991) (applying *Livonia Road* analysis to commercial real

The cases following *Livonia Road* show a trend at the federal level extending due process protections to landowners in civil forfeiture cases. The question thus remains: was the reliance by these courts on the personal property analysis in *Fuentes* justified and can *Fuentes* legitimately be extended to real property seizures initiated by the government?

#### V. CONNECTICUT *v.* DOEHR: FUENTES EXTENDED TO REAL PROPERTY

A weakness in the *Livonia Road* decision and the cases that followed was the court's extension of personal property attachment concepts to real property. The Court in *Fuentes* did not address the question of whether its holding extended to real property. Fortunately, that question was recently decided by the United States Supreme Court in *Connecticut v. Doehr*.<sup>79</sup>

In *Doehr* the Court reaffirmed that absent exigent circumstances, a plaintiff's interest in encumbering real property is not sufficient to justify burdening the owner's property rights without notice and an opportunity to be heard.<sup>80</sup> The Court used the three-fold analysis established in *Mathews v. Eldridge* when examining the constitutionality of Connecticut's prejudgment attachment statute.<sup>81</sup> The Connecticut statute permitted prejudgment attachment of real estate without prior notice or an opportunity to be heard.<sup>82</sup> The provision authorized attachment upon a party's *ex parte* showing of probable cause to sustain the validity of the plaintiff's claim, and it did not require a showing of extraordinary circumstances.<sup>83</sup> The Supreme Court held that the statute was unconstitutional because "by failing to provide a pre-attachment hearing without at least requiring a showing of some exigent circumstance, [the statute] clearly falls short of the demands of due process."<sup>84</sup>

The Court in *Doehr* first noted the nature of the owner's interests:

[T]he property interests that attachment affects are significant. For a property owner . . . attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints

---

estate).

79. 111 S.Ct 2105 (1991).

80. *Id.* at 2115.

81. *Id.* at 2112. See *supra* note 63, at 1264 and accompanying text.

82. *Doehr*, 111 S. Ct. at 2110.

83. *Id.* at 2111.

84. *Id.* at 2116.

any credit rating; reduces the chances of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.<sup>85</sup>

The Court then rejected the government's contention that the lack of a hearing was justified because the deprivation was neither total nor permanent:

The Court has never held that only such extreme deprivations trigger due process concern. To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'<sup>86</sup>

Finally, the Court turned to the "risk of erroneous deprivation" factor and distinguished its earlier decision allowing a lienholder to have disputed goods sequestered:

Unlike determining the existence of a debt or delinquent payments, the issue does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.' The likelihood of error that results illustrates that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it'. . . . It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented. 'The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause'.<sup>87</sup>

*Doehr* shows a clear directive from the United States Supreme Court that in matters of real property attachment the rights of homeowners in their property are so great that even the slightest deprivation will constitute a significant taking under the Due Process Clause.

## VI. THE GOVERNMENT'S ARGUMENT IN SUPPORT OF *EX PARTE* SEIZURE OF REAL PROPERTY

To prospectively examine Montana's position on the constitu-

---

85. *Id.* at 2112-13.

86. *Id.* at 2113 (citations omitted).

87. *Id.* at 2114-15 (citations omitted).

tionality of section 44-12-102 (1)(i) of the Montana Code requires an analysis of *Livonia Road* and its reliance on *Fuentes*. The holding in *Fuentes* is a "narrow one,"<sup>88</sup> involving a state replevin statute where a private citizen invoked governmental power to replevy goods. The holding in *Fuentes* is based on a Fifth Amendment analysis as applied to the states through the Fourteenth Amendment. In Montana the government will argue that, in relying on *Fuentes*, *Livonia Road* erred in applying a Fifth Amendment analysis to a Fourth Amendment seizure.<sup>89</sup>

Law enforcement seizures traditionally have not been governed by the Fifth Amendment Due Process Clause, but rather by the Fourth Amendment search and seizure clause.<sup>90</sup> The Court in *Fuentes* expressly distinguished a seizure under a search warrant from a seizure under a writ of replevin, on grounds that: (1) a search warrant is generally issued to serve important governmental needs and is "issued in situations demanding prompt action"; and (2) that the Fourth Amendment guarantees that the government will not relinquish control over the seized property to private parties and that a warrant will not issue except upon probable cause.<sup>91</sup>

The Fourth Amendment expressly governs seizures of property and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>92</sup> The Fourth Amendment makes no distinction between real and personal property, nor does it mandate a hearing or the payment of just compensation.<sup>93</sup>

A Fourth Amendment warrant empowers the government to seize property to further law enforcement purposes, not to advance the private interests of civil litigants, as was the case in *Fuentes*.<sup>94</sup> Because the Fourth Amendment expressly regulates the seizure of property for law enforcement purposes, the Fourth Amendment, rather than the Fifth Amendment Due Process Clause, determines

88. *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972).

