U.S. Department of Justice
Criminal Division
Asset Forfeiture and Money Laundering Section

ASSET FORFEITURE LAW AND PRACTICE MANUAL

June 1998

Foreword

I am pleased to introduce the *Asset Forfeiture Law and Practice Manual*, produced and published by the dedicated staff of the Asset Forfeiture and Money Laundering Section, Criminal Division. This is the third edition of our *Manual* and replaces the *Asset Forfeiture Manual, Volume I: Law and Practice* (1993).

Like the earlier editions, this *Manual* contains a comprehensive discussion of all of the major aspects of forfeiture law and practice with an emphasis on the Government's perspective. Many hours of research have produced this valuable up-to-date tool for government attorneys and others involved in federal forfeiture efforts.

Forfeiture has achieved high priority as a law enforcement tool in the Government's effort to make criminal activity an unprofitable enterprise. The importance of the forfeiture program in dramatically reducing the financial incentive for crime is substantial. By presenting this *Manual* we hope to encourage the enthusiastic use of administrative, civil, and criminal forfeiture as a law enforcement tool.

For a comprehensive collection of policies relating to the asset forfeiture program see the *Asset Forfeiture Policy Manual*, also produced and published by this Section.

This *Manual* is not intended to create or confer any rights, privileges, or benefits for or on any prospective or actual claimants, defendants, or petitioners. It is also not intended to have the force of law or of a United States Department of Justice directive. *See United States v. Caceres,* 440 U.S. 741 (1979).

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Civilly Forfeitable Property

Chapter 1

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Chapter 1

Civilly Forfeitable Property

I. Requirement of Statutory Authority

Property is forfeitable to the United States only if forfeiture is specifically authorized by a federal statute.[1] It is, therefore, of utmost importance that law enforcement officials and government attorneys assure themselves of express statutory authority before seizing or proceeding against property for forfeiture.

II. Substantive Statutes

This chapter will focus on the most commonly used civil forfeiture provisions, including those found in the drug forfeiture statute, 21 U.S.C. § 881, the general forfeiture statute for Title 18 offenses, 18 U.S.C. § 981, and applicable defenses to the provisions.[2] Section 981 governs forfeitures relating to money laundering, foreign drug crimes, bank fraud, and other fraud offenses including health care fraud, counterfeiting and forgery, explosives offenses, and car theft. In addition, this chapter will briefly address civil forfeiture under 18 U.S.C. § 1955, forfeiture based upon an illegal gambling business. Federal law already contains more than 140 other civil forfeiture statutes covering a wide and diverse range of unlawful conduct.

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[1] *See United States v. Charles D. Kaier Co.*, 61 F.2d 160, 162 (3d Cir. 1931) (power to condemn or to declare a forfeiture must be found in the statutes). *See also United States v. Farrell*, 606 F.2d 1341, 1344 (D.C. Cir. 1979); *Sell v. Parratt*, 548 F.2d 753, 758 (8th Cir.), *cert. denied*, 434 U.S. 873 (1977); *United States v. Lane Motor Co.*, 199 F.2d 495, 497 (10th Cir. 1952), *aff'd*, 344 U.S. 630 (1953).

[2] In addition to statutory defenses contained within the statutes, petitioners may have a constitutional defense under the Excessive Fines Clause of the Eighth Amendment. The Excessive Fines Clause is discussed in chapter 12 of this manual.

For a description of federal civil forfeiture statutes, government attorneys may consult *Compilation of Selected Federal Asset Forfeiture Statutes* (revised September 1995), which contains the most frequently used civil and criminal forfeiture statutes.

III. Relation Back Doctrine

When evaluating potential forfeitability, seizing agencies and government attorneys should also consider the effect of the relation back doctrine, under which forfeiture to the Government is deemed to occur at the time of the commission of the act giving rise to the forfeiture. The doctrine and its impact were articulated by the Supreme Court in *United States v. Stowell*, 133 U.S. 1, 16-17 (1890), as follows:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

The relation back doctrine is codified in 18 U.S.C. § 981(f) and 21 U.S.C. § 881(h).[3] These statutes make the doctrine applicable to civil forfeitures under the Title 18 general forfeiture statute and the federal drug laws, respectively. Note, however, that title does not vest automatically upon commission of the unlawful act. In *United States v. A Parcel of Land Known as 92 Buena Vista*, 507 U.S. 111 (1993), the Supreme Court held that the vesting of title occurs only when the Government wins a judgment of forfeiture. Although the Court divided on the precise rationale for that outcome, six Justices concluded that the relation back provision of 21 U.S.C. § 881(h) operates like its predecessor common-law doctrine: the Government must obtain a judicial decree of forfeiture which then operates to vest in the government retroactive title as of the time the offense was committed.[4]

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[3] Under *Stowell*, the relation back doctrine applies to forfeitures prior to the enactment of these two provisions and also applies to forfeitures under other statutory provisions.

[4] *United States v. A Parcel of Land Known as 92 Buena Vista,* 507 U.S. at 126 (1993) (plurality opinion of Stevens, J.); *id.* at 132 (Scalia, J. concurring in judgment). *See United States v. Colonial Nat'l Bank*, 74 F.3d 486, 487 (4th Cir. 1996); *United States v. One Parcel of Land in Name of Mikell*, 33 F.3d 11, 13 (5th Cir. 1994); *Giuffre v. Bissell*, 31 F.3d 1241, 1258 (3d Cir. 1994); *United States v. Daccarett*, 6 F.3d 37, 53-54 (2d Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994); *see also United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 670 (4th Cir. 1996) (same result under relation back provision of 21 U.S.C. § 853(c)). *See generally* "Office of Legal Counsel Opinion," *Asset Forfeiture Policy Manual* (1996), Appendix to Chapter 4, at p. 1.

IV. Forfeitable Property under 21 U.S.C. § 881

The following is a brief description of the types of property that are subject to forfeiture under 21 U.S.C. § 881. It is intended to be illustrative, rather than exhaustive, and to highlight some issues commonly raised by the statute and interpretative case law.

A. Contraband *per se*

Certain items forfeitable under 21 U.S.C. § 881 are considered contraband *per se*[5] and may be forfeited summarily without hearing or notice. These items include schedule I and II controlled substances that are illegally possessed, transferred, sold, or offered for sale,[6] and plants from which schedule I or II controlled substances can be derived if the plants are being grown in violation of the drug laws, are growing wild, or if the owners or cultivators are unknown.[7] Contraband *per se* now includes dangerous, toxic, or hazardous raw materials or products, and their containers.[8] The Controlled Substances Act has established five schedules of controlled substances. The schedules currently in force are codified in 21 C.F.R. § 1308 (implementing 21 U.S.C. § 812).

B. Non-schedule I and II Controlled Substances

Some controlled substances are not considered contraband *per se* because it may be legal to possess or produce them under certain circumstances. These controlled substances are not summarily forfeitable, but may be administratively or judicially forfeited if they are manufactured, distributed, dispensed, acquired, or possessed in violation of the federal drug laws.[9]

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[5] Contraband *per se* is property the possession or production of which, without more, constitutes a crime. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). *See also Austin v. United States*, 509 U.S. 602, 621 (1993) (noting that "forfeiture of contraband...removes dangerous or illegal items from society").

[6] 21 U.S.C. § 881(f).

[7] 21 U.S.C. § 881(g)(1).

[8] 21 U.S.C. § 881(f), *as amended by* Crime Control Act of 1990, Pub. L. 101-647, Title XX, § 2004, 104 Stat. 4855 (Nov. 29, 1990).

[9] 21 U.S.C. § 881(a)(1), (a)(8). Section 881(a)(8) was added by the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976 (Oct. 12, 1984), to allow the forfeiture of any controlled substance possessed in violation of the Controlled Substances Act.

C. Raw Materials, Products, and Equipment

Section 881(a)(2) of Title 21 authorizes the forfeiture of raw materials, products, and equipment of any kind that are used or intended for use in unlawfully manufacturing, compounding, processing, delivering, exporting, or importing controlled substances. For example, data processing equipment used to detail growth characteristics of 30 marijuana plants growing nearby has been held forfeitable under 18 U.S.C. § 881(a)(2).[10] It should be noted that drug paraphernalia, as defined in 21 U.S.C. § 857, is now forfeitable under 21 U.S.C. § 881(a)(10).[11]

D. Containers

Any property that is used or intended for use as a container for illegal drugs or for the raw materials, products, and equipment involved in their processing and distribution, is subject to civil forfeiture under 21 U.S.C. § 881(a)(3).

E. Conveyances

Section 881(a)(4) of Title 21 authorizes the confiscation and condemnation of conveyances (including aircraft, vehicles, or vessels) that are used or intended for use in either of two ways: (1) *to transport* illegal drugs or raw materials, products, or equipment involved in their processing or distribution; or (2) *to facilitate in any manner* the transportation, sale, receipt, possession, or concealment of illegal drugs or the raw materials, products, or equipment involved in their processing or distribution.[12]

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[10] *United States v. Real Property and Premises Known as 5528 Belle Pond Drive,* 783 F. Supp. 253, 256-57 (E.D. Va. 1991), *aff'd*, 979 F.2d 849 (4th Cir. 1992) (computer is forfeitable because "storing marijuana-growing data in a compter is use of the computer in manufacturing a controlled substance).

[11] 21 U.S.C. § 881(a)(10), *as added by* Crime Control Act of 1990, Pub. L. 101-647, Title XX, § 2007, 104 Stat. 4855 (Nov. 29, 1990). The presence of drug paraphernalia when other potentially forfeitable property (particularly cash) is seized may assist the Government's showing of probable cause to believe that the seized property was involved in or derived from an illegal drug transaction. *See, e.g., United States v. $93,685.61 in U.S. Currency,* 730 F.2d 571, 572 (9th Cir.) (circumstantial evidence, including presence of drug paraphernalia, supports showing of probable cause under 21 U.S.C. § 881(a)(6)), *cert. denied,* 469 U.S. 831 (1984); *United States v. Twenty-Two Thousand, Two Hundred Eighty Seven Dollars ($22,287.00) United States Currency,* 709 F.2d 442, 449 (6th Cir. 1983) (declaration of forfeiture of currency supported by scales, firearms, and quantity of heroin found in search).

[12] Conveyances used to transport contraband drugs may also be forfeited under 49 U.S.C. App. § 782 (now 49 U.S.C. § 80303). Furthermore, conveyances used to facilitate unlawful importation (including transporting) may be forfeited under 19 U.S.C. § 1595a(a).

1. Transporting Conveyances

By its plain language, 21 U.S.C. § 881(a)(4) allows the forfeiture of any conveyance used to transport any controlled substance that has been unlawfully manufactured, distributed, dispensed, or acquired. No exception of any kind is created in the statute based on the amount of drugs involved or their intended use.[13] Forfeiture pursuant to 21 U.S.C. § 881(a)(4) is, therefore, not dependent on the quantity of drugs transported[14] or on the fact that the drugs are intended only for personal use and not commercial trafficking.[15]

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[13] "Given the sweeping statutory language, it is impossible to conclude that Congress was concerned only with large scale trading in narcotics. ... The statute clearly requires forfeiture where any contraband article has been physically within the vehicle." *United States v. One 1971 Porsche Coupe Automobile*, 364 F. Supp. 745, 749 (E.D. Pa. 1973). *See also United States v. 280,505 Dollars*, 655 F. Supp. 1487, 1497 (S.D. Fla. 1986) (marijuana residue found in trunk—even if arguably for personal use—supported forfeiture of vehicle); *United States v. One 1975 Mercury Monarch, Etc.*, 423 F. Supp. 1026, 1029 (S.D.N.Y. 1976) (automobile forfeitable based on cocaine in personal possession of owner and trace amounts of marijuana found in trunk of vehicle); *United States v. One 1973 Dodge Van, etc.*, 416 F. Supp. 43, 46 (E.D. Mich. 1976) (personal possession in vehicle establishes probable cause that vehicle was involved in violation of narcotics laws); *United States v. One 1971 Chevrolet Corvette, Etc.*, 393 F. Supp. 344, 346 (E.D. Penn. 1975) (possession of counterfeit currency in vehicle adequate basis to establish probable cause).

[14] *United States v. 1985 Mercedes*, 917 F.2d 415 (9th Cir. 1990) (small quantity of cocaine worth about $75.00); *United States v. One (1) 1982 28' International Vessel*, 741 F.2d 1319, 1322 (11th Cir. 1984) ("fact that a sufficient quantity of marijuana was present to permit testing defeats" assertion that forfeiture was improper); *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979) (.226 grams of marijuana sufficient to support forfeiture); *United States v. One 1977 Chevrolet Pickup*, 503 F. Supp. 1027, 1030 (D. Colo. 1980) (probable cause established by agent's knowledge that one ounce of cocaine was transported in vehicle); *United States v. One 1975 Mercury Monarch*, 423 F. Supp. 1026, 1029 (S.D.N.Y. 1976) (cocaine in personal possession and trace amounts in trunk of car support forfeiture). *See also United States v. One 1957 Oldsmobile Automobile*, 256 F.2d 931, 933 (5th Cir. 1958) (possession of small quantity of marijuana by passenger under 49 U.S.C. § 782). *But see United States v. One Gates Learjet Serial No. 28004*, 861 F.2d 868, 871-72 (5th Cir. 1988) (trace of cocaine whose presence could only be detected by complicated scientific procedures is insufficient to establish probable cause).

[15] *United States v. Premises Known as 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (no requirement that situs available for ongoing drug business, only need to be available for one illegal transaction); *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 11-12 (1st Cir. 1977) (forfeiture statutes not limited to commercial trafficking, personal use on vessel will suffice); *United States v. One 1973 Dodge Van*, 416 F. Supp. 43, 46-47 (E.D. Mich. 1976) (argument that small amount of marijuana in possession of passenger was for personal use failed and vehicle forfeited). *But see United States v. Real Property Located at 110 Collier Drive*, 793 F. Supp. 1048, 1051 (N.D. Ala. 1992) (claimant spouse established innocent owner defense to forfeiture of her automobile where only evidence supporting forfeiture was a marijuana seed or bud found on the floorboard of her car, a vial containing white-powder residue in the glove compartment, and a set of scales in the trunk—all purportedly left in the car by her husband).

2. Facilitating Conveyances

a. Definition

Facilitation under 21 U.S.C. § 881(a)(4) can be simply defined as any use or intended use of a conveyance that makes possession or trafficking in contraband substances less difficult or laborious.[16]

b. Standard for Establishing Facilitation

Although the statute authorizes the forfeiture of conveyances that facilitate drug possession or trafficking "in any manner," courts have generally required the Government to show something more than merely incidental contact between the property and the underlying illegal activity. Some courts have ruled that there must be a "substantial connection" between the conveyance and the unlawful conduct triggering the forfeiture.[17] Other courts have held the Government to the somewhat lower standard of simply

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[16] *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir.) (forfeiture of automobile used to facilitate sale of drugs proper), *cert. denied*, 454 U.S. 818 (1981); *United States v. One 1987 Ford F-350 4x4 Pickup*, 739 F. Supp. 554, 557 (D. Kan. 1990) (forfeiture of truck used to travel to hotel to negotiate marijuana sale proper); *United States v. One 1982 Buick Regal*, 670 F. Supp. 808, 811 (N.D. Ill. 1987) (forfeiture of vehicle proper where vehicle facilitated sale of controlled substance); *United States v. One 1980 BMW 320I*, 559 F. Supp. 382, 384 (E.D.N.Y. 1983) (forfeiture of vehicle used for surveillance proper). *See also United States v. Premises Known as R.R. No. 1*, 14 F.3d 864, 869-72 (3d Cir. 1994) (question of fact whether real property facilitated drug transaction); *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (forfeiture of quarter horses used as cover for drug trafficking activity proper), *cert. denied*, 494 U.S. 1018 (1990).

[17] *See United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 654 (7th Cir. 1993) (forfeiture of vehicle used to transport suspects to and from meeting where heroin scheme discussed proper); *United States v. One 1984 Cadillac*, 888 F.2d 1133, 1137 (6th Cir. 1989) (use of vehicle for transportation of owner to situs of illegal narcotics transaction sufficient under "substantial connection" test); *United States v. One 1976 Ford F-150 Pick-up VIN F14YUB03797*, 769 F.2d 525, 527 (8th Cir. 1985) (observation of truck used on one occasion to inspect marijuana was insufficient to warrant forfeiture); *United States v. One 1979 Datsun 280 ZX*, 720 F.2d 543, 544 (8th Cir. 1983) (per curiam) (forfeiture not warranted where woman lent her ex-husband car to drive to sister state to show car to prospective buyer and husband was arrested for cocaine violation); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426 (11th Cir. 1983) (sufficient nexus to justify forfeiture where vehicle used to transport individuals several hundred miles to location of attempted drug transaction); *United States v. One 1987 Ford F-350 4x4 Pickup*, 739 F. Supp. at 559. *Cf. United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026, 1029 (1st Cir. 1980) (stating that the vehicle must be an "integral part" of and have an "antecedent relationship" to the illicit transaction, but seeming to find no noticeable difference between the "substantial connection" and "sufficient nexus" standards).

establishing a "sufficient nexus" between the property and the illicit act.[18] Still other decisions suggest that there is no material difference between the phrases "substantial connection" and "nexus."[19]

Whatever judicial standard is applied, it is clear that the more remote the connection between the conveyance and the illegal activity, the less likely it is that the property is subject to forfeiture. Conversely, the closer the connection and the more necessary the conveyance is to the unlawful possession or trafficking, the easier it will be for the Government to show probable cause to forfeit the property. Whether a conveyance has "facilitated" a particular illicit act depends ultimately, of course, on the facts and circumstances of the individual case.

c. Examples

The following are examples of uses or intended uses of conveyances that have been found to facilitate the transportation, sale, receipt, possession, or concealment of illegal drugs:

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[18] *See United States v. One 1986 Ford Pickup,* 56 F.3d 1181, 1187 (9th Cir. 1995) (truck seized based upon information that vehicle was used to transport individuals to meeting to recoop drug proceeds); *United States v. Real Property and Residence,* 921 F.2d 1551, 1556 (11th Cir. 1991) (forfeiture of real property warranted where drug deal took place in driveway and owner insisted that transaction take place on property); *United States v. One 1984 Cadillac*, 888 F.2d 1133, 1138 (6th Cir. 1989) (forfeiture of vehicle used to transport owner to location of illicit transaction); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982) (per curiam) (forfeiture of airplane proper where used to transport raw material used to manufacture methamphetamine even though plane never flew to actual laboratory), *cert. denied*, 461 U.S. 914 (1983); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 423 (2d Cir. 1977) (forfeiture of vehicle proper when used to transport drug peddler to scene of drug sale); *United States v. One 1979 Lincoln Continental*, 574 F. Supp. 156, 159 (N.D. Ohio 1983), *aff'd w/o op.*, 754 F.2d 376 (6th Cir. 1984) (forfeiture of automobile proper where owner drove drug dealer to Cleveland with $36,000 in cash for purpose of acquiring more cash and completing drug deal). A good argument can be made for application of the lower standard of "sufficient nexus" under 21 U.S.C. § 881(a)(4), based on the language of section 881(a) generally and the legislative history. In 1978, Congress added subsection (a)(6) to the forfeiture statute and included therein "all moneys, negotiable instruments, and securities used or intended to be used *to facilitate* any violation of this subchapter." The Joint Explanatory Statement on subsection (a)(6) states that Congress intended the enumerated properties to be forfeitable "only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal act which the statute seeks to prevent." H.R. Rep. No. 95-1193, 95th Cong., 2d Sess. 9496 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 9522. No such specific statement as to Congressional intent accompanied enactment of subsection (a)(4), and it seems apparent from the fact that conveyances are forfeitable if they facilitate illegal conduct "in any manner" (language that is not included in (a)(6)), that Congress meant subsection (a)(4) to be broader than subsection (a)(6) as to the range of facilitating uses triggering forfeiture.

[19] *See United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Ave., Elgin, Ill.*, 903 F.2d 490, 493 (7th Cir. 1990) (forfeiture of residence proper where owner used home telephone to negotiate price and quantity of cocaine transaction), *cert. denied,* 498 U.S. 1126 (1991).

(1) serving as the place for the illegal transaction[20];

(2) providing a means of surveillance or lookout[21];

(3) running interference for fleeing wrongdoers[22];

(4) providing cover for an illegal transaction[23];

(5) transporting the participants to the site of the illegal transaction[24];

(6) transporting money for the transaction[25]; and

(7) laying the groundwork for the unlawful activity.[26]

3. Statutory and Constitutional Defenses

Section 881(a)(4) of Title 21 contains three statutory exceptions to the forfeiture of otherwise "guilty" conveyances. Common carriers are not subject to forfeiture unless it appears that the owner or other person in charge consented to or knew of the underlying

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[20] *United States v. Certain Real Property Situated at Route 3*, 568 F. Supp. 434, 435 (W.D. Ark. 1983).

[21] *United States v. One 1980 BMW 320I*, 559 F. Supp. 382, 385 (E.D.N.Y. 1983).

[22] *United States v. One 1968 Ford LTD 4 Door*, 425 F.2d 1084, 1085 (5th Cir. 1970) (car serving as an "active aid" in violating the law).

[23] *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir.) (raised hood on car allowing participants in illegal transaction "to remain more or less free from obstruction or hindrance"), *cert. denied*, 454 U.S. 818 (1981).

[24] *Compare United States v. One 1977 Cadillac Coupe De Ville*, 644 F.2d 500, 502-03 (5th Cir. 1981) *and United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 426 (2d Cir. 1977) *with United States v. Lane Motor Co.*, 344 U.S. 630, 631 (1953) (holding that a vehicle used by participants solely to commute to an illegal business is not forfeitable under a statute not containing the "facilitation" language of 21 U.S.C. § 881(a)(4)).

[25] *United States v. One 1979 Lincoln Continental*, 574 F. Supp. 156, 159 (N.D. Ohio 1983), *aff'd w/o op.*, 754 F.2d 376 (6th Cir. 1984); *see also United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1187 (9th Cir. 1995) (vehicle used to transport the proceeds of earlier drug deal).

[26] *United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 652-54 (7th Cir. 1993) (vehicle used by suspect to attend meeting at which he gave instructions for importing heroin); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982) (vehicle used to find airstrip, storage building, and motor home for drug transaction).

illegal activity.[27] A conveyance is statutorily immune from forfeiture if the owner can show that the unlawful act was committed by another person while the property was illegally in the possession of someone other than the owner.[28] Effective November 18, 1988, 21 U.S.C. § 881(a)(4) was amended to afford an affirmative statutory defense to forfeiture of conveyances for owners who can establish that the unlawful act was committed without their knowledge, consent, or willful blindness.[29]

In addition to those statutory defenses, claimants may attempt to assert defenses to forfeiture based on the Constitution. In *Austin v. United States*, 509 U.S. 602 (1993), the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment limits the extent to which the Government may obtain forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7). The Supreme Court did not set forth any particular test for "excessiveness" in *Austin*, electing to leave that question to lower-court development in the first instance. In the wake of *Austin*, the lower courts have adopted varying approaches to that question[30] and, barring further clarification from the Supreme Court, government attorneys should familiarize themselves with the decisions of the circuit in which they practice.[31] However, government attorneys, who practice in circuits which have not yet articulated a standard, should review the "instrumentality" standard discussed in chapter 8. In addition, the application of the Excessive Fines Clause of the Eighth Amendment to civil forfeiture is discussed in chapter 12 of this manual.[32]

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[27] 21 U.S.C. § 881(a)(4)(A).

[28] 21 U.S.C. § 881(a)(4)(B).

[29] 21 U.S.C. § 881(a)(4)(C). A fuller discussion of these exceptions and other defenses to forfeiture appears in chapter 4, part IV.E.3.b, of this manual.

[30] *Compare, e.g., United States v. Milbrand*, 58 F.3d 841, 844-848 (2d Cir. 1995) (collecting authorities and adopting multi-factor test that emphasizes the harshness of forfeiture in relation to the culpability of the owner), *cert. denied,* ___ U.S. ___, 116 S. Ct. 1284 (1996), *with United States v. Chandler*, 36 F.3d 358, 363-66 (4th Cir. 1994) (adopting "instrumentality" test that emphasizes the property's role in the commission of the offense), *cert. denied,* 514 U.S. 1082 (1995).

[31] *See, e.g., United States v. $405,089.23,* 33 F.3d 1210, *reh'g denied,* 56 F.3d 41 (9th Cir. 1995). An attempt by some courts to derive from *Austin* a claim that civil forfeitures may also be subject to challenge under the Double Jeopardy Clause of the Fifth Amendment, was rejected by the Supreme Court in *United States v. Ursery,* 518 U.S. 267 (1996).

[32] Government attorneys should also note that the Excessive Fines outline is available on the Asset Forfeiture Bulletin Board.

4. Expedited Forfeiture Procedures

Sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, were enacted to provide expedited forfeiture procedures for certain classes of seized property, primarily conveyances. Regulations implementing these statutes are found in 21 C.F.R. §§ 1316.90-1316.99.

Section 6079 requires the issuance of regulations regarding expedited administrative procedures for certain kinds of property seized for forfeiture for violations involving "personal use quantities" of a controlled substance.[33] The statute applies to conveyances subject to forfeiture under 21 U.S.C. § 881(a)(4), 19 U.S.C. § 1595a(a), and 49 U.S.C. App. § 782 (now 49 U.S.C. § 80303), and to property subject to forfeiture under 21 U.S.C. § 881(a)(6) (primarily proceeds) and (a)(7) (real property). In practice, however, the statute applies almost exclusively to conveyances because civil forfeiture actions typically are not taken against "proceeds" or real property involved in "personal use quantities" offenses where there is no other evidence of drug distribution, manufacture, or the like. The regulations governing such expedited administrative procedures are set forth at 21 C.F.R. §§ 1316.92-1316.94.

Section 6080 (originally codified as 21 U.S.C. § 881-1 and recodified as 21 U.S.C. § 888 as part of the Crime Control Act of 1990)[34] provides for expedited forfeiture procedures in *judicial* forfeiture actions against *conveyances* seized for *any drug-related offense*.[35] Unlike section 6079, section 6080 and its implementing regulations (21 C.F.R. §§ 1316.95-1316.98) apply *only to* conveyances and judicial forfeiture actions. However, they apply to seizures of conveyances for any offense involving drugs, regardless of quantity.

A most important aspect of the statute and regulations is the requirement that forfeiture complaints against conveyances seized for any drug-related offenses *must* be filed *not later than 60 days after a claim and a cost bond are filed*, unless the court extends the period for filing for good cause shown or on the agreement of the parties; otherwise the forfeiture will

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[33] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VI, § 6079, 102 Stat. 4235 (Nov. 18, 1988). The term "personal use quantities" is defined in the implementing regulations at 21 C.F.R. § 1316.91(j).

[34] Crime Control Act of 1990, Pub. L. 101-647, Title X, § 1002(h)(1), 104 Stat. 4828 (Nov. 29, 1990).

[35] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VI, § 6080, 102 Stat. 4326 (Nov. 18, 1988).

be barred.[36] It is likely that 21 U.S.C. § 888 applies to money laundering forfeitures predicated on a drug offense, as well as to forfeitures under the drug statutes themselves.[37]

F. Books, Records, and Research

Books, records, and research that are used or intended for use in violation of federal drug laws are also forfeitable under 21 U.S.C. § 881(a)(5).[38] An analogous state statute has been held to authorize the confiscation and condemnation of such items as personal records of drug transactions, notes on methods of production and distribution, and memoranda of research, but not books of general literature and distribution.[39]

G. Exchange Money, Traceable Proceeds, and Facilitating Money

1. Section 881(a)(6) Property and Methods of Proof

Section 881(a)(6) of Title 21 also authorizes the forfeiture of monies furnished in *exchange* for illegal drugs, *proceeds traceable* to such exchanges, and monies used to *facilitate* illegal drug transactions.[40] Property subject to forfeiture under this subsection may

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[36] 21 U.S.C. § 888(c); 21 C.F.R. § 1316.97.

[37] Courts have very strictly interpreted these statutes and regulations against the Government. *See United States v. Indoor Cultivation Equipment,* 55 F.3d 1311, 1317 (7th Cir. 1995) (section 881(a)(6) case: "The statute leaves no room for district court discretion. Once the 60-day period expires without any action by the [G]overnment, the only authority the district court retains over the conveyance is to order its return and prevent any forfeiture from taking place."); *United States v. 1966 Ford Mustang (Shell Only)*, 945 F. Supp. 149 (S.D. Ohio 1996) (seizure of car without engine is not conveyance within 60-day rule); *United States v. 1992 Team Warlock 28' World Twin Hull Speedboat*, 875 F. Supp. 652 (D. Ariz. 1994) (speedboat seized as proceeds of drug offense was not conveyance); *United States v. One White 1987 Tempest Sport Boat Named "El Matador,"* 726 F. Supp. 7, 8-9 (D. Mass. 1989) (the Government improperly filed a motion to extend the 60-day filing deadline under section 888(c) one day after the complaint should have been filed); *Brantz v. United States*, 724 F. Supp. 767, 769-70 (S.D. Cal. 1989) (21-day delay in sending notice of seizure pursuant to section 888(b) unjustified; agency should have sent notice within one week of seizure); *Dwyer v. United States*, 716 F. Supp. 1337, 1340-41 (S.D. Cal. 1989) (62-day delay in sending notice of seizure unjustified). Expedited forfeiture procedure notice provisions are set forth at 21 C.F.R. § 1316.99. *See* Memorandum, entitled "Effect of Delay in Notice Required by the Anti-Drug Abuse Act of 1988," Directive 91-3, issued by the Office of the Deputy Attorney General on March 20, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. II, at p. 1 — 13].

[38] Included as forfeitable under this subsection are formulas, microfilm, tapes, and data.

[39] *Kane v. McDaniel*, 407 F. Supp. 1239, 1243 (W.D. Ky. 1975).

[40] *See* discussion of property forfeitable under 18 U.S.C. § 981(a)(1)(A) in part V.A of this chapter, *infra*. Government attorneys should alert to opportunities to plead forfeiture under this statute as an alternative to a forfeiture under 21 U.S.C. § 881(a)(6).

also be forfeitable under other federal forfeiture statutes. For example, drug proceeds involved in money laundering violations under 18 U.S.C. §§ 1956 and 1957 are subject to civil forfeiture under 18 U.S.C. § 981(a)(1)(A). Moreover, the transportation, transmission, or transfer even of "clean" funds into or out of the United States with the intent of promoting the carrying on of a drug offense would violate 18 U.S.C. § 1956(a)(2)(A), so the funds would also be subject to forfeiture under 18 U.S.C. § 981(a)(1)(A). Similarly, the transportation, mailing, or shipment of currency or certain monetary instruments of a value in excess of $10,000 without the filing of a truthful and complete CMIR report with the U.S. Customs Service would violate the reporting requirements of 31 U.S.C. § 5316 and 31 C.F.R. § 103.23, regardless of whether the currency or monetary instruments are "clean" or "dirty," and, therefore, would give rise to forfeiture of the currency or monetary instruments, or property traceable thereto, under 31 U.S.C. § 5317(c) and 31 C.F.R. § 103.48. Finally, transactions with a broad class of "financial institutions," as defined in 31 C.F.R. § 103.11(I), involving currency in excess of $10,000 that are conducted in violation of, or to evade, the CTR reporting requirements of 31 U.S.C. §§ 5313 and 5324, as implemented by 31 C.F.R. §§ 103.11(p), 103.22, and 103.53, give rise to forfeiture of the currency, any fees or commissions earned as a result of the CTR offense, any facilitating property, or any property traceable to these categories under 18 U.S.C. § 981(a)(1)(A), regardless of whether the currency involved in the transaction(s) was "clean" or "dirty."

Note that the section applies only to currency and other monetary instruments with respect to facilitating property. Unlike the criminal forfeiture counterpart, section 853(a)(2), this section does not authorize the forfeiture of *all* facilitating personal property.[41]

According to Congress' Joint Explanatory Statement on subsection (a)(6), "it is the intent of these provisions that property would be forfeited only if there is a *substantial connection* between the property and the underlying criminal activity which the statute seeks to prevent."[42]

a. Exchange Money

The first forfeitable property described in 21 U.S.C. § 881(a)(6) is money, negotiable instruments, securities, and "other things of value" furnished or intended to be furnished in exchange for illegal controlled substances.

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[41] Section 853(a)(2) is discussed in chapter 5, part VI.C, of this manual.

[42] H.R. Rep. No. 95-1193, 95th Cong., 2d Sess. 9496 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 9522 (emphasis added). *See also United States v. One Gates Learjet Serial No. 28004*, 861 F.2d 868, 872 (5th Cir. 1988); *United States v. $38,600.00 in U.S. Currency*, 784 F.2d 694, 697 (5th Cir. 1986); *United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars*, 661 F.2d 319, 323 (5th Cir. 1981).

Probable cause to believe that such property was substantially connected with an unlawful drug exchange may be established by either direct or circumstantial evidence. For example, bundles of cash actually shown to a drug seller as proof of the ability to pay are obviously forfeitable for their intended use in the anticipated transaction.[43] Even without such direct evidence, however, cash has consistently been found forfeitable as exchange money when it is discovered in large amounts along with other indicia of related illegal activity, such as drugs or drug paraphernalia.[44]

b. Traceable Proceeds

(1) Proceeds

Section 881(a)(6) also authorizes the forfeiture of all proceeds traceable to an illegal drug exchange. The term "proceeds" is not specifically defined in the statute and, therefore, should be given its ordinary and common meaning, keeping in mind that the purpose of 21 U.S.C. § 881(a)(6) is to deprive wrongdoers and those with knowledge of wrongdoing of all amounts and profits realized from illegal drug transactions, in whatever form those amounts and profits are subsequently manifested.[45]

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[43] *United States v. Eighty-Eight Thousand Five Hundred Dollars in U.S. Currency*, 671 F.2d 293, 296 (8th Cir. 1982).

[44] *United States v. Ninety One Thousand Nine Hundred Sixty Dollars ($91,960.00)*, 897 F.2d 1457, 1462 (8th Cir. 1990); *United States v. $38,600.00 in United States Currency*, 784 F.2d at 698; *United States v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Twenty-Two Thousand, Two Hundred Eighty Seven Dollars ($22,287.00) United States Currency*, 709 F.2d 442, 449 (6th Cir. 1983); *United States v. $2,500 in United States Currency*, 689 F.2d 10, 16 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984). *Cf. United States v. $31,990 in United States Currency*, 982 F.2d 851, 984-56 (2d Cir. 1993) (large amounts of cash found bound with rubber bands in trunk of gypsy cab was insufficient to establish forfeiture, even when coupled with cab driver's false statements and his possession of one half-gram of cocaine); *United States v. Wright*, 610 F.2d 930, 946 (D.C. Cir. 1979) (holding that a relatively small amount of cash found in a room with drugs and drug paraphernalia was not shown to have been "colored" by the illegal activity and, therefore, must be returned pursuant to Fed. R. Crim. P. 41(e)).

[45] *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996) (drug dealer required to forfeit gross proceeds, not net profits). According to the legislative history of this subsection, proceeds are forfeitable even if they have been "commingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form." H.R. Rep. No. 95-1193, 95th Cong., 2d Sess. 9496 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 9522. It should also be noted that the proceeds of drug felonies are criminally forfeitable under 21 U.S.C. § 853(a)(2).

Aside from its more obvious applications, the "proceeds" subsection may be used to forfeit real property purchased with drug money[46] or, in certain circumstances, to forfeit fees and other property transferred to attorneys for legal services.[47] However, before initiating any action aimed at the forfeiture of attorney fees, the government attorney must obtain prior approval from the Assistant Attorney General of the Criminal Division.[48] Likewise, no formal, informal, written, or oral agreements may be made to exempt from forfeiture an asset transferred as attorney fees without prior authorization from the Assistant Attorney General. Requests for approval of forfeiture actions or exemption agreements relating to attorney fees must be submitted in writing to the Asset Forfeiture and Money Laundering Section. Following a review, the Asset Forfeiture and Money Laundering Section forwards the request and its recommendation to the Assistant Attorney General for decision.

(2) Requirement of Tracing

All civil forfeiture statutes presently in effect are *in rem* statutes in which the property itself, not the owner of the property, is accused of wrongdoing. For that reason, only property that was actually used to commit, or was derived from, an offense, or property traceable to it, is subject to forfeiture.

Criminal forfeitures are imposed *in personam*; there is no requirement that the court have jurisdiction or control over the property to be forfeited. Hence, the court may enter an order forfeiting the *amount* of proceeds acquired by the defendant by either: (1) entering a "money judgment" of forfeiture equal to the amount of the proceeds—a judgment which may then be enforced the same as any other money judgment; or (2) order the forfeiture of "substitute assets" of the defendant equal in value to these proceeds when the statutory preconditions to such forfeitures[49] are satisfied. There can be no forfeiture of substitute assets in a civil *in rem*

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[46] *United States v. Parcels of Land (Laliberte)*, 903 F.2d 36, 48 (1st Cir.), *cert. denied,* 498 U.S. 916 (1990); *United States v. Premises Known as 8584 Old Brownsville Road*, 736 F.2d 1129, 1130 (6th Cir. 1984); *In re Application of Kingsley*, 614 F. Supp. 219, 222 n.2 (D. Mass. 1985), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986).

[47] Under the relation back doctrine (discussed in part III of this chapter) and 21 U.S.C. § 881(h), the right and title to forfeitable property, including proceeds traceable to illegal drug exchanges, vests in the United States at the moment the unlawful activity occurs. Therefore, the subsequent transfer of section 881(a)(6) proceeds, even in payment of legitimate legal fees, is invalid once the Government obtains a judgment of forfeiture, unless the transferee has a statutory defense to the forfeiture. *United States v. Moffitt, Zwerling & Kemler P.C.*, 83 F.3d 660, 666-70 (4th Cir. 1996) (United States may rely on the relation back doctrine of 21 U.S.C. § 853(c) to sue non-innocent defense attorneys, who received and dissipated drug proceeds, for state law conversion).

[48] *See United States Attorneys' Manual* §§ 9-119.200 to 9-119.203.

[49] *See, e.g.*, 19 U.S.C. § 1963(m); 21 U.S.C. § 853(p).

case, because the legal fiction that the property itself is on trial does not permit the forfeiture of "innocent" property when the "guilty" property is unavailable. Thus, civil forfeiture cases frequently involve issues of tracing.

Tracing issues are particularly common in 21 U.S.C. § 881(a)(6) cases, or any other cases where "proceeds" of a crime are subject to forfeiture. That is, the proceeds are typically funds that can be quite readily exchanged for something else of value or commingled with other funds in a bank account. Government attorneys are advised to become familiar with the discussion of the manner in which funds can be traced through bank accounts in the forfeiture context in *United States v. Banco Cafetero Panama,* 797 F.2d 1154, 1158-62 (2d Cir. 1986) (drug case),[50] and *United States v. $448,342.85,* 969 F.2d 474 (7th Cir. 1992) (18 U.S.C. § 981 case discussing application of *Banco Cafetero* to money laundering).[51]

One currently unresolved issue is whether the tracing requirement in "proceeds" cases is part of the Government's burden of establishing probable cause for the forfeiture, or part of the claimant's burden in establishing a "legitimate source" defense. The weight of authority appears to be that once the Government establishes probable cause for the forfeiture by showing that tainted funds were deposited into a bank account, it is up to the claimant to prove by a preponderance of the evidence that all or part of the subject property was derived from legitimate funds.[52] Nevertheless, it is not uncommon for a claimant to suggest, at the time of trial, that the Government cannot sustain its probable cause burden in the face of evidence that legitimate funds were deposited into a bank account, unless the Government can demonstrate, through a tracing analysis, reason to believe that the subject funds are traceable to the underlying criminal offense.[53]

Government attorneys are thus cautioned to be prepared to trace the subject funds to the underlying offense as part of the Government's probable cause evidence at trial if it is likely

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[50] *See United States v. Daccarett,* 6 F.3d 37, 55-56 (2d Cir. 1993), *cert. denied,* 510 U.S. 1191 (1994).

[51] In 1992, Congress relaxed the tracing requirement somewhat by enacting a new statute, 18 U.S.C. § 984, that is applicable to money laundering forfeitures under 18 U.S.C. § 981.

[52] *See United States v. $448,342.85*, 969 F.2d 474 (7th Cir. 1992) (where there is probable cause to believe that the dirty money previously deposited into an account exceeds the balance of the account at the time of seizure, the *claimant* has the burden of identifying the sums not subject to forfeiture); *United States v. One 1980 Rolls Royce*, 905 F.2d 89 (5th Cir. 1990) (claimant could avoid forfeiture to the extent that he could prove what portions of the property were purchased with legitimate funds).

[53] *See United States v. All Monies in Account No. 90-3617-3*, 754 F. Supp. 1467 (D. Haw. 1991) (Government concedes, on motion for summary judgment, that it can trace only part of funds in bank account to underlying offense, but establishes probable cause to believe that the balance in the account is forfeitable as facilitating property).

that the claimant will attempt to offer evidence that the subject property is derived from a legitimate source.[54]

c. Facilitating Money

Section 881(a)(6) also authorizes the forfeiture of money, negotiable instruments, and securities used or intended to be used to facilitate a violation of federal drug laws. In contrast to the first provision of section 881(a)(6), this provision refers to any violations of the drug statutes, not just exchanges, but does not include "other things of value" in its description of property that is forfeitable for facilitating those violations. Moreover, the types of facilitating uses subjecting monies to forfeiture under section 881(a)(6) may be seen as more limited than those triggering the forfeiture of conveyances under section 881(a)(4), which specifically refers to uses that facilitate drug possession and trafficking "in any manner."[55]

In order to forfeit monies used to facilitate violations of the drug laws, the Government must show that the monies had "some substantial connection to, or were instrumental in, the underlying criminal activity."[56] Examples of such property would include money paid for the operating expenses of the drug network or processing facilities, payments to couriers, and bribes to ensure noninterference by law enforcement or other public officials.

2. Statutory and Constitutional Defenses

Section 881(a)(6) contains a specific "innocent owner" defense for all legal and equitable owners of an interest in the exchange monies, traceable proceeds, or facilitating monies sought to be forfeited if they can prove by a preponderance of the evidence that they did not know of or consent to the underlying illegal conduct.[57] Forfeitures under section 881(a)(6), especially if they involve "proceeds" rather than "facilitating money," are less likely to face challenges under the Excessive Fines Clause of the Eighth Amendment than are forfeitures under section 881(a)(4) and (a)(7). That is, courts have generally agreed with the proposition

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[54] In 1992, Congress relaxed the tracing requirement in civil money laundering cases by enacting section 984.

[55] *See United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982) (per curiam), *cert. denied*, 461 U.S. 914 (1983). *See also* note 18, *supra*.

[56] Joint Explanatory Statement, H.R. Rep. No. 95-1193, 95th Cong., 2d Sess. 9496 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 9522.

[57] A fuller discussion of this defense to forfeiture appears in chapter 4, part VI.C.3.c.(2), of this manual.

that a forfeiture of proceeds exacts no "price" from the owner in terms of property lawfully derived from honest labor.[58]

H. Facilitating Real Property

1. Definition and Examples

As part of the Comprehensive Crime Control Act of 1984, Congress added subsection (a)(7) to 21 U.S.C. § 881(a) authorizing the forfeiture of real property, with any appurtenances and improvements, used or intended for use, in any manner or part, to facilitate felony drug transactions.[59]

Similar to section 881(a)(4) on conveyances, this subsection allows forfeiture of property that facilitates illegal activity "in any manner": real property that makes it in any way less difficult or laborious to commit a drug felony.[60] Examples of property that is potentially forfeitable under subsection (a)(7) would include buildings in which drugs, proceeds, or related materials are stored; dwellings or other locations where drug deals, meetings, and arrangements occur[61]; facilities in which illegal drugs are manufactured or processed; land on

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[58] *United States v. Various Computers*, 82 F.3d 582 (3d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 406 (1996); *United States v. Buchanan*, 70 F.3d 818 (5th Cir.), *cert. denied*, *517* U.S. 1114 (1996); *United States v. Wild*, 47 F.3d 669 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 128 (1995); *United States v. Twenty One Thousand Two Hundred Eighthly Two Dollars*, 47 F.3d 972 (8th Cir. 1995). *See also United States v. Ursery*, 518 U.S. 267, 279-280 (1996).

[59] Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 11, 1984).

[60] *See United States v. Premises Known as 3639—2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989); *United States v. Premises Described as Route 2, Box 61-C*, 727 F. Supp. 1295, 1297 (W.D. Ark. 1990). For cases holding that the Government must prove that the real property had a "substantial connection" to the illegal activity, *see United States v. Parcel of Land and Residence at 28 Emery St.*, 914 F.2d 1, 3-4 (1st Cir. 1990); *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 112-13 (4th Cir. 1990); *United States v. Schifferli*, 895 F.2d 987, 989 (4th Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *United States v. Real Property and Residence at 31 N.W. 136th Court*, 711 F. Supp. 1079, 1081 (S.D. Fla. 1989); *United States v. All Those Certain Lots in the City of Virginia Beach*, 657 F. Supp. 1062, 1064 (E.D. Va. 1987). *See also United States v. Premises & Real Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1269 (2d Cir. 1989) (using a "sufficient nexus" standard); *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Ave.*, 903 F.2d 490, 493-94 (7th Cir. 1990) (the Government must show only that the real property had "more than an incidental or fortuitous connection" to the crime), *cert. denied*, 498 U.S. 1126 (1991); *United States v. Approximately 50 Acres of Real Property*, 920 F.2d 900, 902 (11th Cir. 1991) (standard for forfeiture of real property not expressly adopted; Government has shown probable cause for forfeiture under either a substantial connection test or the more lenient approach); *United States v. Real Property and Residence at 3097 S.W. 111th Avenue*, 921 F.2d 1551, 1556 (11th Cir. 1991) (per curiam) (evidence sufficient to support connection between the property and the drug transaction using either a "substantial connection" standard or a "sufficient nexus" standard).

[61] *See United States v. 124 East North Avenue*, 651 F. Supp. 1350, 1353-54 (N.D. Ill. 1987).

which plants and other raw materials for controlled substances are grown[62]; and land pledged as collateral to obtain a loan for the purpose of purchasing drugs.[63]

The forfeiture of real property on a facilitation theory is limited to the specific property where the unlawful activity occurred. Hence, if there are adjacent but legally separate tracts of land, only the tract of land where the unlawful activity occurred is subject to forfeiture, unless it can be established that the adjacent tract somehow facilitated the commission of the offense.[64] When in doubt as to tracts of adjoining land, the basic rule is that adjacent parcels of land are treated as a single tract of land if the documents filed with local authorities (*i.e.*, deeds of ownership, taxing authorities) treat the parcels as one tract.[65]

2. Statutory Defense

Section 881(a)(7), like section 881(a)(6) on monies and proceeds, contains a statutory "innocent owner" defense for all legal and equitable owners of an interest in the real property sought to be forfeited, if they can prove by a preponderance of the evidence that they did not know of or consent to the underlying unlawful conduct. As already noted, forfeitures under section 881(a)(7) have been the subject of numerous challenges based on the Eighth Amendment in the wake of *Austin v. United States*, 509 U.S. 602 (1993). In addition, for seizures of real property occurring before 1993, some property owners may assert due process claims under *United States v. James Daniel Good,* 510 U.S. 43 (1993), which proscribed the seizure of real property on the basis of an *ex parte* showing of probable cause. The courts of appeals have divided on the extent to which *Good* violation furnishes a true "defense" to the forfeiture (*i.e.*, requires dismissal of the action), as opposed to calling for some more limited redress.

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[62] *See United States v. One Parcel of Real Property Known as Plat 20, Lot 17, Great Harbor Neck*, 960 F.2d 200, 205 (1st Cir. 1992).

[63] *See United States v. RD 1, Box 1, Thompsontown*, 952 F.2d 53, 58-59 (3d Cir. 1991).

[64] *See, e.g., United States v. Real Property Located at Section 18, Township 23, Quinault Lake,* 976 F.2d 515 (9th Cir. 1992).

[65] *See United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974, 986 n. 15 (9th Cir. 1995). *See also United States v. Two Parcels of Property Located at 19 and 25 Castle Street*, 31 F.3d 35, 40-41 (2d Cir. 1994); *United States v. Bieri*, 21 F.3d 819, 824 (8th Cir. 1994); *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989); *United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988).

I. Chemicals, Equipment, Machines, and Capsules

As part of the Anti-Drug Abuse Act of 1988, Congress added subsection (a)(9) to 21 U.S.C. § 881 allowing the forfeiture of chemicals, drug manufacturing equipment, tableting and encapsulating machines, as well as gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of the Controlled Substances Act or the Controlled Substances Import and Export Act.[66]

J. Drug Paraphernalia

On November 29, 1990, the Crime Control Act of 1990, Pub. L. 101-647, added a new provision which allows for the forfeiture of any drug paraphernalia as defined in 21 U.S.C. § 863. This provision is codified as 21 U.S.C. § 881(a)(10)[67] and permits forfeiture of any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the body a controlled substance, possession of which is unlawful under the Controlled Substances Act.[68]

K. Firearms

The Crime Control Act of 1990 also added new subsection (a)(11) to 21 U.S.C. § 881(a) permitting the forfeiture of any firearm[69] used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of any property forfeitable under subsections (a)(1) or (a)(2) of 21 U.S.C. § 881, and any proceeds traceable to such property.[70] Such firearms are also forfeitable under 18 U.S.C. § 924, a statute enforced primarily by the Bureau of Alcohol, Tobacco, and Firearms. Basically, the purpose of section 881(a)(11) is to

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[66] *Added by* Pub. L. 100-690, Title VI, § 6059(a), 102 Stat. 4319 (Nov. 18, 1988).

[67] 21 U.S.C. § 881(a)(10), *added by* Pub. L. 101-647, Title XX, § 2007, 104 Stat. 4855 (Nov. 29, 1990). This provision has been upheld against a vagueness challenge. *See, e.g., United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 655-60 (8th Cir. 1992), *aff'd*, 511 U.S. 513 (1994).

[68] 21 U.S.C. § 863 contains examples of equipment, products, and materials constituting "drug paraphernalia."

[69] The term "firearm" is defined in 18 U.S.C. § 921(a)(3).

[70] 21 U.S.C. § 881(a)(11), *added by* Pub. L. 101-647, Title XX, § 2008, 104 Stat. 4856 (Nov. 29, 1990). This civil forfeiture authority is in addition to the civil forfeiture authority conferred by 18 U.S.C. § 924(d) and 26 U.S.C. § 5872(a), as well as the criminal forfeiture authority conferred by 18 U.S.C. § 3665. *See generally United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

permit the firearms to be forfeited in drug cases by the Drug Enforcement Administration or the Federal Bureau of Investigation, instead of having to refer the case to the Bureau of Alcohol, Tobacco, and Firearms.

V. Forfeitable Property under 18 U.S.C. § 981

A. Property Forfeitable under 18 U.S.C. § 981(a)(1)(A) (Money Laundering)

Section 981(a)(1)(A) provides for the civil forfeiture of all property involved in violations of the most frequently used money laundering statutes, 18 U.S.C. §§ 1956 and 1957, as well as the currency transaction reporting statutes in the Bank Secrecy Act, 31 U.S.C. §§ 5313(a) and 5324(a) (CTR offenses). Civil forfeiture for violations involving the Currency and Monetary Instrument Report (CMIR) required by the U.S. Customs Service under 31 U.S.C. §§ 5316 and 5324(b), is authorized under a separate statute, 31 U.S.C. § 5317(c). There is no civil forfeiture authorized for failure to comply with the currency reporting requirement imposed on a trade or business under 26 U.S.C. § 6050I (IRS Form 8300); nor is civil forfeiture authorized for violations of 18 U.S.C. § 1960, relating to the operation of an illegal money transmitting business.[71]

1. Legislative History

When it was first enacted in 1986, section 981(a)(1)(A) authorized the forfeiture only of the "gross receipts" a person obtained, directly or indirectly, as a result of violation of 18 U.S.C. § 1956 or 1957, or property traceable thereto. The legislative history defined "gross receipts" to include only the commission earned by the money launderer, and not the corpus laundered itself or any facilitating property.[72] Therefore, the statute was of limited usefulness as originally enacted, and was rarely used.

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[71] Criminal forfeiture for CMIR and section 1960 violations is authorized by 18 U.S.C. § 982. *See* chapter 5 of this manual. There is no criminal forfeiture for Form 8300 violations.

[72] S. Rep. No. 433, 99th Cong., 2d Sess. 23 (1986). *But see United States v. Sokolow*, 91 F.3d 396 (3d Cir. 1996) ("gross receipts" included proceeds of underlying SUA being laundered, notwithstanding legislative history stating that it was limited to the commissions paid to the money launderer), *cert denied*, ___ U.S. ___, 117 S. Ct. 960 (1997).

The original statute also contained a forfeiture provision for CTR offenses in 18 U.S.C. § 981(a)(1)(C).[73] That provision authorized the forfeiture of the corpus of money involved in the CTR violation and any proceeds traceable thereto, but did not provide for forfeiture of facilitating property or for the fees and commissions earned by any person involved in the CTR violation. The statute also barred forfeiture in the case of any violation "by a domestic financial institution examined by a federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, officer, or employee thereof."

In 1988, Congress amended section 981(a)(1) by repealing section 981(a)(1)(C) and combining the forfeiture provisions for money laundering and the CTR offenses into an expanded version of section 981(a)(1)(A).[74] Effective November 18, 1988, section 981(a)(1)(A) now provides for the forfeiture of any property "involved in a transaction or attempted transaction in violation of [s]ection 5313(a) or 5324(a) of Title 31, or of [s]ection 1956 or 1957 of this [t]itle, or any property traceable to such property." The term "involved in" is broadly defined by the legislative history to the 1988 amendments:

> The term "property involved" is intended to include the money or other property being laundered [the corpus], any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.[75]

2. Forfeiture for CTR offenses

As mentioned, section 981 has provided for the forfeiture of all property involved in a CTR offense since it was first enacted in 1986. The CTR offenses include: the failure to file

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[73] Anti-Drug Abuse Act of 1986, Pub. L. 99-570, Title I, § 1366(a), 100 Stat. 3207-35 (Oct. 27, 1986).

[74] Section 6463 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4374, amending sections 981 and 982. The legislative history of section 6463 states that "it is the intent of Congress that a person who conducts his financial transactions in violation of the anti-money laundering statutes forfeits his right to the property involved regardless of which statutory provision he happens to violate." 134 Cong. Rec. S17,365 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

[75] *Id. See United States v. All Monies*, 754 F. Supp. 1467, 1473 (D. Haw. 1991); *United States v. Certain Accounts*, 795 F. Supp. 391, 396 (S.D. Fla. 1992); *United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 650 (E.D. Mich 1992); *United States v. Real Property in Mecklenburg County*, 814 F. Supp. 468, 479 n. 37 (W.D.N.C. 1993); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1153 (E.D. Pa. 1993); *United States v. Krasner*, 841 F. Supp. 649 (M.D. Pa. 1993).

a CTR (31 U.S.C. § 5313(a))[76]; to cause another to fail to file a CTR (section 5324(a)(1)); to file a false or incomplete CTR (section 5324(a)(2)); and to structure a transaction to evade the filing of a CTR (section 5324(a)(3)).[77] The property involved in any of these CTR offenses includes the unreported or structured currency and any property traceable thereto.[78] Thus, if a person evades a currency transaction report by cashing a series of sub-$10,000 checks and uses the resulting currency to buy a car, the car may be forfeited under section 981(a)(1)(A).[79]

3. Forfeiture for Violations of Sections 1956 and 1957[80]

As the legislative history of the 1988 amendment suggests, forfeiture under section 981(a)(1)(A) still includes what was forfeitable under the original statute: the commission earned by the money launderer. So if a professional money launderer is hired to launder

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[76] Section 5313(a), as implemented by 31 C.F.R. § 103.22, mandates the filing of a currency transaction report (CTR) by a "domestic financial institution" when it is involved in a transaction for the payment, receipt, or transfer of foreign or domestic currency in excess of $10,000. Failure to file this CTR, also known as Treasury Form 4789, or filing a report containing a material misstatement or omission, is a violation of law. The term "financial institution" is broadly defined in 31 C.F.R. § 103.11(m) to include many public businesses and private individuals. Section 981(a)(1)(A) provides, however, that the forfeiture provisions do not apply in the case of violations of section 5313(a) by "regulated" domestic financial institutions, regulated either by a federal bank supervisory agency or the Securities and Exchange Commission. Hence, forfeiture will not lie against such regulated institutions for a willful violation of the currency transaction reporting requirement provisions under this subsection.

[77] In addition, the term "structure" is defined in the implementing regulations at 31 C.F.R. § 103.11(p). Note that while section 5324(a) is aimed primarily at bank customers, there is no exception for regulated financial institutions. Consequently, there is no restriction on forfeiting assets of regulated financial institutions whenever an institution knowingly aids and abets a deliberate attempt by a customer to evade the reporting requirements, as opposed to situations where there is simple noncompliance by the institution with the reporting requirements.

[78] *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (forfeiture of real property purchased with ten cashiers checks in amounts under $10,000); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (cars purchased with cashiers checks acquired in structured transaction forfeited); *United States v. Rogers*, (N.D.N.Y. 1996) (same); *United States v. 5709 Hillingdon Road*, 919 F. Supp. 863 (W.D.N.C. 1996) (forfeiture of property traceable to 33 structured deposits).

[79] Note that this and all other money laundering forfeitures are subject to the Excessive Fines Clause. *See* chapter 12 of this manual. In *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996), the Ninth Circuit held that *all* forfeitures for currency reporting offenses are *per se* excessive and, therefore, unconstitutional. The case involved the CMIR statute, but the language of the opinion applies unequivocally to all currency reporting offenses. Accordingly, until such time as *Bajakajian* is reviewed by the Supreme Court, forfeitures under section 981(a)(1)(A) for CTR offenses are barred in the Ninth Circuit. This restriction does not apply in any other circuit nor does *Bajakajian* apply in any case where the forfeiture is based on a violation of 18 U.S.C. § 1956(a)(1)(B)(ii) or (a)(2)(B)(ii) (laundering criminal proceeds with the intent to violate the currency reporting requirement) instead of section 5313 or 5324.

[80] This discussion presumes an understanding of substantive money laundering under sections 1956 and 1957.

money for someone else, the Government can forfeit the launderer's fee. As mentioned, however, the legislative history states that the phrase "property involved in a transaction in violation of [section 1956 or 1957]" should be read broadly to include not just the commissions and fees, but the *actual money laundered and any property used to facilitate* the money laundering offense.

There are four categories of property that fall within the meaning of the "actual money laundered and property used to facilitate" the money laundering offense: (1) the proceeds of the specified unlawful activity (SUA) being laundered; (2) any money commingled with the SUA proceeds at the time of the financial transaction; (3) property obtained as a result of the transaction, if the financial transaction involved an exchange for other property; and (4) property used to conceal or disguise the true nature, source, location, ownership or control of the SUA proceeds. Note that forfeiture under any of these theories must be based on the commission of, or an attempt to commit, a money laundering offense under section 1956(a) or 1957, or a conspiracy to commit such offense under section 1956(h).[81] Proof that the property was the proceeds of the underlying SUA will not, by itself, support a forfeiture under section 981. There must be a money laundering offense.[82]

a. The Proceeds of the SUA Offense

If a person takes $60,000 in drug proceeds and wires it to a third person, in violation of section 1957, the $60,000 is obviously "involved in" the offense; it is the *corpus delicti* of the crime. Thus, the SUA proceeds that are the subject of the financial transaction constituting the money laundering offense may be forfeited under section 981(a)(1)(A).[83]

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[81] There is no forfeiture for conspiracies to commit money laundering under 18 U.S.C. § 371.

[82] *See Money Laundering Manual*, Chapter 3 [June 1994]: R32, discussing the need to show that the money laundering constituted a separate transaction that occurred after the underlying SUA matured to the point where it generated the proceeds to be laundered. A transaction that generates drug proceeds or that deprives a fraud victim of his money is not a money laundering offense because it occurs before the property in question is the proceeds of another offense. *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994) (drug deal is not a transaction involving SUA proceeds because money exchanged for drugs is not proceeds at the time the exchange takes place); *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992) (where the defendant fraudulently induces the victim to wire transfer funds directly to the defendant's account, such transfer *does not* constitute money laundering, because funds were not "criminally derived" at the time the transfer took place; however, if the transaction had occurred in two steps, with the defendant first obtaining money from the victim and then making the deposit, the second step would be a section 1957 violation).

[83] *See United States v. Saccoccia*, 823 F. Supp. 994 (D.R.I. 1993) (sum equal to the SUA proceeds laundered, or the amount involved in CTR violations, is forfeitable under section 982), *aff'd*, 58 F.3d 754 (1st Cir. 1995); *United States v. $814,254.76 in U.S. Currency*, 51 F.3d 207 (9th Cir. 1995) (bank that permits its employees to launder drug money through its accounts risks forfeiture from those accounts of sum equal to amount of money laundered).

At first, this may not seem particularly useful to the Government. Proceeds of drug offenses are already subject to civil forfeiture under 21 U.S.C. § 881(a)(6) without the additional burden of having to demonstrate that a money laundering offense occurred. But the drug statutes actually are among the relatively few federal offenses for which such forfeiture is authorized.[84] For most statutes, including the commonly used mail and wire fraud provisions,[85] there is no statute authorizing direct forfeiture. Under the money laundering provisions of section 981(a)(1)(A), however, the proceeds of another offense may be forfeited if they have been involved in a money laundering violation, whether or not direct forfeiture for that particular offense has been authorized.

For example, if a person launders the proceeds of a mail fraud by wiring the money to an account in a false name, the fraud proceeds may be forfeited under section 981(a)(1)(A) even though there is no forfeiture for mail fraud directly, because the money was involved in a violation of section 1956(a)(1)(B)(i) (conducting a financial transaction with the intent to conceal or disguise SUA proceeds). Similarly, if a person takes more than $10,000 in stolen property that has crossed state lines—*i.e.*, property constituting the proceeds of an interstate transportation of stolen property (ITSP) offense (18 U.S.C. § 2314)—and wires it to another account, the ITSP proceeds are forfeitable under section 981 as property involved in a section 1957 offense even though no direct forfeiture is authorized under section 2314.

Thus, the forfeiture provisions for money laundering offenses in section 981(a)(1)(A) are often used to forfeit criminal proceeds where no provision for direct forfeiture has been enacted.[86]

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[84] Most of the other statutes authorizing forfeiture of proceeds are found in the later subsections of section 981.

[85] 18 U.S.C. §§ 1341, 1343.

[86] This list of SUA offenses for money laundering is set forth in 18 U.S.C. § 1956(c)(7).

b. Commingled Money

The second category of property subject to forfeiture under section 981(a)(1)(A) is "clean" money that is commingled with the SUA proceeds at the time the financial transaction takes place. In order to satisfy the "proceeds" element of a money laundering offense under section 1956, it is not necessary to show that all of the property involved in the offense was illegally derived[87]; the Government need only show that a particular financial transaction involved at least one dollar of SUA proceeds.[88] For example, a person who deposits $1,000 in SUA proceeds in an account and then withdraws $17,000 from that account to buy a car, commits a money laundering offense under section 1956 when he makes the withdrawal, assuming the other elements of the statute are satisfied.

For forfeiture purposes, the relevant question is: "How much money was involved in the money laundering transaction?" If the transaction was the withdrawal of $17,000 in commingled funds, the amount involved in the transaction was $17,000 even though only a portion of that money could be traced back to the underlying SUA. Thus, all $17,000 would be subject to forfeiture.[89] In contrast, if the forfeiture action were brought under the drug proceeds provision of 21 U.S.C. § 881(a)(6), the Government would be able to forfeit only the portion of the property traceable to the underlying drug offense.[90] This makes the money laundering provision of the forfeiture statute a more powerful tool of law enforcement than

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[87] *See United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995) (the Government met burden of showing check drawn on account involved in SUA proceeds by showing that $80,000 in proceeds were deposited into the account and commingled with other funds; strict tracing not required); *United States v. Rodriguez*, 53 F.3d 1439 (7th Cir. 1995) (purchase of house involved SUA proceeds even though only $1,000 of $17,000 payment was drug money); *United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994) ("it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds"); *United States v. English*, 92 F.3d 909 (9th Cir. 1996) (following *Garcia*); *United States v. Marbella*, 73 F.3d 1508 (9th Cir. 1996) (once SUA proceeds are commingled in an account, any withdrawal from that account involves proceeds, even if the balance in the account drops to zero between the time the proceeds are deposited and the time of the withdrawal); *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994) (money launderer may not escape liability by commingling drug proceeds with other assets); *United States v. Jackson*, 935 F.2d 832, 840 (7th Cir. 1991) (transactions drawn on account containing commingled funds "involve" proceeds of SUA).

[88] For a section 1957 offense, there must be at least $10,000 in SUA proceeds. *See United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996) (at least $10,000 of the property involved in the monetary transaction must be traceable to SUA proceeds); *United States v. Mills*, No. CR295-42, 1996 WL 634207 (S.D. Ga. May 1, 1996) (unpublished) (transaction must include at least $10,000 of dirty money (following *Adams*); Government may not presume that transaction involves $10,000, even if more than $10,000 in dirty money was deposited into an account, if the ratio of clean to dirty money in the account is 800:1).

[89] *See United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 252 (E.D. Va. 1993) (where sections 1956 and 1957 financial transaction is car payment, car is "involved in" the money laundering offense and is forfeitable in its entirety even if legitimate funds are used to make other payments).

[90] *See United States v. One 1980 Rolls Royce*, 905 F.2d 89, 90 (5th Cir. 1990).

the forfeiture provisions of other statutes that authorize only the forfeiture of proceeds and property traceable thereto.

c. Property Exchanged in the Transaction

Some financial transactions simply involve the movement of funds from one place to another, but many transactions are two-way transactions in which funds are exchanged for other property. In such transactions, both the money and the property obtained in exchange are "involved in" the money laundering offense.

For example, if the financial transaction is the purchase of a car, the Government can forfeit the money paid to the seller, the car itself,[91] or both. This is not, however, just another way of saying that the Government can forfeit property traceable to the SUA proceeds being laundered, or to the commingled funds involved in the offense. When the Government forfeits the property obtained in an exchange transaction that constitutes a money laundering offense, it is entitled to the property *in its entirety*, even if the money laundering offense constituted only a down payment or installment payment for the property.

Take the car payment case as an example. If forfeiture were limited to the amount of money paid to the seller as part of the money laundering transaction, or property traceable thereto, the Government could only forfeit the portion of the car equal to the number of dollars that the buyer gave the seller. For example, suppose a person made a $17,000 downpayment on an expensive car, and the making of the downpayment were a money laundering offense. If the Government were limited to the amount of *money* involved in the exchange transaction, it would be able to forfeit only the $17,000 or the portion of the car up to that amount, unless the balance of the payments for the car constituted money laundering offenses as well.

But the Government is not limited to forfeiting the amount of *money* given in exchange for other property. Section 981(a)(1)(A) authorizes the forfeiture of any *property* involved in a money laundering offense. Because the car itself is involved in the exchange, the car is forfeitable in its entirety, even if the balance of the payments came from a legitimate source.[92]

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[91] *See United States v. Basler Turbo-67*, 906 F. Supp. 1332, 1340 (D. Ariz. 1995) (aircraft purchased with drug money is forfeitable under sections 981 and 1956-57); *United States v. Premises Known as 3 Jade Lane*, 96 F.3d 1436 (E.D. Pa. 1995) (real property purchased in a transaction that violates section 1957 is forfeitable as property involved in the offense).

[92] *See United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 252 (E.D. Va. 1993) (where sections 1956 and 1957 financial transaction is car payment, car is "involved in" the money laundering offense and is forfeitable in its entirety even if legitimate funds are used to make other payments).