89. The Fourth Amendment expressly governs seizures of property and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

90. See generally *Graham v. Connor*, 490 U.S. 386 (1989); *Brower v. County of Inyo*, 489 U.S. 593 (1989). See also *Gumz v. Morrisette*, 772 F.2d 1395, 1404-09 (7th Cir. 1985)(Easterbrook, Circuit Judge, concurring).

91. *Fuentes*, 407 U.S. at 93-94 n.30. See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

92. U.S. CONST. amend. IV.

93. *Id.*

94. *Fuentes*, 407 U.S. at 93 n.30.

the process applicable to a seizure initiated by the government.<sup>95</sup> Indeed, to effect the seizure of a person, the government need only satisfy Fourth Amendment requirements.<sup>96</sup> In *United States v. Monsanto*, the Supreme Court upheld the validity of a pre-trial order in a criminal case that barred the defendant from transferring his property (including a home and an apartment) prior to trial.<sup>97</sup> The Court held that “assets in a defendant’s possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable.”<sup>98</sup> The Court further explained that it had “previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable.”<sup>99</sup> The Court noted:

[W]here respondent was not ousted from his property, but merely restrained from disposing of it, the governmental intrusion was even less severe than those permitted by our prior decisions. Indeed it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent’s possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense.<sup>100</sup>

The government could further argue that a seizure of real property in which the government merely takes constructive custody of the premises without eviction is less intrusive than a seizure of personal property in which the owner is entirely deprived of its use and the property remains in the government’s custody. Yet the Supreme Court agrees that in the later situation the Constitution does not require a prior hearing.<sup>101</sup> The seizure of real property through constructive custody, in contrast, involves no more than filing a complaint and notice of *lis pendens*, posting notice, and conducting a quick survey of the property—or procedure, considerably less intrusive than the physical seizure and removal of

---

95. See *Graham*, 490 U.S. at 387 (holding that the Fourth Amendment, rather than substantive due process, is the source of limitations on use of force in seizing an individual).

96. *United States v. Monsanto*, 491 U.S. 600 (1989).

97. *Id.* at 611.

98. *Id.* at 615.

99. *Id.*

100. *Id.* at 614-15.

101. *Calero-Toledo*, 416 U.S. at 679-80; *United States v. \$8,850.00 in U.S. Currency*, 461 U.S. 555, 562 (1983); *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1162 (2d Cir. 1986).



a person or personal property.<sup>102</sup> In *United States v. \$8,850.00 in United States Currency*,<sup>103</sup> the Court expressly observed:

[A]bsent an extraordinary situation a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that a seizure is justified. But we have previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture.<sup>104</sup>

In *United States v. Von Neumann*,<sup>105</sup> the Court also acknowledged that "[d]ue process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture."<sup>106</sup> Although the decisions in *\$8,850.00* and *Von Neumann* involve assets that could easily be moved or dissipated in value (money and a car), this fact was not mentioned in either opinion. Further, the Eleventh Circuit construed the Court's statement as suggesting that pre-seizure notice and hearing are never required in the forfeiture context.<sup>107</sup>

The government's argument might be persuasive, but it ignores a well established principle of forfeiture law: forfeiture exists exclusively as a civil remedial action.<sup>108</sup> As such, an analysis that civil seizures should be considered Fourth Amendment seizures because they involve law enforcement creates a distinction without a difference. The *Fuentes* Fifth Amendment criteria, by virtue of its civil remedial quality, must apply to civil seizures. Therefore, the government's argument referring to the narrow scope of *Fuentes* must necessarily fail because of the *Doehr* holding that in matters of real property attachment the rights of homeowners in their property are so great that the slightest deprivation constitutes a significant taking requiring due process.<sup>109</sup>

102. *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1306-07 (4th Cir. 1992) (citing *Livonia Road* with approval and holding that the summary eviction of tenants from seized public housing units violates due process).

103. 461 U.S. 555 (1983).

104. *Id.* at 562 n.12 (citations omitted).

105. 474 U.S. 242 (1986).

106. *Id.* at 249 n.7.

107. *United States v. Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Fort Lauderdale*, 803 F.2d 625, 632 (11th Cir. 1986).

108. See, e.g., *United States v. Ward*, 448 U.S. 242 (1980); *United States v. One 1972 Toyota Mark II*, 505 F.2d 1162 (8th Cir. 1974).