For the same reasons, when a person engages in an exchange transaction constituting a money laundering offense, and the transaction yields only a modest profit, he cannot claim that the Government is entitled to forfeit only the profit. To the contrary, the property obtained as part of the transaction is forfeitable in its entirety because it was all "involved in" the money laundering offense. In *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994), a gold dealer, Hendrickson sold gold worth approximately $500,000 for $742,555 in drug proceeds in violation of section 1957. The defendant argued that the forfeiture should be limited to his net profit because he had acquired the gold with legitimately-derived funds. But the court held that the property obtained by Hendrickson as part of the money laundering offense was subject to forfeiture in its entirety because it was all "involved in" the offense, within the meaning of section 981(a)(1)(A). Thus, Hendrickson forfeited all $742,555, not just his net profit on the sale.

d. Facilitating Property

Finally, "property involved in" a financial transaction includes property used to facilitate the transaction. Facilitating property is generally defined as property that makes the offense easier to commit, or harder to detect, but the concept has a particular meaning in the context of money laundering cases. In order to be forfeitable as facilitating property under section 981(a)(1)(A), property must be integral to the money laundering offense and not merely "present at the scene" or otherwise external to the financial transaction.[93]

For example, in *United States v. One 1989 Jaguar XJ6*, No. 92-C-1491, 1993 WL 157630 (N.D. Ill. May 13, 1993) (unpublished), the court declined to order the forfeiture of an automobile used to drive to and from the location of the money laundering offense because a vehicle that merely affords a means of transportation to the place where a financial transaction is conducted is not "involved in" the financial transaction itself. If the financial transaction that was charged as money laundering were the actual transportation of SUA proceeds from one place to another for delivery to a second person, presumably the result

[93] *See United States v. Swank Corp.*, 797 F. Supp. 497, 500 (E.D. Va. 1992) ("facilitation" requires "substantial connection" between criminal act and forfeited property); *United States v. Certain Accounts*, 795 F. Supp. 391, 395 (S.D. Fla. 1992); *United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 650 (E.D. Mich. 1992); *but see United States v. One Parcel...613 Warwick Road*, No. CIV-A-95-339, 1995 WL 214451 (E.D. Pa. Apr. 10, 1995) (unpublished) (denying motion to dismiss section 981 forfeiture of building where defendants met to plan to cash checks in violation of section 1957).

would be different, for in that case the vehicle would be integral to the financial transaction itself.[94]

(1) Conceal or Disguise Cases

In section 981(a)(1)(A) cases, the Government has been most successful in forfeiting facilitating property where the defendant is charged with conducting a financial transaction with intent to "conceal or disguise" under section 1956(a)(1)(B)(i) or (a)(2)(B)(i), and the property helps the defendant to accomplish that aspect of the offense. Contrary to a car that is external to the money laundering offense if it is merely used as transportation, the property that is used to accomplish one of the elements of the offense—*i.e.*, conducting a financial transaction with intent to conceal or disguise—is integrally involved in the offense and can be forfeited as facilitating property.[95]

This concept is analogous to the forfeiture of facilitating property in other contexts. For example, it is well established in drug cases that property used by a defendant to disguise the true nature of his operation is forfeitable as facilitating property. So, if a defendant uses his ranch as a base for a drug operation but disguises the true nature of the operation by placing quarter horses on the property, the horses are subject to forfeiture.[96] Similarly, in money laundering cases, if the defendant conducts a financial transaction with the intent to conceal or disguise the true nature, location, source, ownership, or control of SUA proceeds, the property that he uses to help conceal or disguise the proceeds is subject to forfeiture.

Property that can be used to facilitate a money laundering offense by helping the defendant to conceal or disguise the SUA proceeds includes: bank accounts, real and personal property, and businesses. For example, if a defendant commingles the proceeds being laundered with other money in a bank account in order to conceal the true nature of the

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[94] *Cf. United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995) (picking up cash from A and delivering car containing the cash to B was a money laundering offense); *United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991) (transfer of cash from one car to another was a money laundering offense); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995) (drug case: vehicle used to distribute drug proceeds is substantially connected to drug sale that was completed before vehicle was involved).

[95] Use of the facilitation theory in section 981(a)(1)(A) cases is discussed in Cassella, Stefan D., "Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases," *New York Law School Law Review* [1994]: 1.

[96] *See United States v. Rivera*, 884 F.2d 544 (11th Cir. 1989) (defendant required to forfeit horses that he used to make ranch appear to be a legitimate ranch when it was in fact the cover for a heroin operation).

dirty money, the clean money is "involved in" the money laundering offense and is forfeitable.[97]

If defendant conceals or disguises dirty money by exchanging it for inventory in his business, and commingles the dirty inventory with the clean inventory, the clean inventory is "involved in" the money laundering offense, and is forfeitable.[98] And if the defendant hides his SUA proceeds by using them to make mortgage payments on real property or to pay for improvements on the property, the entire parcel is forfeitable as property involved in the money laundering offense.[99]

The forfeiture of an entire business will often present practical problems as well as raise issues under the Excessive Fines Clause. Nevertheless, an entire business may be forfeited under section 981(a)(1)(A) if it is used by the defendant to conceal or disguise SUA proceeds. For example, if a person conceals or disguises dirty money by running it through

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[97] *See United States v. All Monies*, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991) (untainted money in account provided "cover" for laundering operation); *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) (same); *United States v. Certain Accounts*, 795 F. Supp. 391, 397 (S.D. Fla. 1992) (same); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329, 334-35 (S.D.N.Y. 1994) (legitimate funds used to conceal or disguise laundering forfeited; cases involving structuring offenses distinguished); *United States v. South Side Finance, Inc.*, 755 F. Supp. 791, 797-98 (N.D. Ill. 1991) (bank accounts into which laundered money is deposited, and a business through which such money moved, forfeitable under section 981 as property "involved in" the money laundering offense); *United States v. Tencer*, 107 F.3d 1120 (E.D. La.) (entire bank account balance is forfeitable even though only a small amount of criminal proceeds was deposited into the account if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds), *cert. denied*, ___ U.S. ___, 118 S. Ct. 390 (1997).

[98] *See United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 650 (E.D. Mich. 1992) (following *United States v. All Monies*, inventory of jewelry business forfeitable as facilitating property).

[99] *See United States v. Myers*, 21 F.3d 826, 830 (8th Cir. 1994) (farm property is involved in a money laundering offense if laundered funds are used to make payments on the purchase contract and to pay for improvements to the property and equipment used on the farm); *United States v. Real Property in Mecklenburg County*, 814 F. Supp. 468, 479-80 (W.D.N.C. 1993) (where drug money is hidden by using it to pay for construction of a valuable building on land, the land is involved in and facilitates the laundering offense; therefore, the entire parcel is forfeitable, not just the portion traceable to the drug money); *United States v. Sonny Cook Motors*, 819 F. Supp. 1015, 1018 (N.D. Ala. 1993) (entire parcel of real property on which car dealership is located is "involved in" effort to launder money through the business in "sting" case).

his legitimate business to make the dirty money appear to be revenue from the business, the business itself is involved in the offense and is forfeitable.[100]

(2) Facilitating Property Outside of "Conceal and Disguise" Cases

If the money laundering offense does not require proof of an intent to conceal or disguise, forfeiture of untainted property under a facilitation theory is more difficult. For example, suppose a person commits a section 1957 violation by wiring SUA proceeds into a bank account that also contains some untainted money. How is the untainted property "involved in" the offense? Because the Government is not required to show that the transaction was committed with the intent to use the clean money to "conceal or disguise" the dirty money, it is harder to claim that the clean money made the offense easier to commit or harder to detect. More likely, the clean money was simply present when the crime was committed. For this reason, efforts to forfeit untainted property under a facilitation theory other than in "conceal or disguise" cases have generally be unsuccessful.[101]

In this regard, it is important to remember that it is not a bank account that the Government is entitled to forfeit, it is the money in the account. An account is just an address or routing device; it is not a thing that is itself subject to forfeiture.[102] Thus, the Government must focus on the funds in a bank account and be prepared to explain how each

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[100] *See United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 487 (2d Cir. 1995) (business used to sell stolen auto parts and launder proceeds forfeited under section 981); *United States v. Swank Corp.*, 797 F. Supp. 497, 502 (E.D. Va. 1992) (proceeds of mail fraud scheme "cleared" through corporate bank accounts; if there is substantial connection between business and laundering activity, entire business and all of its assets are forfeited regardless of amount of money laundered); *United States v. Any and All Assets of Shane Co.*, 816 F. Supp. 389, 397 (M.D.N.C. 1991) (drug proceeds laundered through trucking business); *United States v. 155 Bemis Road*, 760 F. Supp. 245, 251 (D.N.H. 1991) (business forfeitable under section 981 because corporate checks were used to make drug trafficker's purchase and improvement of real property with drug money appear to be legitimate business activity); *United States v. South Side Finance, Inc.*,755 F. Supp. at 797-98 (N.D. Ill. 1991).

[101] *See United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992) (legitimate funds in bank account do not facilitate structuring; account itself is not subject to forfeiture; cases involving facilitation of section 1956 or 1957 offenses distinguished); *Marine Midland Bank N.A. v. United States*, No. 93-CIV-0307-RPP (S.D.N.Y. May 11, 1993), *aff'd on other grounds*, 11 F.3d 1119 (2d Cir. 1993) (untainted funds in interbank account used to "clear" structured money orders not forfeitable under facilitation theory).

[102] *United States v. $488,342.85*, 969 F.2d 474, 477 (7th Cir. 1992); *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992); *United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542, 562 (E.D.N.Y. 1993).

sum of money deposited into the account was involved in the money laundering offense.[103] For example, if SUA proceeds are laundered through a bank account, the Government may be able to forfeit the proceeds themselves and other clean money that was in the account at that time under a facilitation theory, but it may have no basis to forfeit other funds that were deposited into the account after the money laundering offense was complete.[104]

(3) Property Used to Facilitate the SUA Offense

A few cases have held or suggested in *dicta* that property is "involved in" a money laundering offense if it was used to facilitate the commission of the underlying specified unlawful activity.[105] Unless the property is also involved in the financial transaction that constitutes the money laundering offense, however, the Asset Forfeiture and Money Laundering Section does not recommend reliance on this theory.

4. Forfeiture of Property "Traceable to" the Offense

Section 981(a)(1)(A) provides that in addition to the property directly involved in the money laundering offense, the Government may forfeit any property traceable thereto. For example, if a person purchases a car or parcel of real property with structured funds, the

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[103] *See United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 446 (E.D.N.Y. 1992) (the Government must establish probable cause with respect to *all* of the seized property; where portion of bank account is not traceable to criminal activity and no facilitation theory applies, the Government has failed to establish probable cause with respect to portion of funds); *see also United States v. $488,342.85*, 969 F.2d 474, 477 (7th Cir. 1992) (the Government establishes probable cause to believe that all funds in account are forfeitable by showing that scheme is ongoing and that deposits of proceeds of scheme exceed the balance of the account at the time to seizure; burden then shifts to claimant to identify the sums not subject to forfeiture as part of affirmative defense); *United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991) (the Government concedes it has burden of establishing probable cause with respect to funds not directly traceable to criminal activity; establishes probable cause to believe balance of funds were used to facilitate criminal activity); *United States v. Certain Accounts*, 795 F. Supp. 391, 397 (S.D. Fla. 1992) (deposit of numerous money orders in amounts just under $10,000 into an account was circumstantial evidence that all of the funds in the account were involved in a structuring offense, even though the account balance exceeded total value of money orders).

[104] *See United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991) (later deposited funds were subject to forfeiture as facilitating property because there was no evidence that the money laundering scheme had terminated).

[105] *See United States v. $488,342.85*, 969 F.2d 474, 477 (7th Cir. 1992) (dicta) (property "involved" in money laundering offense not limited to money derived from the SUA, but may include funds that facilitated the SUA); *United States v. All Assets of Blue Chip Coffee, Inc.*, 836 F. Supp. 104, 108 (E.D.N.Y. 1993) (property used to facilitate underlying section 659 offense forfeitable under section 981(a)(1)(A)); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1155 (E.D. Pa. 1993) (business used to facilitate violation of the Arms Export Act was forfeitable because money laundering was essential to the arms export scheme); *United States v. Puello*, 814 F. Supp. 1155 (E.D.N.Y. 1993) (real property and vehicles used to facilitate food stamp fraud scheme that included money laundering).

vehicle or parcel may be forfeited as property traceable to the money involved in the structuring offense.[106]

Some courts will insist on a strict tracing analysis that links the property involved in the money laundering offense to the property subject to forfeiture. For example, in *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996), the court declined to order the forfeiture of jewelry purchased with funds drawn from an account that was involved in a prior money laundering transaction because the account included subsequently-deposited clean money that was not subject to forfeiture. In such a case, the court held, the Government was unable to satisfy the strict tracing requirements linking the jewelry to the money laundering offense. The result would likely have been different if the Government had charged the purchase of the jewelry as a money laundering offense itself. In that case, there would have been no question that the jewelry was "involved in" the offense.[107]

5. Substitute Assets and Fungible Property

In *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996), the court of appeals noted that if the Government was unable to trace the jewelry directly to the property involved in the money laundering offense, it could nevertheless have forfeited the jewelry as substitute assets. Forfeiture of substitute assets is discussed in detail in chapter 5, parts V.E and VI.E; however, it is worth noting here that there are two practical problems that limit the usefulness of the substitute assets theory in money laundering cases.

First, the circuits are split regarding the Government's ability to seize or restrain substitute assets pretrial. If property is forfeitable only as substitute assets and *not* as property directly involved in or traceable to a money laundering offense, this problem could limit the ability of the Government to preserve the property for trial. Second, the criminal

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[106] *See United States v. 5709 Hillingdon Road*, 919 F. Supp. 863 (W.D.N.C. 1996) (real property forfeited when mortgage was retired with funds traceable to 33 structured deposits); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1155 (E.D. Pa. 1993) (where business was forfeitable as facilitating property, salaries paid by business, and property purchased with salaries, were proceeds traceable to forfeitable property and were forfeitable even though the Government did not seek forfeiture of business itself); *United States v. 1990 Chevrolet Silverado Pickup*, 804 F. Supp. 777 (W.D.N.C. 1992) (truck traceable to earlier truck purchased with gambling proceeds is forfeitable as property traceable to property "involved in" section 1956 violation); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (cars purchased with cashiers checks acquired in structured transaction); *United States v. Rogers*, No. 94-CR-138(FJS), 1996 WL 252659 (N.D.N.Y. May 8, 1996) (unpublished) (same); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994) (bank account that contains only funds transferred from account forfeitable as facilitating property is itself forfeitable).

[107] Purchase made with funds drawn from commingled bank account constitutes money laundering offense, and property purchased in such transaction is forfeitable as property involved in the offense.

forfeiture statute, section 982(b), contains an exception applicable to money laundering cases that exempts "mere intermediaries" from the forfeiture of substitute assets in certain circumstances.

Whatever the limitation on the forfeiture of substitute assets in criminal forfeiture cases, it is important to realize that there is no forfeiture of substitute assets in civil cases at all. This is not due to some oversight in the statutory structure, but instead is inherent in the distinction between criminal forfeitures which are *in personam* and civil forfeitures which are *in rem*.

In personam forfeiture is directed against the convicted defendant as punishment for the commission of the criminal offense. If the property directly involved in the offense or property traceable thereto is not available, the court can order the forfeiture of other property of equal value that the defendant owns.

In contrast, in an *in rem* forfeiture, the property itself is the defendant; it is subject to forfeiture because that particular asset was involved in or is traceable to a criminal offense. The Government could not file a civil *in rem* action against other property of equal value any more than it could, in a criminal case, prosecute another person of "equal value" if the defendant who committed the offense is unavailable for trial. Thus, only property strictly traceable to a money laundering offense may be subject to civil forfeiture under section 981(a)(1)(A).

B. Forfeitable Property under 18 U.S.C. § 981(a)(1)(B) (Proceeds of Foreign Drug Violations)

Chapter 11 of this manual discusses 18 U.S.C. § 981(a)(1)(B) in depth. Be careful to distinguish forfeiture under this subsection from the forfeiture of the proceeds of or facilitating property used in the laundering in this country of the proceeds of a foreign drug violation under 18 U.S.C. § 981(a)(1)(A) as discussed above. Use of forfeiture under section 981(a)(1)(A) permits the Government to obtain facilitation forfeiture, unlike section 981(a)(1)(B), but it is necessary to prove that a money laundering transaction occurred at least in part in this country, and to prove (if the predicate offense is drug related) that the foreign drug violation was a sale, importation, distribution, or manufacturing offense. Section 981(a)(1)(B), by contrast, authorizes the civil forfeiture of the proceeds of any foreign drug violation, which is punishable both here and in the foreign country by over a year in prison but limits forfeiture to the proceeds of that offense. Because the elements required for a section 981(a)(1)(B) forfeiture are easier to establish, forfeiture should be

sought under this subsection whenever a government attorney is only seeking forfeiture of proceeds.

While this statute applies only to the proceeds of foreign drug violations, it may be possible to forfeit civilly the proceeds of a foreign fraud offense under 18 U.S.C. § 981(a)(1)(A). It would be necessary to establish a predicate offense of either 18 U.S.C. § 2314 or 2315 (transportation, sale, or receipt of stolen goods in foreign commerce) for a money laundering violation.[108]

Special evidentiary rules are available for the civil forfeiture of assets pursuant to either section 981(a)(1)(A) or 981(a)(1)(B).[109] A certified copy of a foreign forfeiture order is sufficient to establish probable cause and thus could be the sole basis for a default judgment.[110] A certified transcript of testimony from a foreign judicial proceeding concerning an order of forfeiture is admissible in forfeiture proceedings here as well.[111] Finally, a certified copy of a foreign drug conviction judgment is admissible as proof of the commission of the underlying drug activity, but, by itself, would not ordinarily be sufficient to establish probable cause for the forfeiture of a specific asset.[112]

In order to facilitate monitoring of the use of this provision, and to be able to respond to inquiries from foreign governments, Department policy requires that government attorneys contemplating the filing of an action pursuant to section 981(a)(1)(B) first consult the international forfeiture counsel in the Asset Forfeiture and Money Laundering Section.[113]

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[108] These statutes apply even when all the underlying criminal activity occurs in a foreign country, just so long as the activity was intended to have an effect here. *United States v. Braverman*, 376 F.2d 249 (2d Cir. 1967). The money laundering activity itself would have to occur here or be subject to the extraterritorial provision in 18 U.S.C. § 1956(f). *See* further discussion in chapter 11, part III.C, of this manual.

[109] The statute is not totally clear that these special rules apply to section 981(a)(1)(A) forfeitures, as well as to section 981(a)(1)(B) forfeitures, but the relevant provisions do use the term "section," not "subsection," in stating when the evidence in question is admissible. Read the language of subsections (i)(3) and (i)(4) carefully.

[110] *See* 18 U.S.C. § 981(i)(3).

[111] *Id.*

[112] *See* 18 U.S.C. § 981(i)(4).

[113] *Handbook on the Anti-Drug Abuse Act of 1986* at 50.

C. Forfeitable Property under 18 U.S.C. § 981(a)(1)(C) and (D) (FIRREA and Other Criminal Offense Forfeitures)

The Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 183 (Aug. 9, 1989), was comprehensive legislation intended to reform the federal deposit insurance system, enhance the regulatory and enforcement power of federal financial institution regulatory agencies, and strengthen the civil sanctions and criminal penalties imposed for defrauding or otherwise damaging depository institutions and their depositors.[114] Unlike money laundering and currency transaction reporting requirement forfeitures, which are covered by 18 U.S.C. § 981(a)(1)(A), FIRREA forfeiture is limited to the "proceeds" of the illegal activity. There is no "facilitation" forfeiture under FIRREA.

Section 981(a)(1)(C) of Title 18, which was originally enacted August 9, 1989,[115] makes forfeitable any property that "constitutes or is derived from proceeds traceable" to a violation of a series of federal criminal statutes, which by definition apply only to situations involving financial institutions. These violations are:

(1) 18 U.S.C. § 215, which covers the receipt of commissions or gifts for procuring loans;

(2) 18 U.S.C. § 656, which covers the theft, embezzlement, or misapplication of funds from a covered bank by an officer or employee of that bank;

(3) 18 U.S.C. § 657, which covers the theft, embezzlement, or misapplication of funds from a series of specified federal regulatory institutions or from other regulated entities and investment companies not covered by section 656;

(4) 18 U.S.C. § 1005, which covers unauthorized or fraudulent bank entries, reports, and transactions by bank officers or employees;

(5) 18 U.S.C. § 1006, which covers unauthorized or fraudulent entries, reports, and transactions by officers or employees of specified federal regulatory institutions or

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[114] *See* H.R. No. 101-222 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 432.

[115] Whether the FIRREA civil forfeiture provision may be retroactively applied to permit the forfeiture of bank fraud proceeds that were acquired before the effective date is an open question. One district court has ruled that it is retroactive. *See United States v. 403½ Skyline Drive*, 797 F. Supp. 796 (C.D. Cal. 1992). *But see Landgraf v. USI Film*, 511 U.S. 244 (1994) (default rule is "no retroactivity" in absence of affirmative evidence that retroactivity was in fact intended by Congress).

from other regulated entities and investment companies not covered by section 1005;

(6) 18 U.S.C. § 1007, which covers the making of false statements for the purpose of influencing the FDIC;

(7) 18 U.S.C. § 1014, which covers the making of false statements on loan and credit applications to specified federal and federally regulated financial institutions;

(8) 18 U.S.C. § 1032, which covers the concealment of assets from the FDIC or other federal regulatory bodies when they are the conservator or receiver of a financial institution, or any other attempt to impede the function of, or put property beyond the reach of, that body or an individual appointed to act on their behalf;

(9) 18 U.S.C. § 1344, which covers the defrauding of a financial institution; and

(10) 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud), when the violation "affects" a financial institution.

Effective October 6, 1992, section 981(a)(1)(C) was expanded to cover a whole series of fraud related offenses that are unrelated to typical FIRREA violations.[116] These offenses include:

(1) most of the counterfeiting and forgery felony offenses found in Chapter 25 of Title 18 (18 U.S.C. §§ 471-74, 476-81, 485-88, 501-02, and 510) investigated by the U.S. Secret Service;

(2) several Customs investigated offenses involving smuggling (18 U.S.C. §§ 542 and 545);

(3) several offenses investigated by the Bureau of Alcohol, Tobacco, and Firearms relating to the unlawful importation, manufacture, distribution, or storage of explosive materials (18 U.S.C. §§ 842 and 844);

(4) fraud and related activity in connection with identification documents (18 U.S.C. § 1028); and

[116] Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. 102-393, 106 Stat. 1729, 102d Cong., 2d Sess. (Oct. 6, 1992).

(5) fraud and related activity in connection with access devices and computers (18 U.S.C. §§ 1029-30).

Because these offenses are listed in subsection 981(a)(1)(C), the special provisions in subsection (e)(3)-(7) applicable to FIRREA forfeiture cases discussed below apply to forfeitures based on these offenses as well.

Section 981(a)(1)(D) of Title 18, effective November 29, 1990,[117] provides for the forfeiture of property that represents or is traceable to the gross receipts obtained directly or indirectly from one of the following violations, to the extent that such violation relates to the sale of assets acquired or held by the FDIC, RTC, Office of the Comptroller of the Currency, Office of Thrift Supervision, or National Credit Union Administration, or any individual acting on their behalf, when such property was acquired or held as conservator, receiver, or liquidating agent for a financial institution:

(1) 18 U.S.C. § 666(a)(1)—federal program fraud;

(2) 18 U.S.C. § 1001—false statements to a federal agency;

(3) 18 U.S.C. § 1031—fraud against the United States in the procurement of property or services where the property or services are $1,000,000 or greater;

(4) 18 U.S.C. § 1032—concealment of assets from, or other attempt to impede operations of, FDIC or other named federal financial regulatory institutions when they, or any individual acting on their behalf, are a conservator or receiver for a financial institution;

(5) 18 U.S.C § 1341—mail fraud; and

(6) 18 U.S.C. § 1343—wire fraud.

For further guidance on the meaning or application of any of the above listed violations, government attorneys should consult with the Fraud Section of the Criminal Division.

Section 981(a)(1)(E) of Title 18 provides that, with respect to any offense listed in subsection (a)(1)(D), if the offense in question was committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property

[117] *See* discussion in note 118, *infra*.

by means of false or fraudulent statements, pretenses, representations, or promises, the "gross receipts" subject to forfeiture under subsection (a)(1)(D) "shall include all property, real or personal, tangible or intangible, which thereby [was] obtained, directly or indirectly." It is not certain what this subsection adds to the meaning of the term "gross receipts" as used in subsection (a)(1)(D). Since this definition is implicit in mere use of the term "gross receipts" already, subsection (a)(1)(E) should not be viewed as either expanding or limiting the type of property available for forfeiture in particular subsection (a)(1)(D) cases.

Since forfeiture under these statutes is limited to "proceeds,"[118] consideration should be given to seeking forfeiture on a money laundering theory pursuant to 18 U.S.C. § 981(a)(1)(A) if facilitation forfeiture is warranted in a particular case. All the predicate offenses for FIRREA forfeiture are predicate offenses for money laundering forfeiture, except 18 U.S.C. §§ 1001 (false statements) and 1031 (major procurement fraud). Even if an 18 U.S.C. § 1956 money laundering violation cannot be established, it may be possible to establish an 18 U.S.C. § 1957 unlawful monetary transaction violation or a 31 U.S.C. § 5313(a) (CTR reporting) or § 5324 (structuring) violation.

D. Forfeitable Property under 18 U.S.C. § 981(a)(1)(F) (Carjacking)

Effective October 25, 1992, Congress enacted a set of new criminal statutes and amendments relating to automobile theft and "carjacking."[119] Included in this legislation were parallel civil and criminal forfeiture provisions codified as 18 U.S.C. §§ 981(a)(1)(F) and 982(a)(5), respectively. These subsections permit the forfeiture of the "gross proceeds" of any violation of 18 U.S.C. §§ 511 (altering or removing vehicle identification numbers); 553 (importing/exporting stolen vehicles); 2119 (armed robbery of automobiles); 2312 (transporting stolen vehicles); and 2313 (possessing stolen vehicles moved in interstate commerce). The term "gross proceeds" is not defined, and it is not clear how its meaning differs from the terms "property involved in," "proceeds," and "gross receipts" that are used in other parts of sections 981 and 982.

[118] As noted in the text, "proceeds" are forfeitable under subparagraph (a)(1)(C), while "gross receipts" are forfeitable under subparagraphs (a)(1)(D) and (E) and "gross proceeds" are forfeitable under subparagraph (a)(1)(F). There is no legislative history explaining why Congress chose to use these various terms.

[119] Anti-Car Theft Act of 1992, Pub. L. 102-519, 106 Stat. 3384, 102d Cong., 2d Sess. (Oct. 25, 1992).

E. Collateral Forfeiture Provisions Unique to 18 U.S.C. § 981

Civil forfeiture procedures and other collateral forfeiture provisions set forth in section 981 are similar to those set forth for civil forfeitures pursuant to 21 U.S.C. § 881.[120] However, there are certain aspects of section 981 forfeitures that are unique and will be highlighted here.

First, in FIRREA and other section (a)(1)(C) forfeiture cases, 18 U.S.C. § 981(e)(3) and (5) authorize the transfer of forfeited property to designated federal regulatory agencies essentially as restitution for amounts paid out to claimants or creditors of a financial institution and to such agencies to cover their investigative costs. Subsection 981(e)(4) also authorizes the transfer of forfeited property to financial institutions when they are the victim of the offense, upon order of the applicable regulatory body, and subject to an offset for compensatory damages received before or after by the financial institution. Subsection 981(e)(6) also authorizes the restoration of forfeited property directly to an individual victim. These authorizations currently apply only in the event of a section 981(a)(1)(C) forfeiture. However, 18 U.S.C. § 981(e)(7) separately authorizes the transfer of forfeited property to the applicable federal regulatory agency in the event of a section 981(a)(1)(D) forfeiture.

Under a Memorandum of Understanding between the Department of Justice, the Department of the Treasury, and federal financial institution regulatory agencies, properties seized for forfeiture will be placed in the custody of the federal regulatory agency in failed institution cases. Cash seized for forfeiture will initially be placed into the U.S. Marshals Service Seized Asset Deposit Fund, but, after forfeiture, will be transferred to the regulatory agency after a subtraction for investigative and litigative costs incurred by the Department of Justice and the Department of the Treasury components. The financial regulatory agencies will then retain the net proceeds of the sales of property in their custody and the cash as authorized by 18 U.S.C. § 981(e)(3), subject only to the granting of petitions for remission or mitigation.[121]

Second, unlike other civil forfeiture provisions, Grand Jury information may be disclosed, under certain circumstances, to attorneys working on a FIRREA civil forfeiture proceeding brought under section 981(a)(1)(C) without the need for a special court order under

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[120] *See* discussion in chapter 4, part III, of this manual.

[121] *See* the further discussion in chapter 10, part VI, of this manual.

Rule 6(e).[122] It is also possible to get a disclosure order authorizing the showing of Grand Jury information to identified personnel at a financial institution regulatory agency to assist a government attorney in investigating a covered violation, upon a showing of "substantial need."[123]

Third, the innocent owner defense for all section 981 forfeitures, which is set forth in section 981(a)(2), is worded somewhat differently from the innocent owner defense set forth in 21 U.S.C. § 881. Section 981 requires that a claimant prove lack of knowledge to successfully assert an innocent owner defense, while 21 U.S.C. § 881(a)(6) and (7) require proof of lack of knowledge *or* consent, and section 881(a)(4) requires proof of lack of knowledge and willful blindness or consent. A claimant may, therefore, have a harder time establishing an innocent owner defense under section 981, because he will not have the option of proving lack of consent if he cannot prove lack of knowledge. On the other hand, some circuits interpret the phrase "knowledge or consent" in section 881 conjunctively, requiring the claimant to prove both lack of knowledge *and* lack of consent.[124] In those courts, establishing an innocent owner defense under section 981 would be easier because the claimant would have only one matter to prove instead of two.

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[122] 18 U.S.C. § 3322(a). Caution must be exercised in using this disclosure provision to obtain Grand Jury information. First, the provision regarding disclosure for use in civil forfeiture actions applies only to actions under 18 U.S.C. § 981(a)(1)(C), and does not apply to actions under 18 U.S.C. § 981(a)(1)(D). Second, 18 U.S.C. § 3322(a) applies only to disclosure of "Grand Jury information concerning a banking law violation." This language posed no problem with respect to the violations listed in 18 U.S.C. 981(a)(1)(C) as originally enacted since the federal offenses listed therein—18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1032, 1034, and 1344 and a violation of 18 U.S.C. § 1341 or 1343 affecting a financial institution—arguably constituted "banking law violations." However, the statute was amended effective October 6, 1992, to add the following additional offenses: 18 U.S.C. §§ 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, and 1030. *See* Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. 102-393, 106 Stat. 1729 (Oct. 6, 1992). These newly added offenses do not facially constitute "banking law offenses" and it is unclear whether the liberalized disclosure authority of 18 U.S.C. § 3322(a) would permit disclosure of Grand Jury information for use in a civil forfeiture action under 18 U.S.C. § 981(a)(1)(C) based on the commission of such an offense that does not at least arguably constitute a "banking law violation."

[123] 18 U.S.C. § 3322(b). This showing should be viewed as less onerous than the showing of "particularized need" required for disclosures under Fed. R. Crim P. 6(e). *See* H. R. Rep. No. 101-222, 101st Cong., 1st Sess. 447 (1989).

[124] *See United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172 (8th Cir. 1992) (holding implicitly that test is conjunctive under section 881(a)(4) where claimant who could show lack of knowledge and lack of consent was still required to show lack of willful blindness); *United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4)*, 902 F.2d 1443, 1445 (9th Cir. 1990) ("knowledge" and "consent" are conjunctive terms, and claimant must prove lack of both); *United States v. Real Property Located at Section 18, Township 23, Quinault Lake*, 976 F.2d 515 (9th Cir. 1992) (same).

On the other hand, it is not as clear under section 981 as it is under section 881(a)(4) that such a claimant must prove lack of willful blindness, as well as lack of actual knowledge, in order to prevail. At least one court, in interpreting section 881(a)(6), held that the term "knowledge" in that subsection encompasses "willful blindness"; therefore, the same principle may apply here.[125]

Fourth, seizure pursuant to probable cause without a warrant is not authorized in section 981 cases, even though it is authorized in section 881 cases.[126] A seizure must be pursuant to a warrant of arrest *in rem* or a seizure warrant, or be incident to a lawful arrest.[127]

F. Section 984

This leads to a problem in many money laundering cases. Suppose a person places $10,000 in laundered funds in a bank account on Monday and the Government seizes the account for civil forfeiture on Friday. Suppose also that at the time of the seizure, the balance in the account is $10,000, but that in between, on Wednesday, the balance dropped to zero, so that the Government cannot strictly trace the seized funds back to the money laundering offense. In that case, what can the Government forfeit in a civil forfeiture action?

In general, a court would have to hold that the $10,000 that was seized on Friday was not the same money as the laundered funds that were placed in the account on Monday. Failing the strict tracing requirement, the Government would not be able to forfeit the $10,000.[128]

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[125] *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1572-73 (S.D. Fla. 1990), *appeal dismissed,* 932 F.2d 1433 (11th Cir. 1991), *rev'd sub nom. Republic National Bank v. United States,* 506 U.S. 80 (1992). *See also United States v. All Monies in Account No. 90-3617-3,* 754 F. Supp. 1467, 1477 (D. Haw. 1991), which assumes but does not decide that "knowledge" includes "willful blindness" in section 981 cases. *See generally* discussion of the innocent owner defense in section 981 cases in chapter 4, part V.C.4.c.(5), of this manual.

[126] *Cf.* 21 U.S.C. § 881(b). It is Department of Justice policy to avoid use of such seizures except in exigent circumstances.

[127] 18 U.S.C. § 981(b)(1).

[128] *See United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158-62 (2d Cir. 1986) (the Government entitled to use "first in, first out" or "first in, last out" analysis in tracing tainted funds through volatile bank account, but if the account balance falls to zero, the Government is subject to the "lowest intermediate balance" rule and can forfeit nothing); *but see United States v. $488,342.85*, 969 F.2d 474, 476-77 (7th Cir. 1992) (section 981 case discussing application of *Banco Cafetero* to money laundering; strict tracing such as employed in the law of trusts not required in civil forfeiture cases).

In 1992, Congress resolved this problem to some extent by enacting 18 U.S.C. § 984, which provides that money in a bank account is considered fungible for the purpose of forfeiture under section 981(a)(1)(A).[129] Under this statute, if $10,000 in laundered funds is placed in a bank account, the Government may forfeit $10,000 from that account without regard to fluctuations in the balance in the account,[130] as long as it commences the forfeiture action within one year of the commission of the money laundering offense giving rise to the forfeiture.[131]

Section 984 is not a separate forfeiture statute. It is a statutory exception to the usual rule regarding strict tracing that would otherwise apply in section 981(a)(1)(A) cases. Thus, the Government must allege a cause of action under section 981(a)(1)(A) while invoking section 984 to by-pass the tracing rule. If the Government can satisfy the tracing rule, of course, there is no reason to invoke section 984 at all.

For example, if a person launders $10,000 in SUA proceeds by commingling it in a bank account with $25,000 in "clean" funds, the Government would be entitled to forfeit $35,000 from the account under the "proceeds" and "facilitation theories" discussed above. If all $35,000 is still in the account at the time of seizure, the forfeiture action is based solely on section 981(a)(1)(A). However, if the balance in the account has fluctuated below $35,000 at any time between the money laundering offense and the seizure, the Government would rely on section 984 to the extent that it could not directly trace any part of the seized funds to the money laundering offense. Note that section 984(b)(2) makes the statute applicable to "any property involved in the offense," which implicitly includes property forfeitable under any of the theories discussed above, including facilitating property.[132]

Note also that section 984(d) contains an exception that exempts funds held by banks in interbank accounts from application of the fungible property rule. Thus, funds may be forfeited from an interbank account only if they are directly traceable to the money

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[129] Section 984 only applies in money laundering cases. *See* 18 U.S.C. § 984(a).

[130] *See Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993); *see also United States v. $814,254.76 in U.S. Currency*, No. CIV 92-659-TUC-ACM (D. Ariz. Jan. 10, 1994) (unpublished) (section 984 permits forfeiture of amount equal to sting money laundered in violation of section 1956(a)(3)), *rev'd on other grounds*, 51 F.3d 207 (9th Cir. 1995).

[131] 18 U.S.C. § 984(c).

[132] *But see United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542, 559-61 (E.D.N.Y. 1993) (with respect to actual money laundered, section 984 overrules the lowest intermediate balance rule in *Banco Cafetero*, but it does not permit substitution of fungible property for property forfeitable under a facilitation theory; enactment of section 984 abrogates facilitation theory for section 981 cases).

laundering offense, unless the bank itself was complicit in the offense.[133] Finally, note that section 984 does not apply retroactively to money laundering offenses committed before 1992.[134]

VI. Forfeitable Property under 18 U.S.C. § 1955

Section 1955 was enacted as part of the Organized Crime Control Act of 1970 and was based on an enunciated policy of Congress to reach continuous and substantial gambling operations.[135] This statute makes it unlawful to conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business. An "illegal gambling business" is defined as a gambling business which: (1) is in violation of the law of a state or political subdivision in which it is conducted; (2) involves five or more persons as owners or managers; supervisors; and (3) has been in substantially continuous operation for a period in excess of 30 days or has a gross revenue of $2,000 in a single day.[136]

Subsection (c) states that in order to obtain a warrant for arrest, seizure, search, and interception, probable cause that the business received gross revenue in excess of $2,000 in any single day shall be deemed established if five or more persons are involved in the gambling business as specified above, and the business operates for two or more successive days.

Subsection (d) provides that any property, including money, used in violation of section 1955 may be seized and forfeited to the United States. The term "any property" includes real

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[133] *See Marine Midland Bank, N.A. v. United States*, Nos. 93-CIV-0307 (RRP), 93-CIV-0357 RPP, 1994 WL 381536 (S.D.N.Y. July 20, 1994) (unpublished), *renewed motion for return of funds denied*, Nos. 93-CIV-0307 (RPP), 93-CIV-0357, 1995 WL 450483 (S.D.N.Y. July 31, 1995) (unpublished) (foreign bank not entitled to interbank account exception where the Government seeks forfeiture of property directly traceable to the offense, not fungible property); *United States v. $814,254.76 in U.S.Currency*, No. CIV-92-659-TUC-ACM (D. Ariz. Jan. 10, 1994) (unpublished), *rev'd on other grounds*, 51 F.3d 207 (9th Cir. 1995) (foreign bank not entitled to interbank account exception in section 984(d) if employees knew of the illegal scheme); *United States v. All Funds on Deposit . . . in the Name of Perusa, Inc.*, 935 F. Supp. 208 (E.D.N.Y. 1996) (money transmitter not entitled to the interbank account exempt because it is not a "financial institution" for purposes of section 984(d); definition in 18 U.S.C. § 20, not 31 U.S.C. § 5312, applies).

[134] *See United States v. $814,254.76 in U.S. Currency*, 51 F.3d 207 (9th Cir. 1995); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994).

[135] *See* Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (Oct. 15, 1970).

[136] *See* 18 U.S.C. § 1955(b).

property in addition to personal property.[137] Section (d) explicitly incorporates "all provisions of law relating to the seizure, summary, and judicial forfeiture procedures...for violation of the Customs laws. ..." This clause has been held to incorporate an innocent owner provision.[138] The Customs laws, "insofar as applicable and not inconsistent" with section 1955 shall apply to seizures and forfeitures under the statute.

Proceeds of a gambling violation are not forfeitable under the statute. However, the statute is a predicate to the money laundering statute, 18 U.S.C. § 1956; therefore, proceeds may be reached through a forfeiture based upon 18 U.S.C. § 981.

The statute is a general intent crime,[139] and borrows state law for the limited purpose of defining conduct that is prohibited as illegal gambling activities in each individual State. However, the incorporation of state law for other purposes has been rejected.[140]

Subsection (e) exempts bingo, lottery, or similar games of chance if such games are conducted by a tax-exempt organization, as defined by the Internal Revenue Code, and the proceeds of the games do not benefit any shareholder, member, or employee of the tax-exempt organization.

VII. Forfeitable Property under Other Statutes

There are well over 140 distinct forfeiture provisions scattered throughout the United States Code. Most are confined to proceeds and/or the actual property illegally used or obtained. However, some sections are broader. Individual statutes should be consulted

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[137] *See United States v. Taylor*, 13 F.3d 786, 790 (4th Cir. 1994); *United States v. Premises Located at Rt. 13*, 946 F.2d 749, 753 (11th Cir. 1991); *United States v. On Leong Chinese Merchants Ass'n. Bldg.*, 918 F.2d 1289, 1297 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991); *United States v. The South Half of Lot 7 and Lot 8*, 910 F.2d 488 (8th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991); *United States v. The Premises and Real Property at 614 Portland Ave.*, 846 F.2d 166 (2d Cir. 1988).

[138] *See United States v. One Parcel of Real Property Located at 4560 Kingsbury Rd*, 16 F.3d 1222 (6th Cir. 1994) (unpublished) (inferring an innocent owner provision based upon lack of actual or constructive knowledge).

[139] *See United States v. Sims*, 68 F.3d 476 (6th Cir. 1995).

[140] *See United States v. One Single Family Residence, 18755 North Bay Road, Miami*, 13 F.3d 1493, 1498 (11th Cir. 1994) (state exemption from forfeiture based upon state homestead law preempted by federal forfeiture statute); *United States v. Reval*, 493 F.2d 1 (5th Cir. 1974) (state statute of limitations not incorporated); *United States v. Sacco*, 491 F.2d 995, 1003 (9th Cir. 1974) (state procedural rules not incorporated).

whenever forfeiture is sought under them. Two statutes are singled out for special discussion here.

A. Forfeitable Property under 31 U.S.C. § 5317(c) (Monetary Instrument Transportation Reporting Violations)

A separate forfeiture provision, 31 U.S.C. § 5317(c), provides for forfeiture of certain monetary instruments (including domestic and foreign currency), and any interest in property traceable to such an instrument, when there has been noncompliance with the reporting requirements of 31 U.S.C. § 5316, the filing of a report pursuant to that statute that contains a material omission or misstatement of fact, or the structuring of funds for the purpose of evading the reporting requirements in violation of 31 U.S.C. § 5324(b).[141] Section 5316(a), as implemented at 31 C.F.R. § 103.23, requires the filing of a report with the U.S. Customs Service whenever such monetary instruments[142] in an aggregate amount exceeding $10,000 are transported, mailed, or shipped into or out of the United States, or are received in the United States from abroad, at any one time.[143] The obligation to file this report, known as the Report of International Transportation of Currency or Monetary Instruments (CMIR) or Customs Form 4790, is upon "a person or an agent or bailee of the person transporting" the instrument.[144] The obligation is not limited to someone having a legal ownership or possessory interest in the instrument, but extends (with specified exceptions including common carriers) to each person who transports, mails, or ships the instrument, or who causes any of these things to be done.[145]

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[141] The Crime Control Act of 1990 made violations of section 5316 also subject to criminal forfeiture penalties under 18 U.S.C. § 982. See discussion of this provision in chapter 5, part VII, of this manual. The structuring violation was added to sections 5317(c) and 5324 in 1992.

[142] The term "monetary instrument" is restricted by regulation to currency and negotiable instruments that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery. *See* 31 C.F.R. § 103.11(m).

[143] The phrase "at any one time" means one calendar day (or more, if attempting to evade the reporting requirements). 31 C.F.R. § 103.11(a).

[144] The implementing regulations define the term "person" as meaning an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, any other unincorporated organization or group, and all entities cognizable as legal personalities. 31 C.F.R. § 103.11(n).

[145] 31 C.F.R. § 103.23(a), (c). A person physically transporting, mailing, or shipping reportable monetary instruments into or out of the United States at the time of entry into the United States, or, at the time of departure, mailing or shipping them from the United States, is covered by the regulations. 31 C.F.R. § 103.27(b)(1). A recipient of a reportable monetary instrument in the United States is obligated to file the report within 15 days of receipt if the transporter did not. 31 C.F.R. § 103.27(b)(2). *See United States v. Six Thousand Seven Hundred Dollars ($6,700.00) in United States Currency*, 615 F.2d 1, 3 (1st Cir. 1980), which holds that a thief in possession of stolen monetary instruments is not exempt from the reporting requirements.

Forfeiture of the unreported instrument may result when the report is not filed or when it is filed but contains a material omission or misstatement.[146] A report that materially misstates the amount of monetary instruments being transported may result in the forfeiture of *all* monetary instruments involved in the violation.[147] For purposes of the forfeiture provision, the instrument is considered to be "transported" by mail or other messenger or carrier as of the time it is delivered to the U.S. Postal Service or to the other messenger or carrier.

Effective October 28, 1992, 31 U.S.C. § 5317(c) was amended: (1) to cover property involved in violations under then new 31 U.S.C. § 5324(b), which makes it unlawful to fail to file a report required by 31 U.S.C. § 5316; (2) to cause another to fail to file such a report; (3) to file a report that contains a material omission or misstatement of fact; or (4) to structure or assist in structuring any importation or exportation of monetary instruments.[148] However, much of what might be considered "structuring" to evade the CMIR reporting requirement was previously covered by the regulatory definition of "at one time" codified at 31 C.F.R. § 103.11(a).[149]

The most controversial issue to have arisen under section 5317(c) is whether it is necessary to establish that the person had knowledge of the reporting requirement for a

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[146] One district court has limited the nature of the reporting requirement by holding that an individual who was involved in "transporting" currency did not violate the pertinent regulation when he falsely reported that he was carrying $500,000 in monetary instruments and $30,000 in currency, when in fact at least $470,000 was being carried in currency. The court held that 31 C.F.R. § 103.23(a) requires that a person only report the amount transported, not the form of the monetary instruments involved, so a false report of the form of the instruments transported was not actionable. The court said that 31 C.F.R. § 103.23(b) did require such an accurate report from a shipper or recipient of monetary instruments. *See United States v. Four Hundred and Seventy Thousand Dollars ($470,000) in U.S. Currency*, No. 89-2585-CIV-Davis (S.D. Fla. Sept. 10, 1992) (unpublished). The court failed to consider 31 C.F.R. § 103.27(d), which requires that all information requested on a currency reporting form must be provided. Customs Form 4790 requests information on the form of monetary instruments transported. Moreover, the court failed to consider binding precedent in *United States v. Belcher,* 927 F.2d 1182, 1185-88 (11th Cir.), *cert. denied,* 502 U.S. 856 (1991), interpreting the currency transaction reporting requirement under 31 U.S.C. § 5313(a) and 31 C.F.R. § 103.22. *See United States v. $173,081.04 in United States Currency,* 835 F.2d 1141, 1143-44 (5th Cir.), *cert. denied*, 488 U.S. 850 (1988).

[147] *See United States v. $173,081.04 in United States Currency*, 835 F.2d at 1143-44.

[148] Money Laundering Enforcement Improvements Act of 1991, Pub. L. 102-550, § 1525, 106 Stat. 4062, 102d Cong., 2d Sess. (Oct. 28, 1992). *See United States v. O'Banion,* 943 F.2d 1422, 1428-29 (5th Cir. 1991); *United States v. Morales-Vasquez,* 919 F.2d 258, 264 (5th Cir. 1990).

[149] *See United States v. O'Banion*, 943 F.2d at 1428-29; *United States v. Morales-Vasquez*, 919 F.2d at 264.

forfeiture to be valid.[150] The case law is currently split into opposite interpretations of the forfeiture provision: those cases holding that knowledge of the reporting requirement is an element of the forfeiture action under section 5317(c),[151] and those cases to the contrary which accept the Government's position that only knowledge of the transportation of the currency, not the reporting requirement, must be proved.[152]

Section 5317(c) of Title 31 does not specify what forfeiture procedures are to be used, but 19 U.S.C. § 1600 states that forfeiture proceedings for any law enforced by the U.S. Customs Service are to be conducted according to the customs forfeiture statutes, 19 U.S.C. §§ 1602-17.[153] The Supplemental Rules for Certain Admiralty and Maritime Claims also apply to CMIR forfeitures.[154]

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[150] The willfulness requirement espoused in *Ratzlaf v. United States,* 510 U.S. 135 (1994), does not apply to civil forfeiture.

[151] *United States v. One (1) Lot of Twenty-Four Thousand Nine Hundred Dollars ($24,900.00) in U.S. Currency*, 770 F.2d 1530, 1533-36 (11th Cir. 1985); *United States v. Forty-Eight Thousand Five Hundred Ninety-Five Dollars*, 705 F.2d 909, 914 (7th Cir. 1983).

[152] *United States v. Three Hundred Fifty-Nine Thousand Five Hundred Dollars ($359,500.00) in U.S. Currency*, 828 F.2d 930, 932-34 (2d Cir. 1987); *United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980.00) in Canadian Currency*, 804 F.2d 1085, 1090-91 (9th Cir. 1986), *cert. denied*, 481 U.S. 1072 (1987); *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in U.S. Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986); *United States v. $831,160.45 in United States Currency*, 607 F. Supp. 1407, 1414 (N.D. Cal. 1985), *aff'd w/o op.*, 785 F.2d 317 (9th Cir. 1986). Prosecutors should be aware that one controversial area is whether the forfeiture of unreported currency in a currency-transaction offense is excessive under the Eighth Amendment Excessive Fines Clause. *See United States v. Dean,* 80 F.3d 1535 (11th Cir. 1996) (affirming district court's decision to mitigate an agreed-to civil CMIR forfeiture from $140,000 to $5,000 during sentencing of defendant in criminal case); *United States v. Bajakajian,* ___ U.S. ___, 117 S. Ct. 1841 (1997) (petition for certiorari granted) (affirming district court's reduction of forfeited currency from $357,144 to $15,000 and would have disallowed all forfeiture on ground that any forfeiture of currency for CMIR violation would be excessive, but for the fact that defendant had failed to cross-appeal issue of $15,000); chapter 12 of this manual contains the Government's brief and reply to the *Bajakajian* case. *But see United States v. United States Currency in the Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars ($145,139.00),* 18 F.3d 73 (2d Cir.) (currency involved in CMIR violation), *cert. denied sub nom. Etim v. United States*, 513 U.S. 815 (1994). *Cf. United States v. $196,601.00 in United States Currency,* No. 93-5326 (Dec. 10, 1993) (unpublished) (rejecting post-conviction double jeopardy challenge to CMIR civil forfeiture on grounds that the currency was an "instrumentality" of the crime).

[153] The Supplemental Rules for Certain Admiralty and Maritime Claims also apply to CMIR forfeitures. *See United States v. $22,640.00 in United States Currency*, 615 F.2d 356, 358 (5th Cir. 1980).

[154] *See United States v. $22,640.00 in United States Currency,* 615 F.2d at 358.

B. Forfeitable Property under 18 U.S.C. § 2254 (Child Exploitation Violations)

Section 2254 of Title 18 is a civil forfeiture statute that applies to instances of violations of 18 U.S.C. § 2251 (exploitation of children by having them engage in sexually explicit conduct for the purpose of producing visual depiction of that conduct), 18 U.S.C. § 2251A (selling or buying children so they may be used in visual depiction of sexually explicit conduct), and 18 U.S.C. § 2252 (shipping, receiving, or distributing visual depictions of sexually explicit conduct involving children).[155] Forfeiture extends to the visual depiction itself, any property used or intended to be used to commit or promote the commission of any of those violations, and any property constituting or traceable to gross profits or other proceeds obtained from any of those violations. There is an innocent owner defense in the statute.[156] Procedural provisions for this type of civil forfeiture are similar to those for other types of civil forfeiture.[157] The relation back doctrine applies.[158] The venue provision extends venue to any district in which a defendant criminally charged with a violation who owns such property is found, or to any district where a related criminal prosecution is brought.[159]

Use of this forfeiture statute, first enacted to be effective October 18, 1984, then amended effective November 18, 1988,[160] was stayed for some time due to a ruling by a federal district court in Washington, D.C., that its provisions (as well as a portion of the criminal forfeiture provisions in 18 U.S.C. §§ 1467 and 2253) were unconstitutional.[161] The court held that seizures based on probable cause were improper when they involved First Amendment protected materials, so the civil forfeiture procedures were unconstitutional as applied to expressive materials like those covered by this statute, even though there was no requirement that they be legally obscene. This stay was vacated in February 1992, primarily because the

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[155] The criminal forfeiture provision for these violations is contained in 18 U.S.C. § 2253.

[156] 18 U.S.C. §§ 2254(a)(2)-(3).

[157] *See, e.g.*, 18 U.S.C. § 2254(d), which incorporates the Customs laws and procedures by reference. Property custody and disposition provisions are similar to those found in 18 U.S.C. § 981 and 21 U.S.C. § 881.

[158] 18 U.S.C. § 2254(g).

[159] 18 U.S.C. § 2254(i).

[160] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VII, § 7522(c), 102 Stat. 4181 (Nov. 18, 1988).

[161] *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989), *vacated*, 956 F.2d 1178 (D.C. Cir. 1992). The lower court opinion limited the forfeiture remedy to post conviction criminal forfeiture, and then only when a pattern of illegal activity was demonstrated.

court of appeals found that the plaintiff associations—who represented producers and distributors of books, magazines, and films—lacked standing to seek declaratory relief on the constitutionality of section 2254.[162]

Effective November 29, 1990, 18 U.S.C. § 2252 was amended to prohibit possession of three or more books, films, video tapes, periodicals, or other matter depicting children involved in sexually explicit activity, if they were shipped or transported in interstate or foreign commerce, or if they were produced using materials so shipped or transported.[163] In light of the fact that such material is now considered to be contraband *per se*, administrative forfeitures resumed after the district court's opinion was vacated.[164] However, advice by both the Child Exploitation and Obscenity Section and the Asset Forfeiture and Money Laundering Section of the Criminal Division should be sought before any civil judicial action is filed pursuant to this statute. A proposed civil forfeiture complaint and related documents should first be submitted to the Child Exploitation and Obscenity Section for review. This section in turn will refer the complaint and other documents to the Asset Forfeiture and Money Laundering Section for review.

As an alternative or in addition to using section 2254 in child exploitation cases, it may be possible in some situations to file a money laundering forfeiture action pursuant to 18 U.S.C. § 981(a)(1)(A). As a matter of standard procedure, the Asset Forfeiture and Money Laundering Section will review all proposed child exploitation forfeiture actions which seek forfeiture under a money laundering theory and/or civil forfeiture action as well. The Child

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[162] *American Library Ass'n v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992). The court cited an affidavit by Edward S.G. Dennis, former Assistant Attorney General of the Criminal Division, to which were attached instructions sent to United States Attorneys on the subject of pretrial seizures in obscenity-related cases. *Id.* at 1198. The Memorandum, entitled "Pretrial Seizure of Presumptively Protected First Amendment Materials," issued on April 12, 1989, states that pretrial seizures of forfeitable material are barred in RICO cases predicated on obscenity statute violations, in obscenity cases, and in child exploitation cases. The Memorandum then adds that the Department of Justice may still seek restraining orders, or request performance bonds, to ensure that assets are not substantially depleted prior to conviction, and that pretrial seizures of limited copies for evidentiary purposes are still permitted. However, in view of the amendment to the statute effective November 29, 1990, which prohibits possession of three or more books or other items depicting child pornography (if transported in interstate or foreign commerce) (now 18 U.S.C. § 2252(a)(4)), the Child Exploitation and Obscenity Section no longer regards this Memorandum as applicable in child exploitation cases.

[163] 18 U.S.C. § 2252(a)(4)(B), *added by* Crime Control Act of 1990, Pub. L. 101-647, Title III, § 323, 104 Stat. 4818 (Nov. 29, 1990). The amendment also made possession of three or more such materials contraband *per se* if they are possessed in the "special maritime or territorial jurisdiction" of the United States. 18 U.S.C. § 2252(a)(4)(A).

[164] The Supreme Court has recognized that there is a significant constitutional difference between child pornography and obscenity. *See New York v. Ferber*, 458 U.S. 747 (1982) (upholding New York's child pornography statute). Works visually depicting such sexual conduct by children are not, the Court held, First Amendment protected speech. *Id.* at 756-57.

Exploitation and Obscenity Section is responsible for forwarding the pleadings in all such proposed actions to the two components for their review.

Seizure of Property for
Civil Forfeiture

Chapter 2

Seizure of Property for Civil Forfeiture

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Chapter 2

Seizure of Property for Civil Forfeiture

I. Overview of Common Seizure Issues

The process of civil forfeiture begins with the actual or constructive seizure of the allegedly "guilty" property. Actual seizure of tangible personal property frequently occurs prior to the initiation of a formal civil forfeiture action, based on a Fourth Amendment warrant or a recognized exception to the constitutional warrant requirement, such as an extrajudicial assessment of probable cause by the seizing agency.[1] However, all property that is to be civilly forfeited in a judicial proceeding, whether it is real or personal property, tangible or intangible, must be brought within the jurisdiction of the court pursuant to a warrant of arrest *in rem*.[2]

A. Constitutional Requirements

The constitutional rights and safeguards of the Fourth and Fifth Amendments have been held to be applicable to civil forfeitures that are predicated on criminal conduct because such forfeitures are considered quasi-criminal in nature.[3] Therefore, seizures of property for forfeiture must be "reasonable" under the Fourth Amendment.[4] As a general rule, the pre-seizure notice and hearing are not required to satisfy the Fifth Amendment Due Process Clause, as long as a prompt post-seizure hearing is available for those contesting the

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[1] *See* discussion in part III of this chapter, *infra*.

[2] *See* discussion of warrants of arrest *in rem* in part III.B of this chapter, *infra*. In the case of property located abroad, however, property is brought within the court's control through other means, as discussed in chapter 11, part II, of this manual.

[3] *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

[4] *See Boas v. Smith*, 786 F.2d 605, 609 (4th Cir. 1986); *United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982).

property's forfeitability.[5] However, in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Supreme Court held that, absent exigent circumstances, due process requires that real property owners receive notice and an opportunity for an adversarial hearing *before* real property is seized in civil forfeiture cases.[6] To establish exigent circumstances, the Government must prove that its interest in preventing the sale, destruction, or continued unlawful use of the property cannot be protected by means less restrictive than seizure, such as a *lis pendens*, restraining order, or bond.[7] The requirements of *Good* apply to all forms of real property, residential or otherwise.[8] Furthermore, a "seizure" under *Good* is arguably anything that unreasonably interferes with an owner's right to use and enjoyment of the real property.[9]

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[5] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974); *United States v. 141st Street Corp.*, 911 F.2d 870, 874-76 (2d Cir.) ("exigent" or "extraordinary" circumstances were present, so seizure necessary without notice), *cert. denied*, 498 U.S. 1109 (1991); *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 189 (8th Cir. 1989); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1147 (9th Cir. 1989).

[6] Prior to the *Good* decision, the Second Circuit held that, in the absence of exigent circumstances, the Government may not seize a business *ex parte* without a hearing. *See United States v. All Assets of Statewide Autoparts, Inc.*, 971 F.2d 896 (2d Cir. 1992) (Government should first consider less drastic alternatives, such as occupancy agreements, bonds and receiverships). In addition, it has been held that *Good* does not apply to seizures of personal property. *See United States v. Funds in the Amount of $228,390.00*, No. 94-C-6618, 1996 WL 284943 (N.D. Ill. May 23, 1996) (unpublished) (*Good* was expressly confined to the forfeiture of real property); *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995) (*Good* applies only to cases involving real property); *U-Series International Services, Ltd. v. United States*, No. 94-CIV-2733 (MBM), 1995 WL 671567 (S.D.N.Y. Nov. 7, 1995) (unpublished) (*Good* does not extend to seizure of electronic goods from ships). *Compare United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (*Good*, on its face, is limited only to real property; however, there is the possibility that it could extend to property other than realty) *and Organizacion JD Ltda. v. United States Department of Justice*, 18 F.3d 91 (2d Cir.) (no need to decide if *Good* applies to personal property such as electronic fund transfers seized by Government because case clearly involved exigent circumstances), *cert. denied*, 512 U.S. 1207 (1994).

[7] *See United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (Government failed to show that it even considered less restrictive measures to preserve the property for forfeiture, or that less restrictive measures would have been insufficient to preserve the availability of the property for forfeiture); *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (10th Cir. 1994) (to establish exigent circumstances sufficient to dispense with requirement of pre-seizure notice and hearing, Government must establish that less restrictive measures, including *lis pendens* and restraining orders, would not suffice to protect the Government's interest); *United States v. All Right, Title and Interest in Real Property Titled in the Name of Taipei Partners*, 927 F. Supp. 1324 (D. Haw. 1996) (threat of continued drug activity at the property insufficient to establish exigent circumstances); *United States v. All Right, Title and Interest...Kenmore Hotel*, 888 F. Supp 580 (S.D.N.Y. 1995) (exigent circumstances justified seizure of hotel where drug activity was rampant).

[8] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

[9] *Id.* at 54.

The Court in *Good* also explicitly endorsed a method of initiating a civil forfeiture proceeding against real property that does not require actual physical seizure of the property. This method, commonly referred to as "post and walk," involves obtaining a warrant of arrest *in rem* on the defendant real property and serving process on the owner. The Court noted in *Good* that actual seizure of real property is not necessary in order to establish jurisdiction in an *in rem* forfeiture proceeding involving real property.[10] When a civil forfeiture is commenced by using the "post and walk" procedure described above, the actual seizure of the real property occurs upon or after the forfeiture of the property.[11]

In response to the *Good* decision, the Department of Justice issued a policy memorandum addressing real property seizures.[12] Given the holding of *Good* and the Court's endorsement of the method of initiating a real property forfeiture by "posting" the process on the real property and serving process on the owners, the *Good* policy provides that posting real property without taking actual custody and control "is to be preferred and utilized in every case *unless* a balancing of the interests weigh in favor of a pre-seizure hearing or exigent circumstances dictate immediate seizure without a pre-seizure hearing." The *Good* policy at p. 4 states:

> The warrant of arrest *in rem* must contain the word "arrest" on its face so as to meet the requirements of the Admiralty rules and actually establish the jurisdiction of the Court. Use of the words "arrest" and "seize," however, should be avoided in the section of the warrant containing directions to the U.S. [m]arshal. The warrant should: a) include direction to the U.S. [m]arshal to "post" the warrant by affixing it to the structure to effect service of process on the defendant *in rem*; and b) contain a statement that the property is not being seized or otherwise taken into custody and that the U.S. Marshals Service is not responsible for the care or maintenance of the property during the pendency of the forfeiture action.

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[10] *Id.* at 58 (citing *United States v. TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d 984, 986 and n.4 (1st Cir. 1992) which, in turn, cited Rule E(4)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims).

[11] *See United States v. Real Property Located at 165 Adelle Street*, 850 F. Supp. 534 (S.D. Miss. 1994) (government service of notice on real property by posting at the property the summons, Verified Complaint for Forfeiture and a Notice of Forfeiture Action, held sufficient to satisfy due process requirements under *Good*).

[12] *See* Memorandum, entitled "Seizure of Real Property In Civil *In Rem* Proceedings In Light of the Supreme Court's decision in *United States v. James Daniel Good Real Property*," Directive 94-8, issued by the Office of the Deputy Attorney General on November 14, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. I, at p. 1 — 1]. The purpose of this policy is to describe some of the alternatives available to the Government to effect civil forfeitures and still protect real property during the pendency of the forfeiture action. The policy is divided into three sections: (1) posting of real property without taking actual custody and control (continued occupancy); (2) notice and an opportunity for a hearing required before seizure (no exigent circumstances; possible continued occupancy); and (3) seizure upon exigent circumstances without notice and an opportunity for a pre-seizure hearing (possible removal of occupants).

A number of legal issues have arisen as a result of the *Good* decision. For example, several courts have ruled that sanctions are available for seizures of real property made in countervention of the notice and hearing requirements endorsed in *Good*. Some circuits require dismissal with opportunity to refile if the statute of limitations permits, while others require suppression, damages, or return of rents.[13]

B. Illegality of Seizure

The illegality of a seizure is not necessarily fatal to forfeiture of the seized property if the basis for forfeiture can be sustained by independent, untainted evidence.[14] However, suppression of the fruits of an illegal seizure may result in dismissal of a case, or summary judgement for a claimant, where the Government has no other evidence to establish probable

[13] *See, e.g., United States v. Peyton Woods Trail, S.W.*, 66 F.3d 1164 (11th Cir. 1995) (dismissal of complaint); *United States v. One Parcel of Real Property with Building...Known as Lot Six (6)*, 48 F.3d 289 (8th Cir. 1995) (same); *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994) (same); *Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (dismissal not required in historical cases, but dismissal without prejudice is an option in future cases, plus payment of monetary or other relief for loss of use and enjoyment of property); *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (10th Cir. 1994) (return of rents collected); *United States v. One 1989, 23 Foot, Wellcraft Motor Vessel*, 910 F. Supp. 46 (D.P.R. 1995) (same); *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (damages for lost profits); *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (return of property pending resolution of forfeiture case). *See also United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995) (*Good* violation requires suppression of evidence illegally seized, but does not require dismissal of complaint); *United States v. One Parcel Property Located at Lot 85*, 894 F. Supp. 397 (D. Kan. 1995) (*Good* violation does not require dismissal of forfeiture action as long as impermissibly obtained evidence is not used in the forfeiture proceeding); *United States v. Real Property Known as 429 South Main Street*, 906 F. Supp. 1115 (S.D. Ohio 1995) (same). For a discussion of the various cases in which these issues have presented themselves, *see* Memorandum, entitled "Developments in Case Law Applying *James Daniel Good Real Property*, 510 U.S. 43 (1993)," issued by the Asset Forfeiture and Money Laundering Section. A copy of this policy directive can be found on the Asset Forfeiture Bulletin Board, in the "asset forfeiture training outlines" section.

[14] *United States v. $191,910.00 in U.S Currency*, 16 F.3d 1051, 1064-65 (9th Cir. 1994); *United States v. A Parcel of Land...Known as 92 Buena Vista*, 937 F.2d 98 (3d Cir. 1991), *aff'd on other grounds*, 507 U.S. 111 (1993); *United States v. Premises & Real Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1265-66 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990) (per curiam); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1303 (5th Cir. 1983); *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 351-52 (9th Cir. 1974) (per curiam); *United States v. $37,590.00*, 736 F. Supp. 1272, 1280 (S.D.N.Y. 1990); *United States v. 15824 West 143rd Street*, 736 F. Supp. 882, 887 (N.D. Ill. 1990).

cause.[15] In addition, the doctrine of collateral estoppel may impact on seizure issues.[16] Moreover, an illegal seizure may subject the offending law enforcement officers to personal liability for their unlawful actions[17] and may preclude the judicial issuance of a certificate of reasonable cause for the seizure, which serves to immunize the seizing party and the government attorney from lawsuits or judgments based on the forfeiture proceeding.[18] The illegality of seizure issue is different where the illegality involves a *Good* violation (Fifth Amendment due process implications).[19]

C. Delay of Seizure

As a general rule, the ultimate forfeitability of property is not undermined by the fact that seizure does not occur immediately upon the discovery of the facts or conduct giving rise to

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[15] *See United States v. $53,082 in United States Currency*, 985 F.2d 245 (6th Cir. 1993) (dog sniff that was fruit of illegal seizure excluded from forfeiture case; summary judgment for claimant when the Government could not otherwise establish probable cause); *United States v. $639,588 in U.S. Currency*, 955 F.2d 712 (D.C. Cir. 1992) (case dismissed where the Government had no evidence to establish probable cause other than drug residue on seized currency had been seized illegally from claimant's luggage).

[16] *See, e.g., United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (defendant who has litigated Fourth Amendment issues in state criminal case is estopped from re-litigating same in federal forfeiture case).

[17] *See, e.g., Transportes Aeros Mercantiles Panamericanos, S.A. v. Boyatt*, 562 F. Supp. 707, 711 (S.D. Fla. 1983) (involving an illegal seizure of a common carrier).

[18] 28 U.S.C. § 2465 provides, in pertinent part:

> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any act of Congress, ...if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

See United States v. One 1986 Ford Pickup, 56 F.3d 1181 (9th Cir. 1995).

[19] *See* discussion in part I.A of this chapter, *supra*.

the forfeiture.[20] The seizure and the institution of civil forfeiture proceedings must, of course, be undertaken within the applicable five-year statute of limitations.[21]

The Supreme Court has held that noncompliance with the procedural provisions of the Customs laws (19 U.S.C. §§ 1602-04), which require prompt action with regard to seizure for forfeiture, is not grounds for dismissal of a forfeiture action as long as the forfeiture action is filed within the five-year statute of limitations period.[22] The issue of delay is discussed in detail in chapter 4.

II. Pre-seizure Planning

A. Involvement of Government Attorney

Whenever possible, the government attorney should become involved in any potential civil forfeiture case prior to the seizure of the subject property and should maintain close contact with the case agent in the investigative agency throughout the processing of the civil forfeiture action. Prior to seizure, the government attorney can provide valuable assistance to the investigating agents in assessing the advisability and legality of seizure and the existence of the requisite probable cause to seize and proceed against the property.

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[20] *United States v. Walker*, 900 F.2d 1201, 1204 (8th Cir. 1990); *United States v. One 1978 Mercedes Benz*, 711 F.2d at 1302; *United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982); *O'Reilly v. United States*, 486 F.2d 208, 210 (8th Cir.), *cert. denied*, 414 U.S. 1043 (1973); *Sanders v. United States*, 201 F.2d 158, 159 (5th Cir. 1953). *But see United States v. Pappas*, 613 F.2d 324, 330 (1st Cir. 1980) (requiring that a warrantless seizure for forfeiture under 21 U.S.C. § 881(b)(4) be contemporaneous with events supplying probable cause).

[21] The statute of limitations for forfeiture proceedings that incorporate the Customs laws is set forth in 19 U.S.C. § 1621, which provides that actions must be instituted within five years from the time the alleged offense was "discovered." One court has held that the term "discovered" relates to the "discovery" of the criminal offense supporting the forfeiture. *See United States v. Real Property Located at 9167 Rock's [Rocky's] Road*, No. C-94-20004 (PVT), 1995 WL 68440 (N.D. Cal. Feb. 10, 1995) (unpublished) (holding that an offense is "discovered" when the Government discovers or posseses the means to discover an offense). A more logical reading would be that the term "discovered" refers to the "discovery" that the property is subject to forfeiture. After all, this is the moment when the Government's cause of action—probable cause for forfeiture—first accrues. The discovery of the "offense" supporting the forfeiture and the discovery of a property's involvement in that offense may occur on considerably different dates as where the Government discovers only after convicting a defendant of the underlying crime that a particular item of property had been purchased with criminal proceeds. The five-year limitations under 19 U.S.C. § 1621 ought to run from the latter date, not the date from which the criminal offense was committed. Forfeiture proceedings that do not incorporate the Customs laws are governed by the statute of limitations set forth in 28 U.S.C. § 2462, which requires that actions be initiated within five years from the date when the claim first accrued.