109. The government may argue that contrary authority undermines this thesis. In a case decided after *Livonia Road*, the Second Circuit in *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) held in a commercial property seizure that land owners were afforded sufficient due process by the *ex parte* warrant procedure allowed under federal law. This holding, at first blush, seemed in startling contrast to the Second Circuit's holding in *Livonia Road* approximately one year before. While acknowledging that real estate seizures normally require notice, the court argued that in this case "an important government inter-

VII. ANALYZING THE CONSTITUTIONALITY OF THE MONTANA  
FORFEITURE STATUTE

The constitutionality of Montana's Forfeiture statute, section 44-12-102(1)(i), may in large part turn on whether the law affords greater protection to real property than to personal property. As a general rule, due process requires notice and an opportunity to be heard prior to the deprivation of a property interest<sup>110</sup> in the absence of an extraordinary situation that justifies postponing notice and opportunity for hearing.<sup>111</sup> The United States Supreme Court found that circumstances meeting the three *Fuentes*' criteria indi-

---

est justified postponing notice until after the initial deprivation." *Id.* at 874. The court distinguished *141st Street Corp.* from *Livonia Road*. As it had in *Livonia Road*, the court applied the three-prong test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Initially, the court emphasized that the claimant had a diminished private interest because it owned the building for "solely commercial purposes" rather than for residential purposes. *Id.* at 875. In holding that an *ex parte* procedure afforded sufficient due process the court indicated that "a commercial interest . . . traditionally has not occupied the same privileged place as the home." *Id.* In acknowledging the governmental interest in curtailing drug activities, the Second Circuit focused on whether there existed exigent circumstances, as set forth in *Fuentes*, which justify postponing the opportunity for an adversarial hearing. After identifying the obvious governmental interest in curtailing drug activity the court found that the "rampant" drug activity in the *141st Street Corporation* property required prompt action. The court found the third prong of the *Fuentes* test satisfied by the magistrate's *ex parte* finding of probable cause. *Id.* at 875.

*141st Street Corp.*, however, clearly is distinguishable from *Livonia Road* and section 44-12-102(1)(i). *141st Street Corp.* concerns a recognized exception to *Fuentes*—exigent circumstances. The government may attempt to use *141st Street Corp.* to distinguish commercial from more protected residential real estate. However, in *141st Street Corp.* exigent circumstances required prompt action. Arguably, absent these exigent circumstances the court would not have treated this commercial property differently than the residential property in *Livonia Road*.

In *Tellevik v. Real Property Known As 31641 West Rutherford Street*, 838 P.2d 111 (Wash. App. 1992) the Washington Supreme Court addressed the *ex parte* due process issue under Washington's civil forfeiture statute. The court found that the *ex parte* warrant procedure used (essentially the same as the federal procedure) did not violate due process. *Id.* at 120. The court applied the principles of *Fuentes* and held that due process requires a hearing prior to a deprivation. *Id.* at 117. The court further determined that an *ex parte* presentation of a seizure warrant constituted such a hearing and thereby satisfied due process requirements. *Id.* Critical to the court's holding was the Washington statute which allowed claimants a full adversarial hearing no later than 90 days from the date of seizure. *Id.* (citing R.C.W. 69.50.505(e) (1989)). The Washington statute as interpreted by the *Tellevik* court differs from section 44-12-102(1)(i) of the Montana Code which does not afford a full adversarial hearing within 90 days of seizure. The *Tellevik* holding is problematic for claimant's counsel and will no doubt be relied upon by government counsel. The court in *Tellevik* distinguished *Livonia Road* and the federal cases that followed it simply by stating that those cases incorrectly applied the principles of *Fuentes* and *Mathews v. Eldridge*. *Id.* at 119. *Tellevik* clearly represents the minority view.

110. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969).

111. *Fuentes*, 407 U.S. at 90.

cate an extraordinary situation.<sup>112</sup> Further, the Supreme Court has held that the principles of *Fuentes* apply to personal property seizures as well.<sup>113</sup> Personal property seizures are distinguishable solely because they fall within one of the *Fuentes*' exceptions, for example "prompt action."<sup>114</sup> In cases of real property forfeiture, however, the need for prompt action does not typically exist. The filing of a notice of *lis pendens* would likely restrain the landowner from transferring the property.

As in *Livonia Road*, there are two main constitutional principles implied in section 44-12-102(1)(i) of the Montana Code. Those principles are procedural due process before seizure, and the heightened constitutional protections persons are normally afforded in their home.<sup>115</sup>

With these fundamental constitutional principles in mind, the conclusion that section 44-12-102(1)(i) is unconstitutional is inescapable. Section 44-12-103(2)(d) provides for the *ex parte* seizure of land pursuant to the provisions of Montana's search and seizure statutes.<sup>116</sup> To determine the constitutional adequacy of section 44-12-102(1)(i), a court must weigh the three considerations of

112. *Id.* at 91.

113. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

114. *Fuentes*, 407 U.S. at 90.