[22] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62-65 (1993).

The government attorney should also become involved in pre-seizure property management decisions with the U.S. Marshals Service (or in the Department of the Treasury cases with independent contractor, EG&G Dynatrend). If seizure and forfeiture of the targeted asset will entail significant management responsibilities (including any situation where an ongoing business is involved), the representative of the U.S. Marshals Service, who will be taking custody of the property, must be consulted so that an assessment of the financial impact of the proposed action is made. Notice should be given at least five days in advance of an ordinary seizure and ten days in advance of a complex seizure. Formal pre-seizure planning, whether through actual meetings or telephone calls, should occur prior to the seizure of any real property, business, livestock, large quantity assets posing storage problems, or any unusual asset that might pose a special management or disposition problem. The ultimate decision as how to proceed, however, rests with the United States Attorney.[23]

When the wrongdoer or the underlying conduct giving rise to forfeiture is also the subject of a simultaneous criminal investigation or proceeding, the government attorney responsible for the civil forfeiture action should also consult with the criminal government attorney involved in the case to ensure that their preliminary and litigative activities are coordinated and consistent. However, the civil government attorney, the criminal government attorney, and the case agent should be aware of the possible need to secure an order under

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[23] A full discussion regarding pre-seizure planning is contained in the Memorandum, entitled "Guidelines for Pre-seizure Planning," Directive 94-2, issued by the Department of Justice on February 16, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. I, at p. 1 — 1], and in the U.S. Marshals Service's *Policy and Procedures Manual* (February 1994). This Memorandum updates and supersedes the Department of Justice policy on pre-seizure planning set forth in the Memorandum, entitled "Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets," Directive 86-1, issued by the Office of the Deputy Attorney General on June 25, 1986, and is intended to encourage practices that will minimize or avoid the possibility that the Government will assume unnecessarily difficult or insurmountable problems in the management and disposition of seized assets. Subject areas include, *inter alia*, scope of assets covered; general policy guidelines; net equity values; planning checklists; financial analysis worksheets; use of seizure warrants on real property; alternatives to seizure; management and disposal of seized assets; and dispute resolution. *See also* Memorandum entitled "Implementation of Pre-seizure Planning Policy," Directive 94-2, issued by the Office of the Deputy Attorney General on April 19, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. I, at p. 1 — 1], and Memorandum, entitled "Implementation of Guidelines for Pre-Seizure Planning," Directive 96-3, issued by the Office of the Deputy Attorney General on March 15, 1996 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. I, at p. 1 — 1].

In any pre-seizure planning, the government attorney should consider the effect of *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990), available from the Asset Forfeiture and Money Laundering Section; Memorandum, entitled "Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances," Directive 90-3, issued by the Office of the Deputy Attorney General on June 29, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 8, at p. 8 — 1]; and Memorandum, entitled "Seizure of Forfeitable Property," Directive 90-1, issued by the Office of the Deputy Attorney General on January 11, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. II, at p. 1 — 13].

Fed. R. Crim. P. 6(e)(3)(C)(i) to authorize disclosure of legitimate grand jury materials for use in the context of the civil forfeiture action.[24] On March 14, 1990, the Attorney General approved guidelines on the disclosure and use of matters occurring before the Grand Jury.[25] A disclosure order is unnecessary where the civil forfeiture attorney was legitimately involved in the related Grand Jury investigation and relies upon information obtained through that investigation in deciding to file the civil forfeiture complaint.[26] This does not mean, however, that the civil forfeiture attorney is permitted to "disclose" that information in the forfeiture complaint without obtaining the necessary disclosure order under Rule 6(e). Any such disclosure must be in compliance with Rule 6(e).[27]

B. Decision to Seize

1. Prospects for Success in Forfeiture Proceeding

The primary determination to be made by the government attorney and the investigating agents before seizing property for forfeiture is whether the Government is likely to prevail in the ensuing forfeiture action. To make this determination, they must assure themselves that the Government has sufficient evidence to meet its burden of proof at trial, whether that burden is simply a showing of probable cause for forfeiture or proof of forfeitability by a preponderance of the evidence.

Under forfeiture statutes that incorporate the Customs laws (*e.g.*, 21 U.S.C. § 881), the Government is required only to make an initial showing of probable cause for forfeiture (19 U.S.C. § 1615), which can be accomplished through the use of hearsay evidence. The burden then shifts to the claimant to defend the property or his interest therein by a preponderance of the evidence. Some courts have applied the same burden-shifting standard to statutes that do not incorporate the Customs laws, while others have applied the general

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[24] *See United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983); *United States v. Baggot*, 463 U.S. 476 (1983).

[25] Part III.D of these guidelines discusses disclosure in civil and criminal forfeiture cases.

[26] *United States v. John Doe, Inc., I*, 481 U.S. 102, 108 (1987).

[27] *Id.* at 110-11. However, in FIRREA matters, criminal prosecutors are permitted by statute to disclosure Grand Jury information to civil forfeiture attorneys for their use in commencing a civil FIRREA forfeiture without the need for a Rule 6(e) order, even if the civil attorney was not involved in the Grand Jury investigation. 18 U.S.C. § 3322(a). It is unclear whether the civil FIRREA attorney may then disclose that information in the forfeiture complaint without further court order. *See* discussion in chapter 1, part V.C, of this manual.

standard for civil actions, with the burden resting on the Government to prove its case by a preponderance of admissible evidence.[28]

2. Evaluation of Property

When determining whether to seize property that is subject to forfeiture, the government attorney and the investigating agents should also consider and analyze the type of property involved and its value. This analysis will necessarily be based on a rough assessment when circumstances require immediate seizure, but if the seizure can legitimately be postponed, there should also be a realistic estimate of the condition and value of the property, the extent of the wrongdoer's interest therein, and the potential validity of third-party claims.

Furthermore, whenever possible, the government attorney and the investigating agents should consult with the U.S. Marshals Service, which normally takes custody of the property after seizure, to make arrangements for, and discuss possible problems with the property's storage and preservation during the pendency of the forfeiture proceeding. The Asset Forfeiture and Money Laundering Section should also be contacted when particularly difficult problems of business management, maintenance, and/or eventual disposition are presented.

In FIRREA forfeiture cases, the applicable regulatory agency should be consulted as it may be the entity responsible for managing the property pre-forfeiture.

If it is likely that third parties will be entitled to relief from forfeiture, or if the costs and difficulties of storage, preservation, and disposition will be unduly burdensome, it may be ill-advised or wasteful to seize the property and attempt to forfeit it to the United States. The same is true if the target property has a low monetary value or is in poor condition. In this regard, both the Federal Bureau of Investigation and the Drug Enforcement Administration have established specific policies against seizing or attempting to forfeit property with low monetary value. There are also minimum net equity policies with respect to adoptive seizures and forfeitures.[29]

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[28] The burden of proof issue is discussed in chapter 4, part V.A, of this manual.

[29] The term "adoptive" seizures refers to seizures of property that are made by non-federal law enforcement agencies, after which the property seized is turned over to a federal agency for "adoption" and subsequent forfeiture. *See* Memorandum, entitled "General Adoption Policy and Procedure," Directive 93-1, issued by the Office of the Deputy Attorney General on January 15, 1993 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. I, at p. 6 — 1]. The minimum monetary thresholds indicated in this Memorandum have been superseded. The current thresholds are contained in part III.D of this chapter, *infra*.

3. Law Enforcement Objectives

It should be kept in mind, however, that the purpose of civil forfeiture is not to make a profit for the Government, but to provide a civil remedial device to impose liability on persons who knowingly or consensually acquiesce in the use of their property, or the acquisition of criminally-derived property, in violation of federal law. Therefore, even if the property is worth little, its forfeiture may nonetheless serve legitimate and overriding law enforcement objectives by depriving the wrongdoer, or persons in concert with the wrongdoer, of its use and availability.

Also, it is appropriate to use the forfeiture statutes as a means of recovering property for the benefit of victims, even if the Government will, in the end, retain none of the property.[30]

4. Special Policies for Certain Types of Property

a. Real Property

When real property is the contemplated subject of seizure and forfeiture, it is particularly important for the government attorney to investigate ownership interests in the property and possible problems with its custody, marketability, and eventual disposition. To this end, a thorough title search should be completed before seizure, as well as a careful examination and estimation of the extent of the wrongdoer's equity in the property through the use of such informational sources as recorded mortgages and liens, and state and local tax records.

Furthermore, the U.S. Marshals Service must be consulted, before the seizure of realty, about the means to be used to preserve the property. For instance, decisions must be made as to whether to seal buildings on the property, how to deal with innocent residents (or the wrongdoer's family if it is living on the property), and whether and how to continue commercial operation of business enterprises that may be situated there.[31]

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[30] *See* chapters 9 (Petitions for Remission and Mitigation of Civil and Criminal Forfeiture) and 10 (Disposition of Forfeited Property) of this manual.

[31] More detailed information on the role of the U.S. Marshals Service in pre-seizure planning for forfeiture of real property can be found in the U.S. Marshals Service's *Policy and Procedures Manual* (February 1994) at chapter 2 (section 21.2-3) and chapter 6 (section 21.6-2). Seizures of real property have become quite uncommon in most districts following the Supreme Court's decision in *Good*. Most districts opt, instead, to employ the "post and walk" procedure endorsed by the majority in *Good*.

b. Conveyances

If feasible, title and lien searches should be considered prior to the seizure of certain conveyances for forfeiture. State motor vehicle agencies, the Federal Aviation Administration, and the U.S. Coast Guard keep records of ownership and certain security interests, which can be indispensable to the seizing agency and the government attorney in deciding whether to pursue forfeiture. Moreover, the U.S. Marshals Service should be consulted about the marketability of certain conveyances to be seized and the possible need for a prompt interlocutory sale of the property to prevent deterioration or damage and to avoid excessive storage and maintenance costs.

c. Ongoing Businesses

Special rules or policies also apply where an ongoing business is to be seized. One circuit has held that the owner(s) of the business must be afforded notice and an opportunity for a hearing prior to the seizure when the Government intends to close the business pending forfeiture.[32] Second, in any case where forfeiture of a business is sought under the theory that the business facilitated a money laundering offense, no civil or criminal forfeiture action may be filed without prior consultation with the Asset Forfeiture and Money Laundering Section.[33] Third, as noted above, if the business involved is particularly complex, the Asset Forfeiture and Money Laundering Section should be consulted on pre-seizure planning issues. Finally, seizures of ongoing businesses may involve multiple considerations, such as whether the business can remain viable when involvement in illegal activities or infusion of illegal business' liabilities both existing and foreseeable, and whether the business is in compliance with applicable law.

5. Documentation of Pre-seizure Planning

a. Planning Checklists

The pre-seizure planning process should be documented.[34] There are a variety of checklists used by United States Attorneys' Offices and the Asset Forfeiture and Money Laundering Section for this purpose. These checklists provide a convenient way to collect

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[32] *See United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992).

[33] *See United States Attorneys' Manual* § 9-105.000.

[34] *See* Memorandum, entitled "Guidelines for Pre-seizure Planning," Directive 94-2 , issued by the Office of the Deputy Attorney General on February 16, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. I, at p. 1 — 1].

necessary information for informed pre-seizure planning decisions. More detailed checklists, which include notice to the U.S. Marshals Service of the pre-seizure conference, a pre-seizure planning questionnaire, and the U.S. marshal's recommendation, are used for planning seizures of businesses and residential or commercial real estate.

b. Net Equity Worksheets

A written net equity analysis is necessary to facilitate and to document pre-seizure planning decisions. The investigative agency should ensure that current and accurate information on the ownership of, and encumbrances against, *personal* property targeted for forfeiture is compiled and made available to the U.S. Marshals Service and the United States Attorney. In instances where real property and/or businesses are targeted for seizure, the U.S. Marshals Service will conduct a title search. In some cases the information necessary for analysis of net equity will not be obtainable prior to seizure without compromising the investigation. In such cases, the U.S. Marshals Service should complete the pre-seizure checklist and net equity worksheet within five business days of the seizure.

c. Litigative Files

If the net equity assessment indicates that the aggregate of all liens, mortgages, and management and disposal costs approach or exceed the United States' potential equity, and the government attorney decides to go forward with the seizure and forfeiture, the government attorney should acknowledge the potential loss and document the circumstances that warrant continuing the seizure and forfeiture.

The government attorney is responsible for ensuring that all pre-seizure planning checklists and net equity analyses are complete and placed, at a minimum, in the litigative file. If the net equity analysis shows that the property has marginal or negative net equity, the government attorney must document a plan to protect innocent lienholders and to dispose of the property in a manner that will minimize loss to the Government (*e.g.*, an immediate motion for interlocutory sale or stipulated sale of the property thereby minimizing asset management costs).[35]

[35] Information concerning stipulated and interlocutory sales may be found in *A Guide to Sales of Property Prior to Forfeiture* (revised November 1990), which is available from the Asset Forfeiture and Money Laundering Section.

6. FIRREA Cases

Effective August 1, 1994, the Department of Justice, the Department of the Treasury, and the various federal financial institution regulatory agencies entered into a Memorandum of Understanding governing FIRREA forfeiture cases. The following is a synopsis of the provisions of this Memorandum of Understanding pertaining to the custody of property seized for FIRREA forfeiture.

As used in the Memorandum of Understanding, the term "FIRREA forfeiture" means forfeiture of any property, real or personal, which: (1) is forfeitable under 18 U.S.C. § 981(a)(1)(D) or (2) is forfeitable under 18 U.S.C. § 981(a)(1)(C) as proceeds traceable to a federal financial institution fraud violation when the financial institution affected by the underlying violation has been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity (or, more simply, in "failed institution" cases).[36]

This definition includes forfeiture of any property which is *forfeitable* under 18 U.S.C. § 981(a)(1)(C) or (D), regardless of whether forfeiture is actually sought or obtained under 18 U.S.C. § 981(a)(1)(C) or (D), or under another statute. In administrative forfeitures under other statutory authority—*e.g.,* 18 U.S.C. § 981(a)(1)(A) (forfeiture of property "involved in" money laundering offenses)—the agency conducting the forfeiture will determine whether it is a FIRREA forfeiture. In judicial forfeitures under other statutory authority, that determination will be made by the United States Attorney's Office conducting the forfeiture (or by the Fraud Section of the Criminal Division in its cases.) The Asset Forfeiture and Money Laundering Section of the Criminal Division or the Department of the Treasury's Executive Office for Asset Forfeiture will resolve any challenges to these determinations by other entities.

In FIRREA forfeitures, the pertinent regulatory agency will participate in pre-seizure planning. The United States Attorney's Office, or, where appropriate, the Fraud Section of the Criminal Division, the U.S. Marshals Service, and the seizing agency[37] will consult with the pertinent regulatory agency in determining whether specific assets should be seized for forfeiture. The Memorandum of Understanding designates the U.S. Marshals Service or

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[36] The term "regulatory agency" means a federal financial institution regulatory agency, *i.e.*, the Board of Governors of the Federal Reserve System, the Farm Credit Administration, the Farm Credit System Insurance Corporation, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision.

[37] For the purposes of the Memorandum of Understanding Governing FIRREA Forfeiture Cases, the term "seizing agency(ies)" refers to the Federal Bureau of Investigation and the U.S. Secret Service.

designated Department of the Treasury component to be the primary custodians of assets pending FIRREA forfeiture.

Currency, negotiable instruments, and securities seized for FIRREA forfeiture will be deposited by the U.S. Marshals Service into the Department of Justice Seized Asset Deposit Fund, or by the appropriate Department of the Treasury component into the relevant Treasury seized asset fund. Such assets will be designated as related to a FIRREA forfeiture and will be invested in interest-bearing Treasury securities pending disposition.

In cases involving the forfeiture of property that is forfeitable under the provisions of 18 U.S.C. § 981(a)(1)(C) but not classified as FIRREA forfeiture cases—*e.g.*, in cases involving a financial institution that has *not* been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity—the U.S. Marshals Service or another agency designated for custody will maintain custody of the seized assets pending forfeiture and will be responsible for their disposition after forfeiture to the same extent it would be in forfeitures under other statutes. The net proceeds from such forfeitures will be deposited into the Department of Justice Assets Forfeiture Fund, the Department of the Treasury Forfeiture Fund, or into such other funds as provided by statute or by separate memoranda of understanding between either department and other agencies or departments.[38]

III. Methods of Seizure for Civil Forfeiture

A. Seizure Pursuant to a Fourth Amendment Warrant

1. Situations for Use

Except in cases involving real property, the procurement and execution of a Fourth Amendment warrant authorizing the seizure of property for forfeiture is always the recommended method of seizure when it is possible and reasonable to obtain one without undermining legitimate law enforcement efforts.[39] Securing such a warrant prior to seizure

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[38] *See* chapter 10, part X.D, for a discussion of the disposition of forfeited property in FIRREA cases.

[39] *See* Memorandum, entitled "Seizure of Forfeitable Property," Directive 90-1, issued by the Office of the Deputy Attorney General on January 11, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. II, at p. 1 — 13]; and Memorandum, entitled "Departmental Policy Regarding Seizure of Occupied Real Property," Directive 90-10, issued by the Office of the Deputy Attorney General on October 9, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. III, at p. 1 — 18].

will eliminate, or at least minimize, future problems relating to the constitutionality of the seizure, as long as the executing officials do not overstep the bounds of the authority granted by the warrant.

A Fourth Amendment warrant authorizing entry and confiscation is required, and a pre-seizure hearing may be required, when the seizure of property for forfeiture involves an intrusion into an area where there is a legitimate expectation of privacy, even if the entry is simply for the purpose of conducting an inventory or inspection, and there are no exigent circumstances mandating immediate action to preserve the property.[40]

2. Method of Obtaining

In order to obtain a Fourth Amendment warrant, the government attorney must submit an application for the seizure of particular property, as well as a sworn affidavit setting forth the facts that provide probable cause for forfeiture. The warrant is issued by an impartial magistrate after (1) a review of the application and affidavit and (2) a determination that there are sufficient facts to establish probable cause.[41]

3. Authority for Issuance

As part of the Anti-Drug Abuse Act of 1986, Congress enacted specific statutory provisions authorizing the issuance of Fourth Amendment seizure warrants for property subject to forfeiture under 21 U.S.C. § 881 and 18 U.S.C. § 981.[42] A similar provision is also included in the customs statutes, permitting the procurement of a seizure warrant for any

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[40] *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977) (involving seizure of the contents of a dwelling); *United States v. Premises & Real Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1262-65 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990) (per curiam); *United States v. Ladson*, 774 F.2d 436, 440 (11th Cir. 1985) (requiring seizure warrant authorizing inventory of house seized pursuant to warrant of arrest *in rem*); *United States v. Device Labeled, In Part, "Theramatic,"* 641 F.2d 1289, 1295 (9th Cir. 1981) (involving seizure of property from a private office); *United States v. A Leasehold Interest in Real Property Located at 850 S. Maple*, 743 F. Supp. 505 (E.D. Mich. 1990); *United States v. United States Currency in Amount of $324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989) (inventory authorized pursuant to a seizure warrant does not bar plain view doctrine's application). *Cf. United States v. Articles of Hazardous Substance*, 588 F.2d 39, 43 n.1 (4th Cir. 1978) (upholding seizure of goods from public area of a store pursuant to an extra-judicial admiralty warrant, but specifically noting that no invasion of privacy was involved). *But see United States v. 141st Street Corp.*, 911 F.2d 870, 874-76 (2d Cir. 1990) (holding that no pre-seizure hearing was necessary for seizure of an apartment building where "exigent" or "extraordinary" circumstances were present), *cert. denied*, 498 U.S. 1109 (1991).

[41] *See In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307 (1st Cir. 1988).

[42] 21 U.S.C. § 881(b); 18 U.S.C. § 981(b).

property that is forfeitable under laws enforced by the U.S. Customs Service.[43] If the property sought to be seized does not fall within the purview of any of these statutes, government attorneys may attempt to secure seizure warrants under the general authority of Fed. R. Crim. P. 41 or the All Writs Act.[44]

Both 21 U.S.C. § 881(b) and 18 U.S.C. § 981(b) provide that the procedure for obtaining the seizure warrant is governed by Fed. R. Crim. P. 41.[45] Under Rule 41, a seizure warrant may only be issued for property located within the district in which the court issuing the warrant is located.[46] For that reason, it has generally been assumed that the Government could not use sections 881(b) and 981(b) to obtain a warrant in one district to seize property located in another district.

In 1992, however, Congress enacted 28 U.S.C. § 1355(d), a nationwide service of process statute that relates specifically to civil forfeitures. This statute provides that a court in the district in which criminal acts giving rise to the forfeiture action occurred "may issue and cause to be served in any other district *such process* as may be required to bring before the court the property that is the subject of the forfeiture action."[47] On its face, this statute appears to authorize a court in one district to issue a seizure warrant for property located in another district. It is uncertain, however, how this language is to be reconciled with the restrictive language in Rule 41(a).

One possibility is that Congress, in using the term "process" in section 1355(d), meant to refer only to arrest warrants *in rem* which are issued only after a civil complaint is filed, and it is, therefore, necessary to arrest the property in order to vest the district court with *in rem*

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[43] 19 U.S.C. § 1595.

[44] Rule 41(b) provides for the issuance of seizure warrants for contraband and the fruits or instrumentalities of crime. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850.00) in United States Currency*, 461 U.S. 555, 569 (1983) (implicitly recognizing the applicability of Rule 41 to civil forfeitures). The All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to issue "all writs necessary or appropriate to their respective jurisdictions and agreeable to the usages and principles of law."

[45] Section 881(b) provides that the Government may request the issuance of a seizure warrant "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure." Section 981(b) provides that the Government must obtain a seizure warrant "pursuant to the Federal Rules of Criminal Procedure." The difference in the wording of these two statutes may have some significance for the problem discussed in the text.

[46] Fed. R. Crim. P. 41(a).

[47] *Id.* (emphasis added).

jurisdiction.[48] If that is the case, section 1355(d) would not apply to seizure warrants at all, and it would still be necessary to obtain a seizure warrant in the district in which the property was located, as Rule 41(a) prescribes.

Another possibility is that Congress meant to allow seizure warrants to be used to seize property outside the issuing district in the same manner as arrest warrants *in rem* are used, notwithstanding the restrictive language in Rule 41(a). It is noteworthy that Rule E(3)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which governs the issuance of arrest warrants *in rem*, also contains a limitation restricting the service of the arrest warrant to within the district in which it is issued, yet courts have held that this provision does not apply when Congress grants a court nationwide service of process authority in a forfeiture case.[49] If, by analogy, the same principle were held to apply to seizure warrants, such warrants could be served outside of the issuing district, notwithstanding the territorial limitation in Rule 41(a).

The legislative history of the 1992 amendments to section 1355 is silent on this point, but it is quite clear that Congress' purpose in enacting the new jurisdictional statutes was to allow the Government to consolidate in one district all potential civil *in rem* forfeiture actions arising out of the criminal acts occurring in that district, regardless of where the property subject to forfeiture might be located.[50] Allowing the Government to obtain seizure warrants from a single judge or magistrate and then to serve those warrants in other districts throughout the United States would certainly be consistent with this legislative intent.

Nevertheless, as long as the law remains ambiguous on this point, government attorneys and agents should exercise caution in seizing property in one district pursuant to a seizure warrant issued in another district. As a matter of sound policy, such seizures should be made only in cases where:

(1) exigent circumstances require immediate seizure of the asset, and seizure by warrant of arrest after the filing of an *in rem* complaint or by seizure warrant issued by the

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[48] *See* discussion in part III.B of this chapter, *infra*.

[49] *See United States v. Parcel I, Beginning at a Stake*, 731 F. Supp. 1348, 1352 (S.D. Ill. 1990) (ruling based on implied nationwide service authority in section 881(j)); *United States v. Premises Known as Lots 50 & 51 Etc.*, 681 F. Supp. 309, 313 (E.D.N.C. 1988) (same).

[50] Under these circumstances, use of seizure warrants to seize property outside the issuing district is consistent with the authority of any court with jurisdiction pursuant to section 1355 "to issue and cause to be served in any other district *such process as may be required to bring before the court the property* that is the subject of the forfeiture action." 28 U.S.C. § 1355(d) (emphasis added). *See* 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) (statement of Sen. D'Amato).

district where the asset is located, would result in an insurmountable delay (*e.g.*, the asset is about to be moved or transferred or is so readily movable or transferable that immediate seizure is necessary to preserve its availability for forfeiture); and

(2) the seizure is necessary for the intended filing of an *in rem* judicial forfeiture action in the issuing district.

In the event that an out-of-district seizure is contemplated under this policy, it must be preceded by consultation with the United States Attorney's Office for the district in which the seizure is to occur.[51] Because a claimant is entitled to file a Rule 41(e) motion for the return of seized property in that district, the United States Attorney must be apprised of the action before any such motion is filed to avoid confusion.

B. Seizure Pursuant to a Warrant of Arrest *in rem*

1. Situations for Use

A warrant of arrest *in rem*, which is issued in civil forfeiture proceedings, pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, must be issued for the "arrest" of any asset that is to be forfeited in a civil judicial proceeding. A warrant of arrest *in rem* is necessary for a civil judicial forfeiture notwithstanding the fact that property is already in custody pursuant to an earlier seizure. The method of service is identical whether or not the property is in custody prior to the issuance of the warrant of arrest *in rem*. The warrant of arrest *in rem* is necessary to provide the court with jurisdiction over the property. It is not appropriate to use one when property is to be forfeited administratively,[52] because it is issued only after judicial proceedings have been formally commenced. A Fourth Amendment warrant should be obtained if property is to be seized from an area where an individual has a legitimate expectation of privacy.

2. Method of Obtaining

According to Supplemental Rule C(3), a warrant of arrest *in rem* is issued automatically by the clerk of the court when a complaint for forfeiture is filed that complies with the

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[51] *See* Memorandum, entitled "Guidelines for Pre-seizure Planning," Directive 94-2, issued by the Office of the Deputy Attorney General on February 16, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. I, at p. 1 — 1].

[52] A description of the types of property that may be administratively forfeited under statutes incorporating Customs procedures appears in chapter 3, part II.A, of this manual.

requirements of Supplemental Rule C(2).[53] In plain language, the Supplemental Rules do not require a review of probable cause by an impartial magistrate or a showing of exigent circumstances.[54] However, it should be noted that a few courts have expressed disapproval of the summary method for issuance of warrants of arrest *in rem* authorized by the Supplemental Rules.[55]

3. Authority for Issuance

Warrants of arrest *in rem* are issued pursuant to Supplemental Rule C(3), which is made applicable to civil forfeiture proceedings generally by 28 U.S.C. § 2461(b), to civil forfeitures under the federal drug laws specifically by 21 U.S.C. § 881(b) and to section 981 forfeitures by 18 U.S.C. § 981(b). Where a forfeiture action is filed in a district other than the district where the property is located, the court's authority to have its *in rem* warrant served on the property is based on the nationwide service of process provision of 28 U.S.C. § 1355(d).

C. Seizure Without a Warrant

Seizures without a warrant may be made for purposes of forfeiture when the seizures are incident to an arrest, incident to searches under search warrants, or incident to otherwise

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[53] In pertinent part, Supplemental Rule C(3) provides: "In actions by the United States for forfeitures for federal statutory violations, the clerk, *upon filing of a complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property. ...*" (Emphasis added.) *See United States v. Device Labeled, In Part, "Theramatic,"* 641 F.2d 1289, 1293 (9th Cir. 1981); 7A Moore's Federal Practice ¶ C12, at 682 (2d ed. 1953). Supplemental Rule C(2) provides that the complaint must be filed on oath or solemn affirmation and must describe with "reasonable particularity" the property involved, the place of seizure, and other allegations as required by the statute on which the forfeiture is based.

[54] Supplemental Rule C(3) specifically states that the clerk shall issue the warrant of arrest *in rem* "without requiring a certification of exigent circumstances." Moreover, according to the Notes of the Advisory Committee on Rules, in its commentary on the 1985 Amendment to Supplemental Rule C(3), the "requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations."

[55] *See United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925, 927 (C.D. Cal. 1987); *United States v. 124 East North Avenue*, 651 F. Supp. 1350, 1356 (N.D. Ill. 1987); *United States v. Life Insurance Co. of Virginia Single Premium Whole Life Policy*, 647 F. Supp. 732, 742 (W.D.N.C. 1986); *United States v. One Hundred Twenty-Eight Thousand Thirty-Five Dollars ($128,035.00) in U.S. Currency*, 628 F. Supp. 668, 672 (S.D. Ohio 1986) (holding that Fourth Amendment requires judicial determination of probable cause prior to issuance of warrant of arrest *in rem*); *In re Application of Kingsley*, 614 F. Supp. 219, 223 (D. Mass. 1985) (holding that under 21 U.S.C. § 881 a judicial officer must review the clerk's warrant to ensure compliance with the Fourth Amendment's requirements of probable cause and particularity), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986).

lawful searches.[56] In addition, 21 U.S.C. § 881(b) enumerates other situations in which property may be seized for forfeiture under that statute without a warrant of any kind. Specifically, those situations are:

(1) seizures of property that is subject to prior judgments in favor of the United States in criminal injunction or forfeiture proceedings under the Controlled Substances Act[57];

(2) seizures based on probable cause to believe that the property is dangerous to health or safety[58]; and

(3) seizures based exclusively on probable cause to believe property is subject to civil or criminal forfeiture under the Controlled Substance Act. (Certain restrictions, including the need for the warrantless search to conform with a recognized exception to the warrant requirement and that such searches are justified only in exigent circumstances, have been held applicable under this circumstance.)[59]

Seizures mandated by exigent circumstances—the need to act promptly to prevent removal, destruction, or concealment of forfeitable property—are also permitted by case law.[60]

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[56] 18 U.S.C. § 981(b)(2); 21 U.S.C. § 881(b)(1). *See United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars*, 965 F.2d 868 (10th Cir. 1992) (seizure incident to execution of search warrant).

[57] 21 U.S.C. § 881(b)(2).

[58] 21 U.S.C. § 881(b)(3).

[59] 21 U.S.C. § 881(b)(4). Probable cause *alone* has been held sufficient to justify the seizure of property for forfeiture *unless the seizure involves an invasion of privacy. United States v. Pace*, 898 F.2d 1218, 1242 (7th Cir.), *cert. denied sub nom. Cialoni v. United States*, 497 U.S. 1030 (1990); *United States v. Valdes*, 876 F.2d 1554, 1557 (11th Cir. 1989); *United States v. One 1978 Mercedes-Benz*, 711 F.2d 1297, 1302 (5th Cir. 1983); *United States v. Kemp*, 690 F.2d 397, 401-02 (4th Cir. 1982); *United States v. Bush*, 647 F.2d 357, 369 (3d Cir. 1981). *See also United States v. Bagley*, 772 F.2d 482, 491 (9th Cir. 1985), *cert. denied*, 475 U.S. 1023 (1986); *United States v. Stout*, 434 F.2d 1264, 1267 (10th Cir. 1970). *But see United States v. Daccarett* 6 F.3d 37 (2d Cir. 1993) (to be valid warrantless seizures must fall within one of the recognized exceptions to the Fourth Amendment's warrant requirement); *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992) (warrantless seizures under 21 U.S.C. § 881(b)(4) must conform with a recognized exception to warrant requirement); and *United States v. Pappas*, 613 F.2d 324, 330 (1st Cir. 1980) (holding that a warrantless seizure under 21 U.S.C. § 881(b)(4) can be justified only when exigent circumstances exist and the seizure immediately follows the events giving rise to probable cause). *See also United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868 (10th Cir. 1992) (proceeds and property used to facilitate may be seized incident to execution of search warrant under section 881(b) even if items are not specifically listed in warrant).

[60] *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

Department of Justice policy, however, encourages the use of warrants to effectuate seizures whenever practical.[61]

D. Seizure by Adoption

The United States may also "adopt" seizures that have been made by private parties or non-federal law enforcement agencies.[62] State and local agencies generally request federal adoption when, after making a seizure, they determine that a state forfeiture proceeding is not possible or that a federal forfeiture proceeding would be more advantageous.[63]

Care must be taken in accepting any "adoptive" seizure to ensure that there are no state law impediments to the exercise of federal *in rem* jurisdiction. It is well-established that when state and federal authorities proceed against the same *res*, the authority first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.[64] However, a few federal courts have recently focused on restrictions on transfers imposed by state law. Such restrictions require that a court order be obtained before seized property may be transferred or otherwise disposed of by state authorities. These courts have held that federal authorities never acquire jurisdiction over property seized and transferred in

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[61] *See* notes 52, 53, *supra*.

[62] *See Dodge v. United States*, 272 U.S. 530 (1926); *United States v. One Ford Coupe Automobile*, 272 U.S. 321, 325 (1926) (holding that adoption is permissible even when the original seizing party lacked authority to make the seizure); *United States v. Eighteen Thousand Five Hundred and Five Dollars and Ten Cents ($18,505.10)*, 739 F.2d 354, 356 (8th Cir. 1984); *Kieffer v. United States*, 550 F. Supp. 101, 103 (E.D. Mich. 1982); *United States v. United States Currency Totaling $87,279 & Cashier's Checks Totaling $15,000*, 546 F. Supp. 1120, 1127 (S.D. Ga. 1982). *But see United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991) and *United States v. One 1987 Mercedes Benz Roadster*, 2 F.3d 241 (7th Cir. 1993) (holding that where a state forfeiture action is still pending, no federal forfeiture adoption may occur). *See also United States v. Sixty-Two Thousand Six Hundred Dollars ($62,600.00)*, 899 F. Supp. 378 (N.D. Ill. 1995) (release may come from state executive branch).

[63] *See, e.g., United States v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267 (4th Cir. 1990) (where the court held that the practice of local officials allowing federal officials to adopt seizures made by local law enforcement officials and to federally forfeit the property, with a portion returned to the local law enforcement agency, does not violate federal law even though the practice essentially allows state officials to avoid state law, which requires that all forfeited monies be used to maintain public schools).

[64] *See Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935); *United States v. $79,123.49 in United States Cash & Currency*, 830 F.2d 94, 96-99 (7th Cir. 1987).

violation of such provisions.[65] Other courts adopt a less restrictive view toward the federal exercise of *in rem* jurisdiction over property involved in an adoptive forfeiture.[66] In any event, where an "adoptive" seizure is undertaken and a state law impediment to the exercise of federal *in rem* jurisdiction is discovered after the property has been accepted for federal forfeiture, it should be possible to alleviate the problem simply by yielding to the state authorities until the impediment is eliminated and then "re-seizing" the property for federal forfeiture, if such action is still necessary.[67]

Normally, a federal seizure warrant is not necessary in adoptive cases; however, under some circumstances, it may be advisable for the government attorney to seek the issuance of an anticipatory seizure warrant. An anticipatory seizure warrant may serve to protect the Government's interest during the transition between the conclusion of a state court's *in rem* jurisdiction over a *res* and the initiation of a federal court's *in rem* jurisdiction over the same *res* in a federal forfeiture proceeding. Such warrants protect the federal interest inasmuch as the *res* is effectively transferred to the jurisdiction of the federal court without the necessity of returning it to an alleged wrongdoer under circumstances where that party may abscond with it before the federal court is able to bring the *res* within its jurisdiction.[68]

Requests for federal adoption of a state or local seizure must be made within 30 calendar days of seizure; this requirement may be waived if the circumstances justify a waiver. The

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[65] *See Scarabin v. Drug Enforcement Admin.*, 966 F.2d 989, 993-94 (5th Cir. 1992) (property seized pursuant to a state warrant was transferred to the Drug Enforcement Administration and administratively forfeited; *held* that federal authorities never acquired *in rem* jurisdiction for purposes of administrative forfeiture because state law requires court order for release of property seized under state warrant); *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120, 122-23 (7th Cir. 1991), and *United States v. One 1987 Mercedes Benz Roadster*, 2 F.3d 241, 243 (7th Cir. 1993) (federal court lacked *in rem* jurisdiction over adoptive seizure because property was transferred in violation of state law requiring state authorities to obtain a court order before such a transfer); *United States v. One 1985 Porsche 944*, 775 F. Supp. 1573, 1573-74 (N.D. Ill. 1991). *See also United States v. $2,542 in U.S. Currency*, 754 F. Supp. 378 (D. Vt. 1990) (no *in rem* jurisdiction over property seized by state authorities pursuant to state warrant where claimant filed motion for return of property in state court prosecution against her and thereby initiated a *quasi in rem* cause of action).

[66] *See United States v. Certain Real Property, 556 Hendrick Boulevard*, 986 F.2d 990, 993-95 (6th Cir. 1993) (mere fact that property was seized pursuant to a state search warrant does not mean that a state court has *in rem* jurisdiction over the property unless so provided by state law); *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 44-45 (1st Cir. 1991); *United States v. $135,290 U.S. Currency*, 767 F. Supp. 1459, 1459-60 (N.D. Ill. 1991); *United States v. Certain Real Property Known as Lot B Governor's Road*, 755 F. Supp. 487, 489-90 (D.N.H. 1990).

[67] *See United States v. One 1987 Jeep Wrangler Automobile*, 972 F.2d 472, 477-78 (2d Cir. 1992).

[68] *See United States v. $ 490,920 in United States Currency*, 937 F. Supp. 249 (S.D.N.Y. 1996) (a warrant issued conditioned on compliance with a state court order satisfies the broad constitutional requirement of comity implicated in the context of concurrent *in rem* proceedings).

Department of Justice has established minimum thresholds in property values (*i.e.*, the net equity), which generally must be met before federal agencies may adopt a forfeiture. The minimum thresholds range from $1,000 for cash, $2,500 for vehicles, and $5,000 for aircraft and vessels, to $10,000 or 20 percent of appraised value (whichever is greater) for real property.[69] These thresholds may be higher in some districts where extremely large caseloads require it. These thresholds may be raised or lowered by a United States Attorney for all cases within a district with the concurrence of the Asset Forfeiture and Money Laundering Section, and in individual cases for valid law enforcement reasons without the necessity for such concurrence.

The Federal Government should accept adoptive seizures only when there is a valid, good faith prosecutorial reason for doing so. The fact that forfeiture pursuant to state law may result in less of a monetary benefit for a local police agency is not such a reason. Moreover, before adopting a non-federal seizure and proceeding against the seized property, the government attorney and federal investigative agency must carefully assess the facts and circumstances upon which the original seizure was based.[70] A lack of probable cause will obviously preclude success in the ensuing forfeiture proceeding and could subject the government attorney to liability in a subsequent lawsuit by a claimant successfully contesting the forfeiture.[71]

In order to minimize storage and management costs incurred by the Department of Justice, state and local agencies that present motor vehicles for federal adoptions should

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[69] *See* Memorandum, entitled "General Adoption Policy and Procedure," Directive 93-1, issued by the Office of Deputy Attorney General on January 15, 1993 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. I, at p. 6 — 1]; and Memorandum, entitled "Monetary Thresholds for Adoptive Forfeitures," Directive 97-1, issued by the Asset Forfeiture and Money Laundering Section, Criminal Division on May 17, 1997. To obtain a copy of Directive 97-1, contact the Asset Forfeiture and Money Laundering Section.

[70] *See* Memorandum, entitled "General Adoption Policy and Procedure," Directive 93-1, issued by the Office of the Deputy Attorney General on January 15, 1993 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. I, at p. 6 — 1]. All state and local requests for adoption must be submitted on a special form, which is attached to the Memorandum. Detailed information concerning the seizure and the property must be provided. Seizures presented for adoption must be reviewed for legal and factual sufficiency by an attorney outside the chain of command of the agency's operational officials (*e.g.*, by an attorney in the agency's Office of Chief Counsel or, in the agency's discretion, by an Assistant United States Attorney), unless: (1) the seizure was pursuant to a judicial seizure warrant; (2) an arrest was made in connection with the seizure; or (3) drugs or other contraband were found on the person from whom the property was seized. A judicial determination of probable cause is encouraged prior to the adoption where practical and is required if real property is involved. While adoptions are normally made by an investigative agency, when an agency refuses an adoption request, a United States Attorney may grant it with the authorization of the Asset Forfeiture and Money Laundering Section.

[71] Under 28 U.S.C. § 2465, a judicially-issued certificate of reasonable cause for seizure serves to immunize the seizing party and the government attorney from liability in lawsuits based on the underlying forfeiture proceeding.

generally be asked to serve as substitute custodians of the property pending forfeiture. Any use of such vehicles, including official use, by state and local law enforcement officials or others is prohibited by Department of Justice policy until such time as the forfeiture is completed and the equitable transfer is made.[72]

E. Appraisal of Property

Section 1606 of Title 19 requires the seizing agency to appraise the seized property after seizure, and to do so at its then current domestic value.[73]

F. Special Considerations when Real Property is Seized

When real property is the subject of seizure for forfeiture, the government attorney may need to undertake certain additional tasks that are not generally required when other types of property are seized.[74]

1. *Lis Pendens*

Under 28 U.S.C. § 1964, notice of a proceeding by the United States involving real property must be filed with the local official responsible for filing deeds if such notice is required by state law. Government attorneys should consult state law, local state court rules, and local federal court rules to ascertain the need for filing a notice of *lis pendens* and the proper procedure for doing so.[75]

Filing a notice of *lis pendens* is particularly important when a civil forfeiture action is being filed in a district different than the district where the property is located, as permitted

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[72] *See* Memorandum, entitled "Use of Property Under Seizure," Directive 91-5, issued by the Office of the Deputy Attorney General on April 9, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. II, at p. 5 — 2].

[73] *See also* 21 C.F.R. § 1316.74.

[74] These special considerations would also be applicable when real property is "constructively" seized, *i.e.*, when the Government commences a forfeiture action against real property through "posting" pursuant to the *Good* decision.

[75] *See United States v. Real Property...429 Main Street*, 906 F. Supp. 1155 (S.D. Ohio 1995) (*lis pendens* and occupancy agreement had no impact on claimant's use and enjoyment of his property; therefore, no seizure occurred).

by 28 U.S.C. § 1355(b). The legislative history to the 1992 amendments to that statute reads that the Government must make certain that such notice is filed in this situation.[76]

2. Authority to Enter Private Areas

When real property is "arrested" using the "post and walk" procedure approved in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), (or in the rare instance there the property is "seized") and the government attorney or seizing agency perceives a need to enter private areas to undertake an inventory or inspection, such entry should not be made unless the parties in possession of the premises have consented or a search warrant has been issued to authorize the intrusion.[77] When a seizure warrant is sought from a judicial official for the seizure of real property, the government attorney should include a "writ of entry" provision which will allow for the required inventory or inspection. When real property is "arrested" pursuant to the "post and walk" procedure, a writ of entry may be obtained under the All Writs Act for the limited purpose of making a pre-announced inspection and videotaping of the property. The application for the warrant should state that the owners will be notified well in advance of the date and time of the inspection and signify that the Government is willing to negotiate a different date and time, if reasonable, as to accommodate the interests of the owners. The Department of Justice does not believe that an "intrusion" for this limited purpose—actually an undertaking to safeguard the *in rem* jurisdiction of the district court—rises to the level of a "seizure" under *Good*. Examples of such pleadings can be found on the Asset Forfeiture Bulletin Board, in the "civil forfeiture forms" section, "orders preserving property" topic folder.

G. Special Considerations when Cash, Bank Accounts, or Financial Instruments are Seized

All seized currency that is subject to forfeiture (except cash seized by the U.S. Customs Service) is to be delivered to the U.S. Marshals Service for deposit into the Seized Asset Deposit Fund within 60 days after seizure or ten days after indictment, whichever is earlier. Exceptions to this general policy will be permitted only when retention of the currency at

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[76] *See* 138 Cong. Rec. S17,918 (daily ed. Oct. 8, 1992).

[77] *See United States v. Showalter*, 858 F.2d 149 (3d Cir. 1988) (finding it improper for federal and state law enforcement officers to accompany the deputy marshals to inventory the seized premises unless it was pursuant to standard office procedure); *United States v. Ladson*, 774 F.2d 436, 440 (11th Cir. 1985) (holding that entry into a dwelling to conduct an inventory or inspection is not justified under a warrant of arrest *in rem* for the real property). *But see United States v. United States Currency in Amount of $324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989) (holding that it was both proper and lawful for law enforcement agents to be present for a limited inventory and to make plain view seizures).

issue serves a significant, independent, and tangible evidentiary purpose. Such an exception must be specifically approved by a supervisor within the United States Attorney's Office or, if the cash retained is $5,000 or more, by the Chief of the Asset Forfeiture and Money Laundering Section.[78]

The Department of Justice has issued a detailed Memorandum, which addresses the responsibilities of the investigative agency and U.S. Marshals Service regarding the seizure of financial instruments.[79] The Department of Justice should be consulted on the precise steps to follow when various types of financial instruments are seized. These instruments include: checks, money orders, traveler's checks, cashiers checks, stocks, bonds, airline tickets, and certificates of deposit.

A number of issues arise in the seizure of bank accounts that must be given careful consideration.[80] Chief among these issues is whether to seize all of the funds in the account or simply that portion of the funds traceable to the offense giving rise to forfeiture.[81]

As discussed in chapter 1, a civil forfeiture action is directed at *funds* in a bank account, not at the account itself. A bank account is simply an address or means by which funds owed by a bank to its customer are designated; it is not a thing that is itself subject to forfeiture.[82]

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[78] Requests for exemptions should be sought through the Asset Forfeiture and Money Laundering Section. The Department's policy and procedure is set forth in *The Attorney General's Guidelines on Seized and Forfeited Property*, § VII(I) (July 1990) [*Asset Forfeiture Policy Manual* (1996), Chap. 8, at p. 1 — 1]. *See also* Memorandum, entitled "Seized Cash," Directive 87-1, issued by the Associate Attorney General on March 13, 1987 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. VI, at p. 1 — 38]; and Memorandum, entitled "Delegation of Authority to Approve Exceptions to Cash Management Policy," Directive 91-16, issued by the Office of the Deputy Attorney General on December 13, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. VI, at p. 1 — 39].

[79] *See* Memorandum, entitled "Seizures of Financial Instruments," Directive 90-11, issued by the Office of the Deputy Attorney General on October 15, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. V, at p. 1 — 33].

[80] *See* the discussion in chapter 1, part V.A, of this manual, regarding the money laundering forfeiture theories applicable to bank accounts.

[81] In a criminal case, the entire bank account often may be sought for forfeiture if it belongs to the defendant because the Government is entitled to substitute legitimate assets of the defendant equal to the value of those that were forfeitable but which have become lost to the Government due to the defendant's dissipation, concealment, or alienation of the assets. *See* 18 U.S.C. § 982(b)(1)(A)-(B), 18 U.S.C. § 1963(m), 21 U.S.C. § 853(p).

[82] *United States v. $488,342.85*, 696 F.2d 474, 476-77 (7th Cir. 1992); *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992); *United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542, 562 (E.D.N.Y. 1993).

Therefore, before it can seize the entire contents of a bank account, the Government must have probable cause to believe that all of the funds in the account are subject to forfeiture, either because they are traceable to illegal activity, or because the otherwise untainted funds were used to conceal or disguise illegal activity and, thus, were "involved" in a money laundering offense within the meaning of 18 U.S.C. §§ 981 and 1956. It is not enough to show that the account itself contained tainted funds or was used to commit illegal acts.

As discussed in chapter 1, some theories of forfeiture support more expansive forfeiture than others. For example, in a structuring case, the Government can generally forfeit an entire bank account only if it has probable cause to believe that all of the funds in the account are traceable to structured transactions. In a money laundering case, however, untainted funds are forfeitable in some circumstances. Accordingly, before deciding whether to seize all or part of a bank account, a government attorney should know what the theory of forfeiture will be—*e.g.*, structuring, drug proceeds, property involved in money laundering—and be familiar with the case law interpreting the scope of forfeiture under that theory.[83]

Once the decision is made as to which accounts to seize and how much of their deposits are to be seized, another issue may arise in determining whether or not to take actual possession of the funds in executing the seizure warrant. Obviously, if the Government has filed an *in rem* forfeiture complaint, it will take physical possession of the funds pursuant to the warrant of arrest. However, where the Government obtains a seizure warrant prior to commencement of a judicial forfeiture, it may be desirable to only constructively seize the funds and to allow them to remain in the bank account. This course is particularly desirable where the funds are in an interest bearing account that can continue to draw interest at a higher rate than the Seized Asset Deposit Fund into which seized funds otherwise must be deposited pending their ultimate forfeiture or where future deposits of tainted funds into the account are anticipated.

As a general practice, many districts do not take physical possession of the funds when executing the seizure warrant. Instead, the funds are constructively seized and frozen in place until it is determined whether the forfeiture will be commenced administratively or judicially. At that point, the funds are then removed pursuant to the original seizure warrant for purposes of the administrative forfeiture or, in the case of a judicial forfeiture, arrested and deposited into the Seized Asset Deposit Fund under the *in rem* warrant. The only situation where the funds would be permitted to remain with the financial institution other than during

[83] *See* chapter 1, parts IV and V, of this manual. *See generally* Cassella, Stefan D., "Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases," *New York Law School Law Review* [1994]: 1.

the initial seizure period is when they are invested in a certificate of deposit that provides a penalty for early withdrawal. In this situation, the bank should be notified immediately after seizure that the certificate of deposit has been seized for forfeiture and that it should take whatever steps are necessary to freeze the funds covered by the certificate of deposit to ensure that the certificate will be negotiable by the U.S. Marshals Service after forfeiture.

Clearly, the account holder claimant suffers less prejudice if the funds ultimately are returned by the Government with the same interest the claimant would have earned regardless of the seizure. Constructive seizure of the funds also makes it faster and easier to release the funds to the account holder in the event that the account holder subsequently satisfies the Government of his innocence. The decision to constructively seize funds assumes that the Government has no reason to believe that the bank holding the account is involved in any illegal activity.

Even with innocent banks, the Government must still take steps to ensure that the bank does not improperly take offsets against the constructively seized funds while such funds were under seizure. At a minimum, government attorneys who intend to constructively seize accounts should take precautions to notify the bank in writing that until further order of the court: offsets are not to be taken against the seized funds; the seized funds are not to be diminished for any reason; the bank is to continue crediting the seized funds with all interest to which the account holder was otherwise entitled prior to seizure; and the bank is to report all such increases to the seized funds forthwith to the Government.[84]

H. Special Considerations when an Ongoing Business is Seized

As noted in the earlier discussion of pre-seizure planning, special considerations also apply where an ongoing business is to be seized. One circuit has held that the owner(s) of the business must be afforded notice and an opportunity for hearing prior to the seizure when the Government intends to close the business pending forfeiture.[85] Moreover, in any case where forfeiture of a business is sought under the theory that the business facilitated a money laundering offense, no civil or criminal forfeiture action may be filed without prior consultation with the Asset Forfeiture and Money Laundering Section.[86]

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[84] For more information on the seizure and management of cash and other financial instruments, government attorneys should consult the U.S. Marshals Service's *Policy and Procedures Manual* (February 1994).

[85] *See United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 900-05 (2d Cir. 1992).

[86] *See United States Attorneys' Manual* § 9-105.000.

I. Use of Property Under Seizure

There are certain restrictions applicable to the use of property under seizure absent a final decree or court order of forfeiture. The general policies include: the use of seized property by Department of Justice personnel; the use of seized property where custody is retained by the state or local seizing agency (in adoption cases); and the use of seized property by occupants (pursuant to an occupancy agreement), along with a model occupancy agreement.[87] It should be noted that the use of occupancy agreements *may* trigger *Good* requirements.[88]

J. Interference with Seizures

Government attorneys should be aware that it is illegal for anyone to interfere with the seizure of forfeitable property,[89] to destroy or remove property to avoid its seizure,[90] or to forcibly dispossess the Government of seized property.[91] Each of these violations is a felony offense with maximum sentences ranging from two to ten years imprisonment. Section 7214 of Title 26, which prohibits certain activities by Internal Revenue Service agents, has also been held to make it illegal for an Internal Revenue Service agent to counsel a friend to transfer property to avoid forfeiture and to help effect that transfer.[92]

K. Administrative Seizures and Criminal Forfeitures

When property that is subject to administrative forfeiture is included in the forfeiture count of an indictment (or in a complaint for civil forfeiture) the seizing agency may discontinue the administrative forfeiture of the property in order to avoid potentially conflicting concurrent judicial and administrative forfeiture proceedings.

Until legislation is obtained to resolve the issue of authority for the continued restraint of property whose administrative forfeiture has been stopped in favor of criminal forfeiture,

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[87] Memorandum, entitled "Use of Property Under Seizure," Directive 91-5, issued by the Office of the Deputy Attorney General on April 9, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. II, at p. 5 — 2].

[88] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 54 (1993).

[89] 18 U.S.C. § 2231.

[90] 18 U.S.C. § 2232.

[91] 18 U.S.C. § 2233.

[92] *United States v. Rice*, 961 F.2d 211 (4th Cir. 1992).

when a seizing agency discontinues its administrative proceeding to make way for a criminal forfeiture, the Government may no longer have the authority to retain the property unless process authorizing the restraint or seizure of the property is obtained under the governing criminal forfeiture statute.[93] Alternatively, the Government could obtain a warrant of arrest *in rem* against the property by filing a parallel civil judicial forfeiture action (even though the property has been named in a forfeiture count in an indictment); or the authority for continued government custody might be that the property was seized as evidence of a crime.

IV. Payment of Property Taxes on Seized Property

A. Federal Government Liability for Payment

The Office of Legal Counsel initially concluded that the Federal Government's immunity from the payment of state and local taxes precluded payment of property taxes for the period of time after the date of the offense which gave rise to the forfeiture.[94] According to the Office of Legal Counsel, under the relation back doctrine, the Government's title to forfeited property, although not perfected until an order of forfeiture was entered, arose on the date of the offense giving rise to the forfeiture. Because the interest of the United States arose on the date of the offense, the Government's tax immunity "mandates that no state and local tax obligations may attach to the property after that date absent congressional authorization."[95] Since Congress had provided no such authorization, the Department of Justice had no authority to direct payment of such taxes.

Subsequently, in light of the Supreme Court's decision in *United States v. A Parcel of Land Known as 92 Buena Vista Ave.*, 507 U.S. 111 (1993), the Office of Legal Counsel reconsidered its earlier opinion and concluded that the Federal Government must pay state and local taxes on properties civilly forfeited where the taxing authority established its innocent owner status prior to the entry of a final order of forfeiture. Thus, in civil forfeiture

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[93] *See United States v. Schmitz*, No. 93-CR-186, 153 F.R.D. 136 (E.D. Wis. Feb. 18, 1994).

[94] *See* Memorandum, entitled "Liability of the United States for State and Local Taxes on Seized and Forfeited Property," Directive 91-13, issued by the Office of the Deputy Attorney General on July 9, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. VI, at p. 4 — 1].

[95] *Id.*

cases, the United States was obligated to pay standard *ad valorem* property taxes up to the entry of an order of forfeiture.[96]

B. Handling of Property Tax Payments

The Department of Justice has obtained legislative authority to pay property taxes accruing on seized property. On September 13, 1994, Congress enacted 28 U.S.C. § 524(c)(1)(H) which statutorily authorizes the payment of state and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order.[97]

[96] *See id.* (with accompanying Memorandum, issued by the Office of Legal Counsel on October 18, 1993); *see* Memorandum, entitled "State and Local Real Property Taxes in Criminal Forfeiture Cases," Directive 94-4, issued by the Office of the Deputy Attorney General on April 29, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. I, at p. 4 — 2].

[97] For information regarding the Department's policy concerning the payment of interest and penalties on state and local real property taxes, *see* Memorandum, entitled "Interest and Penalties on Taxes on Forfeited Realty," Directive 94-9, issued by the Office of the Deputy Attorney General on November 23, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. I, at p. 4 — 3].

Chapter 3

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Chapter 3

Non-judicial Forfeiture Proceedings

I. Summary Forfeiture

Summary forfeiture is the process by which property is seized and forfeited without any notice or hearing. Only contraband *per se*—that is, property, the possession or production of which, without more, is illegal—may be summarily forfeited.[1] Contraband *per se* now includes dangerous, toxic or hazardous raw materials or products, and their containers.[2]

II. Administrative Forfeiture

Administrative forfeiture is the process by which property may be forfeited to the United States by the investigative agency that seized it, without judicial involvement. Unless the applicable statute and procedures specifically permit administrative forfeiture, property may only be forfeited through formal court action. The statutory language authorizing administrative forfeitures is found in the Customs laws (19 U.S.C. §§ 1602-21); therefore, administrative forfeiture generally does not exist under forfeiture statutes that do not incorporate the provisions of the Customs laws.[3]

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[1] *See, e.g.*, 21 U.S.C. § 881(f), (g)(1); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965); *accord United States v. Eighty-Eight Thousand Five Hundred Dollars in U.S. Currency*, 671 F.2d 293, 297 n.1 (8th Cir. 1982).

[2] 21 U.S.C. § 881(f).

[3] *But see* 26 U.S.C. § 7325 (which allows administrative forfeiture under Internal Revenue Code procedures under similar circumstances to those set forth in the Customs laws).

A. Property Subject to Administrative Forfeiture

Under 19 U.S.C. § 1607, property may be forfeited administratively by the seizing agency if:

(1) it does not exceed $500,000 in value;

(2) its importation is illegal (regardless of its value);

(3) it is a conveyance that has been used to import, export, transport or store controlled substances (regardless of its value)[4]; or

(4) it is a monetary instrument within the meaning of 31 U.S.C. § 5312(a)(3) (regardless of its value).[5]

The Customs laws specifically authorize the administrative forfeiture of property that does not exceed $500,000 in value.[6] Such property includes conveyances, merchandise and baggage. However, no value limit exists on the administrative forfeiture of illegally imported merchandise; conveyances used to import, export, transport, or store any controlled substance; and any monetary instrument under 31 U.S.C. § 5312(a)(3).[7] Property falling into these categories may be administratively forfeited regardless of value.[8]

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[4] Special procedures, in addition to those discussed in the text, apply to administrative forfeitures of conveyances seized for drug violations involving "personal use quantities" of a controlled substance. *See* 19 C.F.R. §§ 171.51-171.55; 21 C.F.R. §§ 1316.90-1316.99.

[5] The amendments to Department of Justice regulations implementing 19 U.S.C. § 1607 (Immigration and Naturalization Service, 8 C.F.R. Part 274; Drug Enforcement Administration, 21 C.F.R. Part 1316; Federal Bureau of Investigation, 28 C.F.R. Part 8) became effective March 1, 1991. Note that seized bank accounts are not "monetary instruments"; therefore, may not be administratively forfeited pursuant to 19 U.S.C. § 1607(a)(4). However, bank accounts of a value of $500,000 or less may be administratively forfeited pursuant to 19 U.S.C. § 1607(a)(1). *See* Memorandum, entitled "Opinion on Administrative Forfeiture of Bank Accounts," Directive 92-3, issued by the Office of the Deputy Attorney General on February 28, 1992 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. I, at p. 2 — 2].

[6] 19 U.S.C. § 1607(a)(1).

[7] 19 U.S.C. § 1607(a)(2)-(4).

[8] *But see* 27 C.F.R. § 72.22(a) and 50 C.F.R. § 12.23(a) (limiting administrative forfeitures by the Bureau of Alcohol, Tobacco, and Firearms and the U.S. Fish and Wildlife Service to personal property and conveyances having a value of $100,000 or less).

Department of Justice policy provides that all real property forfeitures must be undertaken judicially, regardless of the property's value.[9] Department policy also requires that when multiple items of property are seized and their aggregate appraised value exceeds $500,000, they are all to be forfeited in a single judicial proceeding (rather than in separate administrative actions) if they are subject to forfeiture under the same statutory authority and on the same factual basis, and if an individual has an ownership interest in the items seized. Otherwise, all properties subject to administrative forfeiture must be forfeited administratively (unless prosecutive considerations dictate that criminal forfeiture of the property occur as part of a criminal prosecution).[10]

B. Decision to Proceed or Continue

After determining that seized property may be administratively forfeited, the seizing agency must still determine whether proceeding against the property is feasible and advisable.

1. Possibility of Deferral to State Proceedings

Section 1616a of Title 19 allows seizing agencies to forego or discontinue federal forfeiture proceedings and transfer the property to state or local authorities for forfeiture under state law. If federal administrative proceedings have been commenced prior to such a deferral, notice of the discontinuance must be given to all known interested parties.[11]

When deciding whether to transfer or retain the seized property, the seizing agency is required to consider the status of the Assets Forfeiture Fund and, when appropriate, to consult with the U.S. Marshals Service.[12] Other considerations should include the potential benefits of retaining the property for official use by the Department of Justice (which would counsel against deferral to state action) and the likelihood that state or local law enforcement agencies

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[9] *See* Memorandum, entitled "Increased Administrative Forfeiture Caps," Directive 91-2, issued by the Office of the Deputy Attorney General on February 26, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. I, at p. 2 — 1].

[10] *Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. I, at p. 2 — 1. The Asset Forfeiture and Money Laundering Section may also authorize judicial forfeitures of properties subject to administrative forfeiture in "exceptional circumstances."

[11] 19 U.S.C. § 1616a(b)(2). A decision to discontinue federal administrative forfeiture proceedings in favor of state action must be approved by the head of the investigative agency. *Attorney General's Guidelines on Seized and Forfeited Property* [hereinafter *Attorney General's Guidelines*] (July 1990) § IX.B.1.

[12] *Attorney General's Guidelines* § IX.B.2.

would eventually be granted all or a substantial share of the property after the federal forfeiture is completed (which would counsel for deferral to state action).[13]

2. Possibility of Quick Release of Property

The seizing agency may also abandon the forfeiture through a quick release of the property. Property should be quickly released only to a person with an ownership interest in the property having no knowledge or reason to know of the property's illegal use or the wrongdoer's criminal record or reputation.[14]

C. Interlocutory Sale

Pursuant to 19 U.S.C. § 1612 and Rule E(9)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims, if the seized property is liable to perish, waste or greatly depreciate in value during the pendency of the administrative proceeding, or if the expenses of keeping it are excessive, the seizing agency may sell it and treat the proceeds of the sale as a substitute for the original property in the ensuing forfeiture. Before such a sale is undertaken, however, specific consideration should be given to any pending or potential requests for equitable sharing of the subject property with state or local law enforcement agencies.[15]

In general, the procedure for accomplishing an interlocutory sale is to obtain a court order directing the U.S. Marshals Service, as custodian of the property, to conduct the sale and to deposit the proceeds into the Seized Asset Deposit Fund. Situations where the Government would move for such an order are where all parties agree to the sale (a "stipulated sale") or where the parties disagree but the sale is justified because the property is "liable to perish or waste," it is likely "to be greatly reduced in value by keeping" or "the expense of keeping the property is disproportionate to [its] value" (an "interlocutory sale"). If the court orders the sale, the procedure for selling the property is governed by 28 U.S.C. §§ 2001 and 2002.

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[13] *See* 21 U.S.C. § 881(e); 19 U.S.C. § 1616a; *Attorney General's Guidelines* §§ V.A.-D.

[14] *See* 28 C.F.R. § 0.101(c), 21 C.F.R. § 1316.73, and 28 C.F.R. § 8.6, which pertain to the quick release of property by various seizing agencies.

[15] Information concerning stipulated and interlocutory sales may be found in *A Guide to Sales of Property Prior to Forfeiture* (revised November 1990), available from the Asset Forfeiture and Money Laundering Section.

Courts are particularly sensitive about authorizing the interlocutory sale of a residence where the claimant opposes the sale, and the issues relating to the forfeitability of the property have necessarily not yet been determined.[16] In such cases, Government attorneys should take steps to ensure that the property owner is given notice of the Government's intent to sell the property as early as possible, and that the sale over the objection of the owner is well-justified by the economic circumstances.

D. Initiation of Administrative Forfeiture Proceeding

1. Requirement of Prompt Action

Once the decision has been made to proceed with administrative forfeiture, the seizing agency should pursue the matter promptly. An unjustified delay by the seizing agency may later contribute to a finding that a claimant has been denied his or her due process right to a hearing at a meaningful time on the forfeitability of the seized property.[17] Department policy requires that written notice be provided not later than 60 days from the date of seizure, though waivers may be granted in exceptional circumstances by a previously designated seizing agency official. The fact of, and reasons for, the waiver must be documented in the case file.[18]

The Department of Justice is sensitive to the complaint that the forfeiture statutes permit the Government to seize property and then delay the initiation of forfeiture proceedings indefinitely, thus, denying claimants the opportunity to recover their property. This criticism is not well-founded; a claimant can file a claim and cost bond and, thus, force the Government to initiate civil judicial or criminal forfeiture proceedings at any time after the seizure of the property. It is not necessary for the claimant to await the publication of notice.[19] Nevertheless, at the request of a claimant or his counsel, the Asset Forfeiture and Money Laundering Section will conduct an inquiry as to the reasons why the 60-day notice period was not observed and, depending on the findings, may direct that the property be returned and any pending forfeiture action dismissed.

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[16] *See United States v. Esposito*, 970 F.2d 1156, 1160-61 (2d Cir. 1992). *See also United States v. Edmond*, 780 F. Supp. 42, 43-44 (D.D.C. 1992).

[17] *See United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162, 165 (5th Cir. 1983). *Cf. Mercado v. U.S. Customs Service*, 873 F.2d 641, 646 (2d Cir. 1989).

[18] *Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. II, at p. 2 — 4.

[19] *United States v. $52,800 in U.S. Currency*, 33 F.3d 1337 (11th Cir. 1994).

2. Rule 41(e) Motion for the Return of Seized Property

Rule 41(e) of the Federal Rules of Criminal Procedure provides that a person "aggrieved...by the deprivation of property" may move the district court for the return of the property "on the ground that such person is entitled to lawful possession of the property." In cases where the Government delays the initiation of forfeiture proceedings following a seizure, claimants may file a Rule 41(e) motion as a device to force the Government to initiate forfeiture proceedings.

The district court, however, only has jurisdiction over a Rule 41(e) motion if the claimant has no adequate remedy at law. Accordingly, once an administrative forfeiture action is commenced by the publication of notice, the Rule 41(e) motion should be dismissed because the claimant has the remedy of filing a claim and cost bond and can litigate his right to the lawful possession of the property in a judicial forfeiture proceeding.[20]

3. Notice of Seizure and Intention to Forfeit

a. Publication

Notice of the seizure of property and the intent to forfeit must be published once a week for three successive weeks in a newspaper of general circulation in the judicial district in which the proceeding is brought.[21]

b. Personal Notice

Personal notice of the pending forfeiture and applicable procedures must also be given to all persons, including lienholders, whose identities and addresses are reasonably ascertainable

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[20] *See, e.g., United States v. Fitzen*, 80 F.3d 387 (9th Cir. 1996) ("It is well-settled that the Federal Government may defeat a Rule 41(e) motion by demonstrating that the property is subject to federal forfeiture."); *United States v. Elias*, 921 F.2d 870 (9th Cir. 1990); *United States v. Price*, 914 F.2d 1507, 1508 (D.C. Cir. 1990) (*per curiam*); *United States v. An Antique Platter of Gold*, No. 95-MAG-2167 (NRB), 1995 WL 758762 (S.D.N.Y. Dec. 22, 1995) (unpublished) (a court should not entertain Rule 41(e) motion if the movant has an available statutory or civil remedy to contest ownership of the property and the lawfulness of the seizure); *but see Muhammed v. United States*, 92 F.3d 68 (8th Cir. 1996) (administrative forfeiture proceeding does not oust district court of jurisdiction over pending Rule 41(e) motion where a DEA notice did not adequately inform claimant that he would have to contest administrative forfeiture by filing claim and cost bond instead of relying solely on Rule 41(e) motion).

[21] 19 U.S.C. § 1607(a); 8 C.F.R. §§ 274.8, 274.9; 19 C.F.R. § 162.45; 21 C.F.R. § 1316.75; 27 C.F.R. § 72.22(A)(9); 28 C.F.R. § 8.8(a); 50 C.F.R. § 12.23(b)(1)(A). Notice in *USA Today* has been held adequate. *United States v. Castro*, 78 F.3d 453, 456 (9th Cir. 1996); *Sarit v. U.S. Drug Enforcement Admin.*, 987 F.2d 10, 13-14 (1st Cir. 1993).

and whose rights and interests in the subject property will or could be affected by the forfeiture.[22] These include: all possessors, owners, and lienholders.

Notice must be "reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections."[23] In the mid-1990s, there have been an enormous number of cases discussing the adequacy of the Government's attempts to provide notice in a variety of situations. In particular, the issue of notice of forfeitures to incarcerated people has proven troublesome.