115. U.S. CONST. amend. V. A number of cases have addressed the issue of a citizen's heightened level of constitutional protection within the home. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the Court distinguished warrantless searches of automobiles from warrantless searches of private offices, holding that the latter were entitled to a higher level of privacy requiring a warrant. The Court also said that "[o]ne governing principle justified by history and by current experience, has consistently been followed: Except in certain carefully defined classes of cases, a search warrant of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." *Id.* at 353-54 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967)).

In *U.S. v. Reed*, 572 F.2d 412, 422 (2d Cir. 1978), the court spoke to the higher level of constitutional protections afforded a homeowner under the Fourth Amendment. In addressing this higher level of protection the court stated "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protections. . . . [P]rivate dwellings involve strong Fourth Amendment interests that justify the warrant requirement . . . ." *Id.* at 422 (quoting *United States v. Martinez-Fuentes*, 428 U.S. 543, 561 (1976)).

In *United States v. Karo*, 468 U.S. 705 (1984), the Court was confronted with the warrantless monitoring of a beeper in a private residence not available for visual surveillance. In ruling that this minimal intrusion still violated the homeowner's expectation of privacy, the Court said "searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. . . ." *Id.* at 714-15.

See also *Payton v. New York*, 445 U.S. 573, 589 (1980) (stating "[t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."); *Livonia Road*, 889 F.2d at 1264 (stating that "it is clear that a home is entitled to special due process safeguards when targeted for civil forfeiture.").

116. MONT. CODE ANN. tit. 46, ch. 5 (1991).

*Mathews v. Eldridge*:<sup>117</sup> First, the significance of the property interest at stake; second, the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and third, the government's interest in pre-notice seizure including the avoidance of burdensome additional procedures.<sup>118</sup> Applying the *Mathews* criteria to section 44-12-102(1)(i) shows that absent the exigent circumstances referred to in *Fuentes* the government's interests could be satisfied by the filing of a notice of *lis pendens*. Absent a showing of exigency the due process balance must favor the homeowner.<sup>119</sup>

The government's most persuasive argument would be that civil forfeiture is a Fourth and not a Fifth Amendment seizure.<sup>120</sup> The weight of federal authority, however, rejects that position. The argument that the absence of a federal eviction statute separates state from federal forfeiture is logical but not compelling.<sup>121</sup> The federal cases focus on the *Fuentes*' criteria and not on the due process aspects of eviction. An analysis of the current federal and United States Supreme Court cases leads to only one conclusion: a citizen's interest in his or her real property requires special protection. The very terms of section 44-12-102(d) reinforce this notion and allow for a presumption of forfeiture in all property *except* real property, where it appears that the government has the burden of proof.<sup>122</sup> Perhaps the most persuasive guidance comes from the United States Supreme Court in *Connecticut v. Doehr*. Prior to *Doehr*, whether the due process protections of *Fuentes* should be extended to real property was in question. In interpreting 21 U.S.C. § 881 (1989), the federal courts relied upon *Fuentes* in deciding that landowners are entitled to pre-seizure notice. Yet in doing so, these courts were relying on a case that by its very terms did not apply to real property. This left open the argument that *Fuentes* does not apply to real property issues. By extending the *Fuentes* protections to pre-judgment attachment of real estate, the Court in *Doehr* definitively answered that question. The *Doehr* decision, therefore, is persuasive and telling in that it shows a clear intent by the United States Supreme Court that even the slightest real property deprivation requires due process.

---

117. 424 U.S. 319, 335 (1976).

118. *Mathews*, 424 U.S. at 335.

119. *Livonia Road*, 889 F.2d at 1263.

120. See, e.g., *U.S. v. Monsanto*, 491 U.S. 600, cert. denied, 109 S.Ct. 265 (1989).

121. *Id.*

122. See, e.g., MONT. CODE ANN. § 44-12-203(1) (1991).

## VIII. CONCLUSION

Since 1990, federal courts have unanimously held that real property civil forfeiture interests are entitled to greater due process protections than personal property.<sup>123</sup> In doing so, these courts have recognized that real property in general and homes in particular are entitled to special due process protections. They have recognized that the need for "prompt action" expressed in *Fuentes* and implemented in *Calero-Toledo* does not exist in real property forfeitures. Moreover, the filing of a notice of *lis pendens* will satisfy that consideration by restraining the land owner from transferring the property. In allowing for the seizure of real property without preseizure notice to the land owner, section 44-12-102(1)(i) is contrary to existing federal precedent as well as the notion of fundamental fairness to land owners. Although the Montana Supreme Court must ultimately decide whether section 44-12-102(1)(i) is unconstitutional as applied, there does exist a strong argument, supported by federal precedent, that the real property portion of the Montana civil forfeiture statute is unconstitutional.

---

123. See *supra* notes 32-38 and accompanying text. See also Recent Development, *supra* note 44, at 1141-43; Weircioch, *supra* note 45, at 1413 n.15.