The notice standard generally does not require actual notice, but only reasonable efforts to notify a potential claimant of the pending proceedings, given the Government's knowledge of plaintiff's identity and whereabouts. Several courts have recently emphasized that when the Government sends notice by mail, the inquiry is not simply whether the Government sent the notice, but whether it acted reasonably under all circumstances in relying on the mail as a means to apprise an interested party of the pending action.[24]

Courts have found notice to be deficient if the Government knew or should have known that the notice would not reach its intended recipient.[25] In particular, courts have held agencies to closer scrutiny where the intended recipient is known by the agency to be in government custody. For example, in *Torres v. $36,256.80 in U.S. Currency*, 25 F.3d 1154, 1160-61 (2d Cir. 1994), the Drug Enforcement Administration sent a potential claimant notice at his home and at his last known location of incarceration. Both letters were returned to the Drug Enforcement Administration, and the letter to the prison was stamped "Not at Chester County Prison."[26] The court said that this notice did not satisfy due process, because this was not a case where the Drug Enforcement Administration "made the reasonable assumption that first class mail had reached its destination; here, the agency knew that both

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[22] *Vance v. United States*, 676 F.2d 183, 186 (5th Cir. 1982). *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). *Cf. $89,000, Plus or Minus, in U.S. Currency and Checks v. Ricon*, 691 F. Supp. 1411, 1414-15 (N.D. Ga. 1988) (lack of notice not fatal on equitable ground that claimant did not have clean hands).

[23] *See, e.g., Mulane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Torres v. $36,256.80 in U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994).

[24] *Armendariz-Mata v. U.S. Dept. of Justice*, 82 F.3d 679, 683 (5th Cir. 1996).

[25] *Demma v. United States*, No. 95-C-27, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (unpublished) (citing cases).

[26] *Torres v. $36,256.80 in U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994).

certified letters were returned unclaimed."[27] The court also said that while the Drug Enforcement Administration did not know of any other location of incarceration for the potential claimant, this situation was "easily curable" because "a simple call to the Bureau of Prisons would have sufficed to reveal where [he] was serving the sentence."[28]

Other courts have reached similar conclusions, and have instructed that due process "explicitly requires actual notice" to either the prospective claimant or his counsel when the known property owner is incarcerated pursuant to government actions.[29] Courts also have

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[27] *Id.*

[28] *Id.* In *Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972), the Supreme Court held that notice of forfeiture proceedings against a car sent to the registered owner's address as listed in state records did not satisfy due process when the State knew that the owner was in jail at the time the notice was sent, but nonetheless did not send the owner notice at jail. *See also United States v. Woodall*, 12 F.3d 791, 794 (8th Cir. 1993) ("When the [G]overnment has actual knowledge of an interested party's whereabouts at the time forfeiture is commenced, failure to direct the statutorily required personal notice to that address cannot be considered compliance with...minimum contacts."); *Williams v. United States*, 51 F.3d 732, 735 (7th Cir. 1995) (describing Government's conduct as "egregious" where Government sent notice to claimant's home address while knowing that claimant was in jail and had been contacted by Drug Enforcement Administration agents in jail, but denying relief because claimant waited over two years to seek return of property); *Torres v. $36,256.80 in U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994) ("a simple call to the Bureau of Prisons would have sufficed to reveal where [claimant] was serving his sentence. The DEA's assertion that no other location of incarceration for Mr. Torres was known for DEA may have been true, but this was easily curable").

[29] *See, e.g.*, *Armendariz-Mata v. U.S. Department of Justice*, 82 F.3d 679, 683 (5th Cir. 1996) (Drug Enforcement Administration unreasonably ignored information about failure of potential claimant to receive notice when that party is known to be in jail and can be easily located; a letter returned unclaimed from such a prisoner is not enough); *Barrera-Montenegro v. United States*, 74 F.3d 657, 660 (5th Cir. 1996) (when Drug Enforcement Administration possesses information that would enable it to effect actual notice on an interested party, Drug Enforcement Administration cannot ignore such information and rely instead on notification by publication); *see also Aero-Medical, Inc. v. United States*, 23 F.3d 328, 331 (10th Cir. 1994) (notice was unreasonable when the Drug Enforcement Administration knew address to which notice sent was invalid, and made no attempt to notify plaintiff's agent, whose identity was in Drug Enforcement Administration's possession); *United States v. Woodall*, 12 F.3d 791, 794 (8th Cir. 1993) (notice sent to incorrect address was unreasonable when the Drug Enforcement Administration had actual knowledge of party's whereabouts); *Martinez-Lorenzo v. Wellington*, 911 F. Supp. 383, 387 (W.D. Mo. 1995) (same). *But see Pou v. U.S. Drug Enforcement Admin.*, 923 F. Supp. 573, 577-78 (S.D.N.Y. 1996) (court found no due process violation where Drug Enforcement Administration's initial notice efforts were not successful, but the Drug Enforcement Administration sent another notice to a revised home address, and the receipt card was returned signed with plaintiff's name).

approved the procedure of providing notice to a party's counsel.[30] Finally, actual notice satisfies due process, regardless of whether some deficiency undermined formal notice.[31]

c. Contents of Notice

According to federal regulation, the notice of administrative forfeiture must include a description of the property seized; the time, place and cause of the seizure; the procedure and time for filing the claim; and the cost bond required for contesting the forfeiture in court.[32] In order to ensure that notice is constitutionally sufficient, the seizing agency also should provide a description of the penalty for a claimant's failure to take timely action[33] and the procedures for filing petitions for remission or mitigation.[34] The notice should also state that a claimant can make an application to proceed *in forma pauperis*, and provide an explanation of the procedure for such an application.

E. Claim and Cost Bond

1. Procedure

In order to contest the proposed administrative forfeiture, a person asserting an interest in the subject property must file a claim and a cost bond with the seizing agency within 20 days of the date of the first publication of notice.[35] The cost bond must be in the amount of $5,000 or 10 percent of the value of the property, whichever is lower, but not less than

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[30] *See, e.g., Bye v. United States*, No. 94-CIV-5067 (DLC), 1996 WL 185723 (S.D.N.Y. Apr. 18, 1996) (notice to an attorney was sufficient, because parties are deemed to have notice of all facts and notices "of which can be charged upon the attorney"), *aff'd*, 105 F.3d 856 (2d Cir. 1997) (unpublished decision) (Table); *Martinez-Lorenzo v. Wellington*, 911 F. Supp. 383, 387-88 (W.D. Mo. 1995) (same) (notice to state proceeding lawyer not sufficient where federal docket sheet would have revealed that the state proceeding lawyer did not represent plaintiff on the federal charges).

[31] *U-Series International Services, Ltd v. United States*, No. 94-CIV-2733 (MBM), 1995 WL 671567 (S.D.N.Y. Nov. 7, 1995) (unpublished), *aff'd*, 104 F.3d 355 (3d Cir. 1996) (unpublished decision) (Table).

[32] 8 C.F.R. § 274.9; 19 C.F.R. § 162.45(a); 21 C.F.R. § 1316.75; 27 C.F.R. § 72.22(a)(3); 28 C.F.R. § 8.8(A); 50 C.F.R. § 12.23(b)(1)(B).

[33] *Holladay v. Roberts*, 425 F. Supp. 61, 67 (N.D. Miss. 1977).

[34] *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 201 (C.D. Cal. 1978).

[35] 19 U.S.C. § 1608. *See also* 8 C.F.R. § 174.9; 19 C.F.R. § 162.45(a)-(b); 21 C.F.R. § 1316.75(A); 27 C.F.R. § 72.22(a)(5); 28 U.S.C. § 8.8(a). *But see* 27 C.F.R. § 72.22(a)(3) and 50 C.F.R. § 12.23(b)(2) (allowing 30 days for filing of claim and cost bond for seizures by the U.S. Fish and Wildlife Service).

$250.[36] "Of course, the bond requirement is subject to the established authority of the courts to dispense with a required bond where a claimant is unable to post it."[37]

2. Effect of Claim and Cost Bond

A claim and a cost bond, properly filed within the 20-day time limit, halt the administrative proceeding and force the Government to proceed against the property judicially.[38] Thus, upon filing of the claim and cost bond, the seizing agency must refer the matter to the United States Attorney for the institution of judicial forfeiture proceedings.[39] The cost bond should be deposited in the U.S. Marshals Service's Seized Asset Deposit Fund.[40] A discussion of the government attorney's duty to file a complaint upon the filing of a claim and a cost bond appears in chapter 4, part I.B.1, of this manual.

3. Policy on *In Forma Pauperis* Petitions

The *Asset Forfeiture Policy Manual* contains procedures for consideration of *in forma pauperis* petitions submitted by claimants seeking waivers of the cost bond requirement based upon indigence.[41] The policy requires the seizing agencies to include in their seizure notices express reference to the availability of petitions for waivers of cost bonds based upon indigence, and to forward to the United States Attorney for judicial action all cases involving

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[36] 19 U.S.C. § 1608.

[37] S. Rep. No. 225, 98th Cong., 1st Sess. 218 (1983). In practice, the seizing agencies receive and determine *in forma pauperis* petitions for waivers of cost bonds. The granting of such petitions, if filed by those unable to afford to post a bond, may be constitutionally required. *Wiren v. Eide*, 542 F.2d 757, 763-64 (9th Cir. 1976). Failure to grant one when it should have been granted constitutes grounds for setting aside the forfeiture. *See Jones v. U.S. Drug Enforcement Admin.*, 801 F. Supp. 15, 26-28 (M.D. Tenn. 1992).

[38] *United States v. United States Currency in the Amount of $2,857.00*, 754 F.2d 208, 212 (7th Cir. 1985). The claim made to the administrative agency, however, does not give the claimant any rights in the subsequent judicial proceeding or excuse him from the requirement of filing a verified claim in court. *Id. See also In re Ninety-One Thousand Dollars*, 715 F. Supp. 423, 434-35 (D.R.I. 1989).

[39] 19 U.S.C. §§ 1603, 1608; 8 C.F.R. §§ 274.10, 274.12; 19 C.F.R. § 162.47(D); 21 C.F.R. § 1316.78; 27 C.F.R. § 72.22(b); 28 U.S.C. § 8.8(c); 50 C.F.R. § 12.23(b)(3). According to 19 U.S.C. § 1603, the seizing agency must furnish the United States Attorney's Office with a report containing a statement of all the known facts and circumstances of the case, the names of witnesses, and a citation of the statutes believed to have been violated.

[40] For a general discussion of applicable law and policy regarding cost bonds, *see Asset Forfeiture Policy Manual* (1996), Chap. 2, Section III at p. 2 — 13. *See also United States v. Real Property and Residence Located at Route 1, Box 111, Firetower Road*, 920 F.2d 788, 789-90 (11th Cir. 1991) (describing nature of cost bonds).

[41] *Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. III, at p. 2 — 9.

claimants who file a sworn affidavit of indigence, unless clear and articulative reasons exist for denial.[42] If the seizing agency believes the petition should be denied, it must seek approval from the Asset Forfeiture and Money Laundering Section before a final determination is made. If the petition is denied, the seizing agency must provide the claimant with written notice giving detailed reasons for the denial and must inform the claimant of the availability of judicial review of the denial pursuant to 5 U.S.C. §§ 705-06.[43] The claimant must be given 20 days to institute a challenge before a final declaration of forfeiture may be issued.

F. Unanswered Notice: Forfeiture

If no one claims the seized property and files the necessary cost bond within the specified time period, the seizing agency will declare the property forfeited to the United States and dispose of it according to law.[44]

G. Petitions for Remission or Mitigation

Section 1618 of Title 19 provides for the filing and granting of petitions for remission or mitigation of forfeiture.[45] Such petitions do not contest the validity of the forfeiture itself; they simply ask for an executive pardon of the property or an interest therein based on either the good faith of the petitioner and his or her innocence or the lack of knowledge of the underlying unlawful conduct, or, in the case of the wrongdoer, on a plea for leniency. A fuller discussion of petition procedures and considerations appears in chapter 9 of this manual.

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[42] *See also Garcia-Rubio v. Immigration and Naturalization Service*, 703 F. Supp. 859, 861 (S.D. Cal. 1989) (the notice to potential claimants must include reference to the procedure for seeking a waiver of the cost bond).

[43] *See Ysasi v. Rivkind*, 856 F.2d 1520, 1526-27 (Fed. Cir. 1988). In *Ysasi*, the claimant (Ysasi) filed a request for waiver with the Immigration and Naturalization Service, which had seized his truck. *Id.* The Immigration and Naturalization Service informed Ysasi that the request was denied at the same time it summarily forfeited the truck. The court found summary judgment inappropriate against Ysasi on his claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because when the Immigration and Naturalization Service provided notice of the denial at the same time it forfeited the truck. A genuine issue of fact existed as to whether Ysasi received an opportunity to post bond or request reconsideration of his waiver request before the forfeiture became final. *Ysasi v. Rivkind*, 856 F.2d 1520, 1526-27 (Fed. Cir. 1988).

[44] 19 U.S.C. § 1609.

[45] *See* 28 C.F.R. Part 9. Seizing agencies adjudicate such petitions in administrative forfeiture cases. Such petitions are typically considered up until the time of disposal of the property.

III. Judicial Review of Administrative Forfeitures

The merits of completed administrative forfeitures generally are not subject to judicial review. Courts, however, have allowed limited challenges to determine if such forfeitures complied with due process requirements and whether defendant property was taken "accidentally, fraudulently, or improperly."[46] Many courts have engaged in this limited judicial review where a party has claimed that an agency provided improper notice prior to the forfeiture.

While courts have allowed due process challenges under some circumstances, courts remain steadfastly unwilling to entertain challenges to the *merits* of administrative forfeitures. Thus, before addressing any procedural or due process issue, a threshold review should be made to ensure that the challenge is not either an overt or disguised attempt to obtain substantive review of an administrative forfeiture.[47] Additionally, a threshold review should be made to determine whether a forfeiture proceeding is still pending and whether the claimant had an opportunity to raise his claim in the administrative forum but did not do so. As long as a claimant has available the remedy of opposing a forfeiture action, or if a claim

[46] *Onwubiko v. United States*, 969 F.2d 1392, 1398 (2d Cir. 1992) ("Put another way, if an administrative forfeiture is procedurally deficient, the court has jurisdiction to correct the deficiency."); *United States v. Giraldo*, 45 F.3d 509, 510 (1st Cir. 1995) ("district courts have jurisdiction to entertain collateral due process attacks on administrative forfeitures"); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) ("It is not surprising that the federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements.").

[47] *See, e.g., Linarez v. United States Dep't of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) ("A forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not."); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 479-80 (2d Cir. 1992) ("once the administrative process has begun, the district court losses subject matter jurisdiction to adjudicate the matter in a peripheral setting such as a 41(e) motion"); *Ogidi v. United States*, 857 F. Supp. 4, 6 (E.D.N.Y. 1994) (same).

could have been raised but was not, the court should not entertain *any* challenge under any statute.[48]

With these threshold issues in mind, a summary of the primary legal theories that have been used to support a due process challenge to an administrative forfeiture follows.

A. The Administrative Procedures Act

The Administrative Procedures Act provides a limited waiver of sovereign immunity for equitable suits challenging agency actions.[49] Courts have relied upon the Administrative Procedures Act to review alleged procedural defects in administrative forfeitures.[50]

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[48] On the issue of failing to raise a defense in the administrative proceedings, see *Linarez v. United States Department of Justice*, 2 F.3d 208, 212-13 (7th Cir. 1993) ("Linarez cannot show that he had an inadequate legal remedy, for he could have sought recovery of his currency in the administrative proceeding by raising the very same claims that he raised in his complaint in the district court."); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 479 (2d Cir. 1992) ("Here, the administrative forum afforded the claimant the opportunity to raise all objections to the seizure ad the lack of a judicial remedy deprived him of nothing."); *In re Harper*, 835 F.2d 1273, 1274-75 (8th Cir. 1988) ("although Harper had knowledge of the pending forfeiture proceeding, he allowed the matter to finalize without challenging the forfeiture or seeking a stay of the proceedings"). Concerning the issue of requiring a claimant to pursue claims in a pending forfeiture proceeding, *see United States v. Hernenadez*, 911 F.2d 981, 983 (5th Cir. 1990) (claimant's due process argument not properly before court since "the proper place to litigate the legality of the seizure is in the forfeiture proceeding"); *United States v. $83,310.78*, 851 F.2d 1231, 1234 (9th Cir. 1988) (claimant had an adequate remedy at law because he could file claim in forfeiture proceeding, Rule 41(e) motion thus was premature).

[49] 5 U.S.C. § 702; *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1098-99 (9th Cir. 1989). *See also Califano v. Sanders*, 430 U.S. 99, 107 (1977) (the Administrative Procedures Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action" but subject-matter jurisdiction can be conferred under 28 U.S.C. § 1331).

[50] *Willis v. United States*, 787 F.2d 1089, 1093 (7th Cir. 1985) ("Although sovereign immunity is waived pursuant to section 702, Willis' claims rest on his rights under the Fourth and Fifth Amendments, and subject matter jurisdiction arises from 28 U.S.C. § 1331, the general federal question jurisdiction."); *U-Series Int'l Servs., Ltd. v. United States*, No. 94-CIV-2733 MBM, 1995 WL 671567 at *2-3 (S.D.N.Y. Nov. 7, 1995) (unpublished), *aff'd*, 104 F.3d 355 (3d Cir. 1996) (unpublished) (Table) (finding review of administrative forfeiture appropriate and stating that "contrary to the [G]overnment's contention, this case does not fall within any of the exceptions to the APA's waiver of sovereign immunity"). *See also Sarit v. United States*, 987 F.2d 10, 17 (1st Cir. 1993); *Lopes v. United States*, 862 F. Supp. 1178, 1186 (S.D.N.Y. 1994); *Montgomery v. Scott*, 802 F. Supp. 930, 934 (W.D.N.Y. 1992).

The Administrative Procedures Act, however, does not apply where a suit seeks "relief other than money damages" or where an adequate remedy exists in another court.[51] The issue of appropriate relief arises when a claim under the Administrative Procedures Act seeks return of forfeited money, thus, arguably becoming a claim for "money damages." Courts, however, have found that the Administrative Procedures Act's limitation to "relief other than money damages" does not prevent return of *specific* property, including money, because such specific relief is in effect equitable. Thus, in *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988), the Supreme Court held that "an equitable action for specific relief...may include an order providing for 'the recovery of specific property or monies.'" The return of specific property, the Court reasoned, is merely an attempt "to give the plaintiff the very thing to which he was entitled."[52] Lower courts thus generally have found equitable power under the Administrative Procedures Act to return specific monetary property.[53]

Because of claims court jurisdiction over actions based on the Constitution, the adequacy of remedies in other courts also arises in Administrative Procedures Act challenges to administrative forfeitures. The claims court, however, has refused to hear due process cases on the basis that the Due Process Clause does not require compensation by the United States.[54] Based on these precedents, federal courts have found that an adequate remedy for

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[51] 5 U.S.C. § 701(a)(1)-(2); 5 U.S.C. § 704. *See also Wright v. United States*, 902 F. Supp. 486 (S.D.N.Y. 1995) ("Here, plaintiff has a remedy available in the forfeiture proceeding instituted by the [G]overnment against his vehicles. That remedy is exclusive, and Section 702, therefore, does not confer authority to grant relief.").

[52] *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988).

[53] *See, e.g., Marshall Leasing, Inc. v. United States,* 893 F.2d 1096, 1099-1100 (9th Cir. 1989); *Sterling v. United States*, 749 F. Supp. 1202, 1207 & n.8 (E.D.N.Y. 1990). *See also Floyd v. United States*, 860 F.2d 999, 1005 (10th Cir. 1988) (finding in context of Rule 41(e) motion that claim for "return of property that happens to be money" is not a claim for damages). Courts have also found that once a court has gained equitable jurisdiction, the court has power to award damages "incident to" the complaint. *See Mora v. United States*, 955 F.2d 156, 159-60 (2d Cir. 1992); *United States v. Martinson*, 809 F.2d 1364, 1367-68 (9th Cir. 1987).

[54] *See, e.g., Lark v. United States*, 17 Cl. Ct. 567, 569 (1989) ("this court has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages"); *Noel v. United States*, 16 Cl. Ct. 166, 169 (1989) (same); *Golder v. General Elec. Credit Corp.*, 15 Cl. Ct. 513, 517 (1988) ("This court lacks jurisdiction to entertain a claim by plaintiff based upon a violation of the Fifth Amendment due process clause arising from the seizure and release of the aircraft."). *See also Willis*, 12 F.3d at 793-94; *United States v. Clagett*, 3 F.3d 1355, 1357 & n.3 (9th Cir. 1993); *Marshall Leasing*, 893 F.2d at 1100-01.

due process claims does not exist in the claims court, and that the federal courts can hear Administrative Procedures Act challenges to administrative forfeitures.[55]

The Administrative Procedures Act does not contain a statute of limitations, and no case directly has addressed the time limit for seeking Administrative Procedures Act review of administrative forfeitures. In other contexts, courts have applied the general civil action six-year statute of limitations in 28 U.S.C. § 2401(a) to Administrative Procedures Act claims. This limitation also seems most applicable for Administrative Procedures Act review of administrative forfeitures.[56]

Some courts have relied upon equitable principles (such as laches and estoppel) to limit the time for Administrative Procedures Act review.[57] These limitations also could be used if an administrative forfeiture review case were filed despite a plaintiff's "unexcused delay" that caused some prejudice to the United States.[58]

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[55] *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1101 (9th Cir. 1989) ("The only court that might have statutory authority to hear the claim for monetary damages against the United States has held that it has no jurisdiction over suits of this kind. Therefore, the district court had jurisdiction to hear appellant's [claim for equitable relief under the Administrative Procedures Act].") (cited for the same proposition and with approval in *U-Series Int'l Servs., Ltd. v. United States*, No. 94-CIV-2733 MBM, 1995 WL 671567 at *3 (S.D.N.Y. Nov. 7, 1995) (unpublished), *aff'd*, 104 F.3d 355 (3d Cir. 1996) (unpublished decision) (Table) and *Sterling v. United States*, 749 F. Supp. 1202, 1208 (E.D.N.Y. 1990). *But see Wright v. United States*, 902 F. Supp. 486 (S.D.N.Y. 1995) (because "plaintiff has a remedy available in the forfeiture proceeding instituted by the government against the vehicles," another forum was available and the Administrative Procedures Act did not confer jurisdiction).

[56] 28 U.S.C. § 2401(a) (every civil action against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues"). *See also Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991) (applying section 2401 to a challenge of a refusal of the Interior Board of Land Appeals to invalidate creation of a wilderness study area over a mining claim); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (applying section 2401 to challenge to an alleged irregularity in procedures for promulgation of a regulation); *Alexander v. United States*, 890 F. Supp. 598, 600 (N.D. Tex. 1995) ("plaintiff's other bases for relief under the APA is also restricted to the six-year statute of limitations contained in 28 U.S.C. § 2401(a)").

[57] *See, e.g., Telestat de Panama v. United States Dep't of Defense*, 976 F.2d 746 (Fed. Cir. 1992) (Table decision) (opinion reprinted at 1992 WL 188153) (district court granted Government summary judgment motion for Administrative Procedures Act review of granting of a contract on basis of laches for three-year delay; appellate court reversed for because of existence of material facts). In another context, the Supreme Court has held that state statutes of limitation barring actions at law are inapplicable in cases "where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right." *Russell v. Todd*, 309 U.S. 280, 289 (1940).

[58] *See Taft v. United States*, 824 F. Supp. 455, 466 (D. Vt. 1993) (discussing in context of summary judgment motion whether two-year delay in filing barred a challenge to an administrative forfeiture, but finding that resolution of issue depended upon resolution of factual disputes).

B. Rule 41(e) of the Federal Rules of Criminal Procedure

Rule 41(e) of the Federal Rules of Criminal Procedure provides that a person harmed by deprivation of property may move the district court for return of the property.[59] A Rule 41(e) motion may be filed even when criminal proceedings are not pending against a defendant.[60] Because Rule 41(e) is a "crystallization of a principle of equity jurisdiction," courts often considered the motion under the general equitable powers of the federal question statute.[61] The federal question section thus discusses Rule 41(e) motions in more detail.

C. The Federal Question Jurisdiction Statute

The federal question jurisdiction statute (28 U.S.C. § 1331) provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[62] Courts have relied on section 1331, either in conjunction with other statutes such as the Administrative Procedures Act[63] or for its own "inherent"

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[59] Fed. R. Crim. P. 41(e).

[60] *Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992) (even after termination of criminal proceeding or in the absence of any criminal proceeding, courts have ancillary equitable jurisdiction to hear motions for return of property); *Floyd v. United States*, 860 F.2d 999, 1002-03 (10th Cir. 1988) ("We hold that Rule 41(e) jurisdiction does not fail in the absence of a related criminal proceeding.").

[61] *United States v. Rapp*, 539 F.2d 1156, 1160 (8th Cir. 1976). *See United States v. Woodall*, 12 F.3d 791, 794 n.1 (8th Cir. 1993) (once criminal proceedings have ended, a pleading by a pro se plaintiff which is styled as a Rule 41(e) motion should be liberally construed as seeking to invoke the proper remedy); *Onwubiko v. United States*, 969 F.2d 1392, 1397 (2d Cir. 1992) ("Where criminal proceedings against the movant have already been completed, a district court should treat a rule 41(e) motion as a civil complaint."); *Soviero v. United States*, 967 F.2d 791, 792-93 (2d Cir. 1992) ("such motion is treated as a civil equitable proceeding even if styled as being pursuant to [Rule 41(e)]"); *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) (motions to return property filed under Rule 41(e) are treated as "civil equitable proceedings" when criminal proceedings have been completed). *See also Mora v. United States*, 955 F.2d 156 (2d Cir. 1992) (collecting cases); *In re Harper*, 835 F.2d 1273, 1274 (8th Cir. 1988) (same).

[62] 28 U.S.C. § 1331.

[63] *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1098-99 & 1102 (9th Cir. 1990) (Administrative Procedures Act contained waiver of sovereign immunity and "the district court had subject matter jurisdiction over the [claims for equitable relief], which arise under the forfeiture statutes and the due process clause of the United States Constitution, under 28 U.S.C. § 1331."); *Willis v. United States*, 787 F.2d 1089, 1092 n.3 (7th Cir. 1985) ("the district court had jurisdiction to review the merits of Willis' claims under 28 U.S.C. § 1331, via the waiver of sovereign immunity found in section 702 of the [Administrative Procedures Act]"). *See also Lopes v. United States*, 862 F. Supp. 1178, 1186 (S.D.N.Y. 1994) ("It is indisputable, however, that Plaintiff's [Administrative Procedures Act claim] raises a federal question pursuant to 28 U.S.C. § 1331."); *Sterling v. United States*, 749 F. Supp. 1202, 1209 (E.D.N.Y. 1990) (stating in dicta that "where sovereign immunity has been waived by the Administrative Procedures Act a proper claim brought under 28 U.S.C. § 1331, the statute on which plaintiff relies, provides a substantive basis for jurisdiction against the United States," but not expressly deciding if plaintiff raised a federal question for jurisdictional purposes).

equitable powers,[64] to address challenges to administrative forfeitures. As mentioned briefly above, courts often recast Rule 41(e) motions as claims for general equitable relief under section 1331.[65]

The statute of limitations in cases basing subject matter jurisdiction on section 1331 and substantive relief on another statute (such as the Administrative Procedures Act) will come from the substantive statute supporting the claim. Where a court exercises its general equitable jurisdiction to review an administrative forfeiture, the statute of limitations becomes a more difficult issue. No case has ruled on this issue, but several have discussed it.

For example, in *Williams v. Drug Enforcement Administration*, 51 F.3d 732, 734 (7th Cir. 1995), the Seventh Circuit addressed a claim concerning a self-styled "Complaint in Replevin." The district court construed the claim as a request to exercise equitable jurisdiction over administratively-forfeited property, but rejected the claim as untimely.[66] In an unpublished opinion, the district court applied a two-year statute of limitations, apparently

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[64] *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) ("We have indicated that [collateral due process attacks on administrative forfeitures] may be pursued in a civil action under 28 U.S.C. § 1331."); *United States v. Giovanelli*, 998 F.2d 116, 119 (2d Cir. 1993) ("Such ancillary equitable jurisdiction is especially appropriate on the facts here before us, in light of the defective nature of the forfeiture proceeding attempted by the [G]overnment in the Eastern District."); *United States v. Mosquera*, 845 F.2d 1122, 1126 (1st Cir. 1988) ("If, instead, as appears more likely, the forfeitures were solely administrative, then petitioner could file a civil action under 28 U.S.C. § 1331.") (citations omitted); *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) (motions to return property filed under Rule 41(e) are treated as "civil equitable proceedings" when criminal proceedings have been completed); *Willis v. United States*, 787 F.2d 1089, 1093 (7th Cir. 1985) (general federal question subject matter jurisdiction exists over constitutional challenge to forfeiture); *Taft v. United States*, 824 F. Supp. 455, 462 (D. Vt. 1993) ("An administrative forfeiture begun in a procedurally deficient manner will not divest a district court of subject matter jurisdiction. In such circumstances, a court retains its equity jurisdiction to correct the decision.").

[65] *See Onwubiko v. United States*, 969 F.2d 1392, 1397 (2d Cir. 1992) ("Where criminal proceedings against the movant have already been completed, a district court should treat a Rule 41(e) motion as a civil complaint."); *Soviero v. United States*, 967 F.2d 791, 792-93 (2d Cir. 1992) ("such motion is treated as a civil equitable proceeding even if styled as being pursuant to [Rule 41(e)]"); *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) (motions to return property filed under Rule 41(e) are treated as "civil equitable proceedings" when criminal proceedings have been completed).

[66] *Williams v. Drug Enforcement Administration*, 51 F.3d 732, 733-34 (7th Cir. 1995). Because of the procedural posture of the case, the court had power to conduct only limited appellate review. *Id.* at 733. After the district court entered its judgment, plaintiff filed a motion for reconsideration, which the district court construed as one to set aside the verdict under Fed. R. Civ. P. 60(b). *Id.* The appeal was thus solely on the issue of whether the district court had abused its discretion in rejecting the Rule 60(b) motion. *Id.* at 734-35.

relying on the Seventh Circuit decision in *Bieneman v. Chicago*, 864 F.2d 463 (7th Cir. 1998), to determine (by an analogy to a *Bivens* claim) the limitation period.[67]

The Seventh Circuit in *Williams v. Drug Enforcement Administration* noted that the claim was "essentially a plea for the court to exercise its equitable jurisdiction" and said the contours of such claims "are largely undefined."[68] Because the statute of limitations was not directly at issue, the court said it would not "express any opinion concerning the district court's use of a two-year statute of limitations," and upheld the decision on other grounds.[69]

The Government recently argued in a Northern District of Illinois case that *Williams v. Drug Enforcement Administration* approved the two-year statute of limitations for review of administrative forfeitures, but the district court rejected this argument.[70] The court instead assumed that jurisdiction existed under the Tucker Act and applied the six-year statute of limitations for such claims.[71] The court said it "need not venture where the Seventh Circuit feared to tread" in *Williams*, and made no ruling on the time limit for relief under general equitable jurisdiction.[72]

The argument that a *Bivens*-type statute of limitations should apply when a party seeks relief under general equitable jurisdiction thus remains open to further development. While the *Bivens* analogy provides one potential argument, courts also will likely look to the six-year limitation period from 28 U.S.C. § 2401(a) (the general civil action statute of

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[67] *Id.* The decision in *Bieneman v. Chicago*, 864 F.2d 463, 468-69 (7th Cir. 1988), concerned claims arising from air traffic around O'Hare Airport for deprivation and taking of property without just compensation or due process. The plaintiff sought relief under 42 U.S.C. § 1983, and the Seventh Circuit held that a section 1983 claim must be file within the time allowed by state law for personal injury actions, which in Illinois was a two years. *Id.* at 466. The court noted the disagreement concerning whether claims "arising directly under the Constitution" would be subject to the two-year period or the myriad of other potential periods applied to other federal claims. *Id.* at 468. Emphasizing the need for certainty in application of statute of limitations, the court held that claims arising under the Constitution should be subject to the same limitations period as claims for personal injury under section 1983. *Id.* at 469-70.

[68] *Williams v. Drug Enforcement Administration*, 51 F.3d at 735.

[69] *Id.*

[70] *Demma v. United States*, No. 95-C-27, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (unpublished).

[71] *Id.*

[72] *Id.*

limitations), as that limitation statute has been found in other contexts to apply to *all* civil actions "whether legal, equitable or mixed."[73]

Another possible limitation draws from the fact that review of administrative forfeitures must be "in accordance with familiar limitations on the granting of equitable relief."[74] Thus, equitable limitation principles (such as laches, estoppel, and the doctrine of unclean hands) should apply in cases relying on a court's general equitable jurisdiction.[75] This issue also remains open for further development in the courts.

D. The Tucker Act

The Tucker Act provides district courts with jurisdiction over civil actions against the United States not exceeding $10,000 based on the Constitution, any act of Congress or any regulation of an executive department.[76] Similar cases for more than $10,000 are within the claims court's jurisdiction.[77] While providing jurisdiction, the Tucker Act "does not create any substantive right enforceable against the United States for monetary damages."[78] Rather, a Tucker Act claim must be based upon a law, statute, or part of the Constitution that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[79]

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[73] *Spannaus v. United States Department of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (collecting cases and criticizing an earlier decision for suggesting a possible exception for "exclusively" equitable claims).

[74] *In re Harper*, 835 F.2d 1273, 1274 (8th Cir. 1988). *See also Williams v. Drug Enforcement Administration*, 51 F.3d 732, 734 (7th Cir. 1995) ("Williams claim of a due process violation is essentially a plea for the court to exercise its equitable jurisdiction."); *Linarez v. United States*, 2 F.3d 208, 213 (7th Cir. 1993) (if a district court "does retain equitable jurisdiction over an administrative forfeiture proceeding, the court's decision to invoke it is governed by equitable principles," as is consideration of a Rule 41(e) motion); *Floyd v. United States*, 860 F.2d 999, 1003 (10th Cir. 1988) ("We hold that a trial court's decision to grant jurisdiction over a Rule 41(e) motion for return of property should be governed by equitable principles.").

[75] In fact, in *United States v. Giovanelli*, the district court had denied relief to the claimant on the ground that he was "estopped" from making a Rule 41(e) motion by having withheld it until the statute of limitations had run against the Government. *United States v. Giovanelli*, 998 F.2d 116, 118-19 (2d Cir. 1993). The Second Circuit disagreed with the factual analysis of the lower court, but did not state any disapproval of the use of equitable principles such as estoppel or "unclean hands" in review of administrative forfeitures. *Id.* at 119-20.

[76] 28 U.S.C. § 1346(a)(2).

[77] 28 U.S.C. § 1346(a)(1).

[78] *United States v. Mitchell*, 463 U.S. 206, 216 (1983).

[79] *Id.* at 217.

Several courts have relied upon the Tucker Act to consider due process challenges to administrative forfeitures of property valued at under $10,000.[80] The remedy under the Tucker Act, however, cannot include equitable relief.[81] In fact, one court suggested in dicta that because a challenge to an administrative forfeiture "necessarily presents a claim for equitable relief," the Tucker Act is not the appropriate jurisdictional statute for such challenges.[82]

The statute of limitations for Tucker Act claims is six years from the time that the claim accrues.[83] Because the Tucker Act is a jurisdiction-granting statute, this limitation is jurisdictional, not merely an affirmative defense.[84]

E. The Federal Tort Claims Act

The Federal Tort Claims Act waives the sovereign immunity of the United States for certain torts and provides district courts with exclusive jurisdiction of suits against the United States for injury or loss of property caused by the negligence of government employees where the United States, as a private person, would be liable.[85]

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[80] *Toure v. United States*, 24 F.3d 444, 445 (2d Cir. 1994) ("We note that Toure's complaint, seeking a return of seized property after the conclusion of the underlying criminal case, is properly treated as commencing a civil action pursuant to 28 U.S.C. § 1346, rather than as a motion pursuant to Fed. R. Crim. P. Rule 41(e)."); *United States v. Clagett*, 3 F.3d. 1355, 1357 n.4 (9th Cir. 1993) ("Unlike the [c]laims [c]ourt, district courts will exercise jurisdiction over due process challenges to forfeiture actions under the Tucker Act."); *Glup v. United States*, 523 F.2d 557, 559 & n.3 (8th Cir. 1975) (Tucker Act "has been held to confer jurisdiction over the claim that a forfeiture proceeding has resulted in a deprivation of property without due process of law.").

[81] *Lee v. Thornton*, 420 U.S. 139, 140 (1975); *Wright v. United States*, 902 F. Supp. 486, 488 (S.D.N.Y. 1995).

[82] *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) ("Although there may be concurrent jurisdiction under the Tucker Act, jurisdiction is more soundly based upon 28 U.S.C. § 1331 or § 1355, along with 19 U.S.C. § 1609(b) and 21 U.S.C. § 881, because a collateral due process attack on a DEA forfeiture declaration necessarily presents a claim for equitable relief, and the Tucker Act does not confer equity jurisdiction.").

[83] 28 U.S.C. § 2401(a). *See also Demma v. United States*, No. 95-C-27, 1995 WL 642831 at *3 (N.D. Ill. Oct. 31, 1995) (unpublished); *Alexander v. United States*, 890 F. Supp. 598, 600 (N.D. Tex. 1995).

[84] *See Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 (Fed. Cir. 1994); *Alexander v. United States*, 890 F. Supp. 598, 600 (N.D. Tex. 1995) ("Failure to bring an action within the applicable statute of limitations does not merely provide the [G]overnment with a defense to the action, 'but deprives the district court of jurisdiction to hear the action at all.'") (citations omitted).

[85] 28 U.S.C. § 1346(b). *Wright v. United States*, 902 F. Supp. 486, 488 (S.D.N.Y. 1995).

As with the Tucker Act, the Federal Tort Claims Act authorizes only monetary damages, not equitable relief.[86] The Federal Tort Claims Act takes its statute of limitations from 28 U.S.C. § 2401(b), which requires that a tort claim be presented to the appropriate federal agency within two years after the claim accrues or be filed within six months after the agency mails notice of the claim's final denial.[87]

The Federal Tort Claims Act contains several exceptions to the general waiver of sovereign immunity. One key exception provides that the Government retains immunity for claims arising from "assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer."[88] Courts have held that this exception protects law enforcement officers engaged in activities "similar" to that of customs or excise agents, such as when Drug Enforcement Administration agents seized a car shipped from abroad and still in its shipping package or when Drug Enforcement Administration agents searched a cargo ship at a port and seized electronic goods bound for Nigeria.[89]

F. Other Theories of Relief

Courts have addressed several other theories for review of administrative forfeiture, including:

(1) 28 U.S.C. §§ 1355 and 1356: Sections 1355 and 1356 confer original jurisdiction to the district courts for claims "for the recovery or enforcement of any fine, penalty, or forfeiture" and for "any seizure under any law of the United States on the land or upon waters not within admiralty and maritime jurisdiction."[90] While both statutes have been invoked as a basis for challenging administrative forfeitures, courts

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[86] *Hatchley v. United States*, 351 U.S. 173, 182 (1956).

[87] 28 U.S.C. § 2401(b).

[88] 28 U.S.C. § 2680(c).

[89] *Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 823-24 (2d Cir. 1985), *aff'd*, 104 F.3d 355 (3d Cir. 1996) (Table). As the court in *Formula One* noted, other courts have ruled "with scant discussion, that section 2680(c) applies to detentions beyond the context of customs duties and taxes." *Formula One*, 777 F.2d at 823 (collecting cases). This expansive reading of section 2680(c) has been subject to criticism. *See Formula One*, 777 F.2d at 825 (Oakes, J., concurring).

[90] 28 U.S.C. §§ 1355, 1356.

consistently have held that neither provides a waiver of sovereign immunity or an independent right of action.[91]

Because the United States can only be sued by its consent, and the consent must be express, courts have held that section 1356 does not provide an independent basis to challenge an administrative forfeiture.[92] While no court appears to have yet addressed this specific issue under section 1355, the result should be no different.

(2) The Fourth and Fifth Amendments to the Constitution: Several parties have also relied generally upon the Fourth and Fifth Amendments to support challenges to administrative forfeitures. Both amendments are silent regarding jurisdiction and thus do not confer jurisdiction by their own force.[93] The federal question statute provides district courts with jurisdiction over claims "arising under" the Constitution, but the United States has not waived its sovereign immunity against constitutional torts.[94] Thus, neither amendment provides an independent basis for relief.

Courts, however, will consider claims based on Fourth and Fifth Amendment rights by way of other waivers of sovereign immunity, such as the Administrative Procedures Act or the Tucker Act—if the portion of the Constitution relied upon "can fairly be interpreted as mandating compensation by the [F]ederal [G]overnment for the damages sustained."[95]

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[91] *See Murray v. United States*, 686 F.2d 1320, 1324 (8th Cir. 1982) ("There is similarly no waiver of sovereign immunity to be found in 28 U.S.C. § 1356, which is merely another general provision vesting jurisdiction in the district courts over certain kinds of seizures."); *Wright v. United States*, 902 F. Supp. 486, 488-89 (S.D.N.Y. 1995) ("[S]ection 1356 does not contain an express waiver of sovereign immunity."); *Greenwood v. United States*, No. CIV-89-6380, 1990 WL 85972 at *1 (D. Or. Apr. 30, 1990) (unpublished) (section 1356 does not "purport to specifically authorize the award of any relief against the United States").

[92] *Wright v. United States*, 902 F. Supp. 486, 488-89 (S.D.N.Y. 1995) ("Even if it were taken to create jurisdiction over claims against the United States seeking remission of forfeiture, however, section 1356 does not contain an express waiver of sovereign immunity.").

[93] *Wright v. United States*, 902 F. Supp. 486, 489 (S.D.N.Y. 1995).

[94] *Id.* The court in *Wright* relied upon the decision in *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994), where the Supreme Court held that "*Bivens*-type actions may be brought" only against "federal agents" and not "federal agencies."

[95] *See, e.g.*, *Willis v. United States*, 787 F.2d 1089, 1093 (7th Cir. 1985) ("although sovereign immunity is waived pursuant to section 702, Willis' claims rest on his rights under the Fourth and Fifth Amendment, and subject matter jurisdiction arises from 28 U.S.C. § 1331, the general federal question jurisdiction").

Civil Judicial Forfeiture Proceedings

Chapter 4

Civil Judicial Forfeiture Proceedings

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Chapter 4

Civil Judicial Forfeiture Proceedings

I. Preliminary Considerations

A. What Property may only be Forfeited Judicially

Any property that may not be forfeited summarily[1] or administratively must be forfeited through a formal judicial proceeding. Such property includes:

(1) property exceeding $500,000 in value and which is forfeitable pursuant to Customs procedures and is not a transporting conveyance or an item that has been illegally imported or a monetary instrument[2];

(2) property forfeitable pursuant to Internal Revenue Service procedures that exceed $100,000 in value[3];

(3) all real property, regardless of its value[4];

(4) all property that is made forfeitable by statutes that do not incorporate the forfeiture procedures of the Customs laws or the Internal Revenue Code;

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[1] "Summarily" lacks a precise meaning. It is sometimes used synonymously with "administratively." It is also used to refer to the forfeiture of contraband, such as cocaine, which is forfeitable without following any particular procedures because no one can have a property interest in cocaine.

[2] 19 U.S.C. § 1610.

[3] 26 U.S.C. §§ 7323, 7325.

[4] *See* Memorandum, entitled "Increased Administrative Forfeiture Caps," Directive 91-2, issued by the Office of the Deputy Attorney General on February 26, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. I.A, at p. 2 — 1].

(5) all allegedly obscene materials[5]; and

(6) any property, once a claim and a cost bond are filed in the administrative proceeding.

Once it has been determined by the seizing agency that the subject property can only be forfeited through a judicial proceeding, the agency must promptly report the seizure and underlying legal violation to the United States Attorney's Office.[6] An unexplained, unjustified, or lengthy delay in referral may jeopardize the ultimate success of the judicial forfeiture action.[7]

B. Evaluation of the Case by Government Attorney

1. Duty to Evaluate

A civil forfeiture case may be presented to the government attorney immediately in any of three ways. It may be referred by the seizing agency because the property seized is of a nature, which can only be forfeited judicially.[8] It may be referred by the seizing agency because a claim and a cost bond have been filed for the property in an administrative

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[5] *See Alexander v. United States*, 509 U.S. 544 (1993); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *United States v. 12,200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *Blount v. Rizzi*, 400 U.S. 410, 418-20 (1971).

[6] Under 19 U.S.C. § 1603, after the seizing agency determines that the property must be forfeited judicially, the responsible agency official must transmit a report of the seizure to the United States Attorney and "include in such a report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction." In the same manner, information concerning the appraisal of the subject property should be transmitted to the U.S. Marshals Service. Under 19 U.S.C. § 1604, the United States Attorney's Office upon referral of the case by the seizing agency, must "immediately...inquire into the facts" and, if it appears that forfeiture is appropriate, must "cause the proper proceedings to be commenced and prosecuted, without delay. ..."

[7] *See United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555 (1983) (establishing a four-part test for determining whether the delay was such as to deny claimant his due process rights). *See also United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 373-74 (1971) (requiring that judicial forfeiture actions involving obscene materials be instituted within 14 days).

[8] *See* 19 U.S.C. § 1610. Even when a number of separate items are seized that could normally be forfeited administratively and they were processed individually, it is Department of Justice policy that if their total value is over $500,000 or one item is real property, they are to be forfeited in a single judicial action when they are subject to forfeiture under the same statutory authority and on the same factual basis and when one person has an ownership interest in the seized property. *See* Memorandum, entitled "Increased Administrative Forfeiture Caps," Directive 91-2, issued by the Office of the Deputy Attorney General on February 26, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. I.A, at p. 2 — 1]. This rule does not apply when seizures occur over a period of weeks and aggregation would thereby delay forfeiture.

forfeiture proceeding.[9] Finally, it may be brought to the government attorney's attention prior to seizure by the investigative agency, and he or she may decide that the property should not be seized until a warrant of arrest *in rem* is issued pursuant to the filing of a formal complaint in a civil forfeiture action.[10]

Regardless of the way the case is presented, it is the duty of the government attorney to immediately undertake a careful review of the underlying facts and circumstances supporting forfeiture before proceeding against the subject property. This duty is specifically imposed by 19 U.S.C. § 1604[11] and implicitly imposed by the verification requirement of Supplemental Rule C(2).[12] Moreover, if the government attorney has not fully evaluated the merits of the case and the justification for forfeiture prior to institution of the lawsuit, it is possible that both the Government and the government attorney will later be exposed to liability for unreasonable or unwarranted litigative action, and the government attorney will be subject to a sanction by the court. For instance, 28 U.S.C. § 2412(d)(1)(A), a section of the Equal Access to Justice Act, allows the award of attorney fees and other expenses against the United States if the claimant prevails and there was not "substantial justification" for the Government's position, including the acts and omissions of the governmental agencies involved. Furthermore, sanctions under Fed. R. Civ. P. 11, which can include personal liability for the fees and expenses of the opposing party, are available against attorneys who sign pleadings or motions that are not submitted in good faith or are interposed for improper purposes. Finally, a lackadaisical examination of the facts to be used to show probable cause for forfeiture may prevent the government attorney from obtaining a judicial certificate of

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[9] *See* 19 U.S.C. § 1608. The cost bond should be deposited into the Department of Justice Seized Asset Deposit Fund account which is administered by the U.S. Marshals Service. For a general discussion of applicable law and policy regarding cost bonds, *see* Memorandum, entitled "Disposition of Cost Bonds," Directive 92-4, issued by the Office of the Deputy Attorney General on April 7, 1992 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. III, at p. 2 — 13].

[10] *See* Supplemental Rule C(2), (3); 21 U.S.C. § 881(b).

[11] In pertinent part, 19 U.S.C. § 1604 states:

> It shall be the duty of the Attorney General of the United States immediately *to inquire into the facts* of the cases reported to him by [the seizing] officers, *and the laws applicable thereto*, and if it appears probable that...forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court...is necessary, forthwith to cause the proper proceedings to be commenced. ...(emphasis added).

[12] Supplemental Rule C(2) requires that complaints initiating civil forfeiture actions be verified. By signing such a verification, the authorizing government official is stating to the court that he has satisfied himself that the allegations in the complaint are true, based on his own knowledge or on information and belief. *United States v. Banco Cafetero International*, 608 F. Supp. 1394, 1400 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 1154 (2d Cir. 1986).

reasonable cause for seizure under 28 U.S.C. § 2465, which can immunize the government attorney and the seizing agents from future lawsuits arising out of the seizure and forfeiture proceeding.[13]

2. Materials to Evaluate

a. Reports from Seizing Agency

Once it has been determined that seized property may only be forfeited judicially, the seizing agency is required to forward the matter to the United States Attorney's Office with a report setting forth: a description of the property, its appraised value, the facts and circumstances known to the agents, the names of witnesses, and a citation of the statute or statutes believed to have been violated and upon which reliance is placed for forfeiture.[14] Government attorneys should make sure that all the pertinent information is included in the seizing agency's report and should review it thoroughly before pursuing forfeiture in court.

b. Pre-seizure Investigative Reports and Consultations

When forfeitable property will not be seized until after judicial proceedings have begun, the government attorney should consult with and review reports prepared by the agents investigating the case to ensure that the underlying facts and the available evidence provide probable cause for seizure and forfeiture. The information reviewed should include the appraised value of the property and, if realty is involved, a title report and an estimate of the wrongdoer's equity interest.[15] It is also extremely important that the U.S. Marshals Service or the Department of the Treasury, depending on which agency is responsible, be consulted as soon as possible (preferably two to four weeks before seizure), so that potential problems with the seizure, custody, storage, preservation, management, and eventual disposition of the

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[13] *See United States v. One 1985 Chevrolet Corvette*, 914 F.2d 804 (6th Cir. 1990) (claimant not entitled to attorney's fees if Government proves probable cause); and *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558 (11th Cir. 1988) (claimant entitled to attorney's fees because complaint failed to state cause of action).

[14] 19 U.S.C. § 1603. *See also* 19 U.S.C. §§ 1606, 1608, 1610.

[15] Formal appraisals prior to filing are generally too expensive to warrant them at this stage, but any real estate company will usually have data on the sales of comparable properties on file. In addition, the property management personnel in the U.S. Marshals Service can often provide reliable drive-by estimates. And tax records should be reviewed to determine if they show an appraisal figure.

property can be discussed and resolved prior to the execution of the warrant of arrest *in rem*.[16] In addition, the Asset Forfeiture and Money Laundering Section should be contacted when the property at issue presents particular difficulties relating to maintenance, operation, or disposition. In FIRREA cases, the regulatory agency should be consulted if it is to be responsible for managing the seized property pending forfeiture. If the property is a gas station, a cocaine processing facility, or other potentially contaminated property, the Assistant United States Attorney should ascertain whether it is in fact contaminated prior to seizing it.

3. Decision to Proceed

According to 19 U.S.C. § 1604, the Attorney General is required to institute "*without delay*" judicial proceedings against seized property "if it appears probable that...forfeiture has been incurred...unless upon inquiry and examination, the Attorney General decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted. ..." Nevertheless, courts may not dismiss a forfeiture action filed within the five-year statute of limitations for noncompliance with the timing requirements of sections 1602-1604.[17]

a. Prospects for Success

Whether property has already been seized or will be taken into custody pursuant to a warrant of arrest *in rem*, it is obvious that the decision to pursue forfeiture depends primarily on the sufficiency of available evidence to establish the "guilt" of the property, which initially requires only a showing of probable cause. The determination of evidentiary sufficiency should also include a realistic assessment of the validity of potential defenses that could ultimately defeat forfeiture.[18]

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[16] In any pre-seizure planning, the government attorney should consider the effect of *the Attorney General's Guidelines on Seized and Forfeited Property* (July 1990) [hereinafter *Attorney General's Guidelines*]; Memorandum, entitled "Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances," Directive 90-3, issued by the Office of the Deputy General on June 29, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 8, Sec. I, at p. 8 — 1]; Memorandum, entitled "Seizure of Forfeitable Property," Directive 90-3, issued by the Office of the Deputy Attorney General on January 11, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. II, at p. 1 — 13]; and Memorandum, entitled "Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets," Directive 86-1, issued by the Office of the Deputy Attorney General on June 25, 1986 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. I, at p. 5 — 1].

[17] *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

[18] *See* discussion of affirmative defenses in part V.C.4 of this chapter, *infra*.

b. Evaluation of Wisdom of Proceeding

Even if there is sufficient evidence to sustain forfeiture, it may be ill-advised and wasteful to pursue the case if the subject property has a low monetary value or is in poor condition, or if the expense and difficulty of custody, preservation, and disposition will be unduly burdensome to the Government. Government attorneys should, therefore, consider not only the legal sufficiency of the case, but also the wisdom of seeking forfeiture in light of the marketability of the property and the costs of maintaining it while its forfeitability is being litigated. Government attorneys should also evaluate the fundamental fairness of the forfeiture, *i.e.,* would society be exacting too high a price for the wrong done by forfeiting this property?[19]

c. Law Enforcement Objectives

Because the purpose of forfeiture is to enhance law enforcement objectives rather than serve as a profit center, there may occasionally be a situation where it is important to seek forfeiture of property even though it has slight or nominal value.

d. Possibility of Deferral to State Forfeiture Proceedings

A final matter that should be considered before a federal judicial forfeiture proceeding is initiated is the possibility of deferring action in favor of a state or local forfeiture proceeding.[20] Once judicial action has been commenced, a decision to defer must be personally approved by the United States Attorney after a review of the recommendation of the investigating agency and an assessment of the status of the Assets Forfeiture Fund.[21] Other factors for consideration include: the possible usefulness of the property to Department of Justice investigative agencies or components or to other federal agencies[22]; the relative involvement of federal and state agencies in the underlying investigation; and the likelihood of eventual equitable sharing based on that involvement and participation.[23]

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[19] *See* the discussion of pre-seizure planning in chapter 2, part II, of this manual.

[20] *See Attorney General's Guidelines* § IX.A.; 19 U.S.C. § 1616.

[21] *Attorney General's Guidelines* § IX.A.

[22] *Id.* § IV; 21 U.S.C. § 881(e)(1).

[23] *Attorney General's Guidelines* § V; 21 U.S.C. § 881(e)(1).

C. Time Limitations

1. Statute of Limitations

Civil forfeiture proceedings must be commenced within the applicable statute of limitations.[24] Forfeiture actions under 21 U.S.C. § 881, 18 U.S.C. § 981, and other statutes that incorporate customs procedures, are governed by 19 U.S.C. § 1621, which requires that the lawsuit be brought within five years from the time the alleged offense was discovered.[25] Actions under statutes that simply provide for *in rem* procedures and do not incorporate the Customs laws on forfeiture[26] are governed by 28 U.S.C. § 2462, which limits the time for instituting the lawsuit to five years from the date the claim first accrued.

The *United States Attorney's Bulletin*, June 5, 1995, p. 220, summarizes ABA Formal Op. 94-387, *Disclosure to Opposing Party and Court That Statute of Limitations Has Run*, September 26, 1994. It states, *inter alia*: "An attorney has no ethical duty to inform an opposing party that her client's claim is time-barred...it may well be unethical to disclosure such information without the client's consent."

2. Requirement of Promptness After Seizure

Section 1621 of Title 19 and Section 2462 of Title 28 dictate that a forfeiture action cannot be brought after a lapse of five years, and the Supreme Court recently ruled that courts may not dismiss a forfeiture action filed within the five-year statute of limitations for noncompliance with the timing requirements of 19 U.S.C. §§ 1602-1604.[27] But once

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[24] Courts may not dismiss a forfeiture action filed within the five-year statute of limitations for noncompliance with the timing requirements of sections 1602-1604. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

[25] It is unclear whether discovery of the offense means discovery of the violation of the underlying criminal statute or discovery of the forfeitability of the property. *See United States v. 318 South Third St.*, 988 F.2d 822 (8th Cir. 1993) (brought under 18 U.S.C. § 1955(d): the offense is not discovered by the Government just because there has been newspaper publicity about the circumstances); *United States v. Real Property 874 Gartel Dr.*, 79 F.3d 918, 922 (9th Cir. 1996) (the statute begins to run upon discovery of the offense); *United States v. Shabahang Persian Carpets, Ltd.*, 926 F. Supp. 123 (E.D. Wis. 1996) (the statute begins to run when a party discovers or possesses the means to discover the alleged wrong); *United States v. $116,000 in U.S. Currency*, 721 F. Supp. 701, 704-05 (D.N.J. 1989) (the statute of limitations begins to run under 19 U.S.C. § 1621 no later than the date of seizure of the *res*, not after the Government has determined that it has facts sufficient to show a nexus between the specific property seized for forfeiture and the underlying illegal activity). *Accord United States v. James Daniel Good Property*, 510 U.S. 43 (1993).

[26] *E.g.*, 31 U.S.C. § 5317.

[27] *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

property is seized, various statutory time limits and the requirements of due process may come into play.[28]

a. Statutory Imperative for Promptness

The civil forfeiture statutes mandate prompt action by the government attorney in instituting judicial proceedings. For instance, 19 U.S.C. § 1602 requires law enforcement agents and officers to report immediately all violations giving rise to forfeiture and to turn over "immediately" all seized property to their appropriate offices. Section 1603 of Title 19 requires the appropriate offices to report "immediately" to the United States Attorney all seizures for which legal proceedings are required. Section 1604 of Title 19 requires the government attorney "immediately" to inquire into the facts of forfeiture cases referred by seizing agencies and "forthwith" to commence litigation if the cases are meritorious.

Moreover, 18 U.S.C. 981(b)(2)(B) provides that whenever property is seized pursuant to a civil seizure warrant (as opposed to an arrest warrant *in rem*), a civil forfeiture action must be "instituted promptly." Similarly, 21 U.S.C. § 881(b) provides that a civil action must be "instituted promptly" whenever the Government seizes property without an arrest warrant *in rem* based on probable cause to believe that it is subject to forfeiture or that it is "dangerous to health or safety."[29]

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[28] *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 564 (1983) ruled that in determining whether the delay between seizure and filing a forfeiture suit was so great as to deny claimant his due process rights, the test to be employed "involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *See, e.g.*, *United States v. $292,888.04 In U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (30-month delay between seizure and suit approved); *United States v. $874,938.00 U.S. Currency*, 999 F.2d 1323 (9th Cir. 1993) (eleven-month delay between seizure and suit approved); *United States v. Prop. Ident. as $88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (eight-month delay between referral to the United States Attorney and filing of suit is not unreasonable); *United States v. Eight Firearms*, 881 F. Supp. 1074 (S.D.W. Va. 1995), *aff'd*, 95 F.3d 42 (4th Cir. 1996) (2.25-year delay found reasonable); *United States v. $27,000.00, More or Less, in U.S. Currency*, 865 F. Supp. 339 (S.D.W. Va. 1994) (four and a half year delay is not unreasonable).

It should be noted that this defense involves delays occurring *after seizure*. Delays between the discovery of forfeitability and the seizure of the property generally do not affect the forfeiture action or provide a cognizable defense as explained above.

[29] Both statutes appear to require that a civil action be filed, even if the same property is subject to forfeiture in a criminal case. However, the ruling in *James Daniel Good Real Property*, 510 U.S. 43 (1993), might well be applied to the time requirements of 18 U.S.C. § 981(b)(2)(B) and 21 U.S.C. § 881(b). Until the statutes are amended by legislation to clarify this issue, government attorneys may want to file civil complaints whenever these provisions apply, even if parallel criminal proceedings are contemplated, and then move for a stay of the civil case.

As discussed in chapter 1, the most specific directives regarding promptness involve the forfeiture of property in connection with personal use amounts of drugs and the forfeiture of a "conveyance seized for [any] drug-related offense."[30] In particular, 21 U.S.C. § 888(c) requires the Government to file a complaint within 60 days of the filing of a claim and cost bond in any case involving the drug-related seizure of an automobile.

Also, for firearms forfeitures under 18 U.S.C. § 924(d), suit must be filed within 120 days from the date of seizure.[31]

b. Constitutional Imperative for Promptness

All federal civil forfeitures are subject to the Fifth Amendment due process requirement that potential claimants be provided with the opportunity for a post-seizure hearing on the forfeitability of the property "at a meaningful time." In *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 564 (1983), the Supreme Court established a four factor balancing test for determining whether a delay in instituting forfeiture proceedings after the subject property has been seized is unreasonable and, therefore, unconstitutional. According to the Court, the proper factors to be considered and balanced are: the length of the delay, the reason for the delay, the claimant's assertion of the right to a hearing, and the prejudice to the claimant because of the delay.

(1) Length of Delay

The length of the delay between the seizure and commencement of the forfeiture action is considered the triggering factor in the balancing test. Thus, an extremely short lapse of time may obviate any need to review the matter further. As the length of the hiatus increases, however, so does the burden on the Government to show that its failure to act is justified and reasonable.[32]

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[30] *See* discussion on expedited forfeiture procedures in chapter 1, part IV.E.4, of this manual.

[31] Section 924(d)(1). A district court held in *United States v. Fourteen Various Firearms*, 889 F. Supp. 875 (E.D. Va. 1995), that this limitation was jurisdictional and that the statutory requirement was not satisfied by commencing administrative forfeiture proceedings within 120 days of the date of seizure.

[32] *See United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 565 (1983). In obscenity cases, the Supreme Court has ruled that in the absence of an explicit statutory provision, filings must occur within 14 days of seizure to avoid a prior restraint problem. *See United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971).

(2) Reason for Delay

The Government's reason for postponing judicial forfeiture proceedings is generally the pivotal factor in the determination of whether the claimant has been denied the right to due process. The justifications most often proffered and found acceptable are based on the existence of related criminal investigations and proceedings[33] or the processing of petitions for extrajudicial relief involving the same property that would otherwise be the subject of the lawsuit.[34]

Government attorneys should note, however, that pending criminal proceedings or pending petitions do not automatically toll the time for bringing the civil forfeiture action and do not provide *carte blanche* for delaying a post-seizure hearing.[35] If the length of the delay is sufficient to prompt judicial inquiry, the Government will be required to account for its actions during the period of time after seizure and to establish that there was "diligent

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[33] *See United States v. Eight Thousand Eight Hundred Fifty Dollars*, 461 U.S. 555, 566-67 (1983); *United States v. $292,888.04 In U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (one and a half year delay reasonable in light of complexity of both the forfeiture and criminal cases); *United States v. United States Currency in the Amount of $228,536.00*, 895 F.2d 908, 917 (2d Cir.) (a three-year delay between guilty plea and institution of a civil forfeiture action was declared reasonable where the Government was conducting additional criminal investigations and no prejudice was shown), *cert. denied*, 495 U.S. 958 (1990); *Mercado v. U.S. Customs Service*, 873 F.2d 641, 646 (2d Cir. 1989) (delay not unreasonable because Government was investigating whether claimant was a doper, since he fit the profile and was not prejudiced by the delay); *$47,980.00 in Canadian Currency*, 804 F.2d 1085, 1088-89 (9th Cir. 1986) (14-month delay reasonable because of possibility of criminal proceeding, because a petition for remission was under consideration, and there was no prejudice), *cert. denied*, 481 U.S. 1072 (1987); *United States v. U.S. Treasury Bills Totaling $160,916.25*, 750 F.2d 900, 902 (11th Cir. 1985) (per curiam) (holding that a 14-month delay was not unreasonable because of the Government's "diligent pursuit" of the pending criminal proceeding); *United States v. $18,505.10*, 739 F.2d 354, 356 (8th Cir. 1984) (holding that the delay was justified because the property was being held as evidence for a state criminal proceeding); *United States v. One 1987 Ford F-350 4x4 Pickup*, 739 F. Supp. 554, 561 (D. Kan. 1990) (five-month delay justified by pendency of related criminal and administrative proceedings); *United States v. $24,000 in U.S. Currency*, 722 F. Supp. 1386, 1391 (N.D. Miss. 1989), *aff'd w/o op.*, 902 F.2d 956 (5th Cir. 1990) (15-month delay reasonable where eight and a half months did not count because that was elapsed time before Federal Government adopted state seizure and claimant failed to show he was prejudiced by next six and a half-month delay), *cert. denied*, 498 U.S. 1024 (1991).

[34] *See United States v. Eight Thousand Eight Hundred Fifty Dollars*, 461 U.S. 555, 566 (1983); *United States v. One (1) 1980 Stapelton Pleasure Vessel Etc.*, 575 F. Supp. 473, 478 (S.D. Fla. 1983) (holding that a ten-month delay was not unreasonable because most of that time period was attributable to the processing of a petition for remission, which might have made the judicial action unnecessary).

[35] *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 461 U.S. 555, 567 (1983).

pursuit" of the related matters on which it relies as justification for delay.[36] As a practical matter, it is advisable for government attorneys to maintain detailed and specific records of the actions they take in related matters that might justify postponement of a civil proceeding to forfeit seized property, particularly when it appears that the delay will be lengthy.

(3) Assertion of Right by Claimant

The claimant may trigger the rapid filing of a civil forfeiture action or obtain a hearing on the merits of the seizure in a variety of ways, including requests and letters to the United States Attorney, a mandamus action, and a motion under Fed. R. Crim. P. 41(e) for the return of the seized property.[37] Government attorneys should remember that a claimant's legitimate assertion of the right to a hearing may invalidate subsequent justifications for delaying commencement of the forfeiture action.

(4) Prejudice to Claimant

The final factor in the Supreme Court's balancing test is prejudice to the claimant.[38] We argue that the relevant inquiry on this factor is whether the delay has hampered the claimant's ability to defend the property or his interest in it, not whether he has lost money or the use of the property because of its seizure.[39] However, prejudice has been found simply in the temporary loss by the owner of his money.[40]

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[36] *See id.* at 567-68; *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142 (9th Cir. 1989) (four and a half-month delay justified even though Government did not explain reason, because claimant did not demand return of property and no prejudice was shown); *United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162, 165-66 (5th Cir. 1983) (holding that a 13-month delay was unreasonable because the Government was unable to justify a major portion of it).

[37] *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 461 U.S. 555, 569 (1983).

[38] *Id.*

[39] *United States v. $18,505.10*, 739 F.2d 354, 356 (8th Cir. 1984); *United States v. One (1) 1980 Stapelton Pleasure Vessel Named Threesome*, 575 F. Supp. 473, 478 (S.D. Fla. 1983).

[40] *United States v. $19,440.00 in U.S. Currency*, 829 F. Supp. (D. Alaska 1993) (holding that the withholding is *per se* prejudice); *United States v. 2401 South Claremont, Independence, MO.*, 724 F. Supp. 670 (W.D. Mo. 1989) (no delay where claimant was permitted to continue to reside in the house). In *United States v. $26,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983), the Government argued that prejudice could never result from the temporary loss of money because compensation could always be had by payment of interest. The Fifth Circuit declined to decide this issue.

3. Ethical Considerations in Maintenance of a Suit Barred by the Statute of Limitations

The *United States Attorney's Bulletin*, June 5, 1995, p. 220, summarizes ABA Formal Op. 94-387, "Disclosure to Opposing Party and Court That Statute of Limitations Has Run," Sept. 26, 1994:

> An attorney has no ethical duty to inform an opposing party that her client's claim is time-barred...it may well be unethical to disclosure such information without the client's consent. The ethics rules do not preclude an attorney from negotiating with an opposing party about a civil claim that may not be susceptible to judicial enforcement because the statute of limitations has run. An attorney in this situation, however, must be careful not to make any affirmative misrepresentations about the facts showing that the claim is time-barred or suggest that she plans to do something to enforce the claim which, in fact, she has no intention of doing. The attorney must inform her own client. It is not unethical to file a time-barred lawsuit. The same rule applies to a government attorney handling a civil matter.

D. Jurisdiction and Venue

1. Subject Matter Jurisdiction

Subject matter jurisdiction over federal civil forfeiture actions is vested in the federal district courts by 28 U.S.C. §§ 1345 (actions in which the United States is the plaintiff) and 1355 (actions to enforce forfeitures incurred under an Act of Congress).

2. *In rem* Jurisdiction and Venue

In addition to having subject matter jurisdiction over the forfeiture action, the district court must have *in rem* jurisdiction over the property to be forfeited, and venue for the action must be proper in the district. Both *in rem* jurisdiction and venue in civil forfeiture cases are governed by 28 U.S.C. § 1355(b).

Historically, pursuant to 28 U.S.C. § 1395, civil forfeiture proceedings were brought in the district where the subject property was found.[41] However, venue for civil forfeiture was extended in 1986, when Congress enacted 18 U.S.C. § 981(h) and 21 U.S.C. § 881(j). Under these provisions, if a person has been criminally charged with a violation that could be the basis for the forfeiture of his property, a civil forfeiture action may be brought in the judicial

[41] *See Pennington v. Fourth National Bank*, 243 U.S. 269, 272 (1917). One court held that this provision did not allow the Government to transfer seized property to a different district simply so that it would be considered "found" there for purposes of *in rem* jurisdiction and venue. *See United States v. One 1974 Cessna Model 310R Aircraft*, 432 F. Supp. 364, 368-69 (D.S.C. 1977).

district where the owner/defendant is found or the criminal prosecution is pending. These statutes were intended to allow the Government to bring related civil and criminal actions in the same district, thus, eliminating unnecessary duplication of effort. They only apply, however, when there is a pending prosecution and the property in question belongs to the criminal defendant. Thus, the statutes do not apply where, for whatever reason, no criminal charges have been filed or where the property is held by a third party who may have obtained it from (or allowed it to be used by) the person actually responsible for the criminal violation. In such cases, until 1992, the Government still had to file a separate forfeiture action in each district where the subject property was located.

More important, an issue arose as to whether sections 981(h) and 881(j), similar to section 1395, relate only to venue, or whether they also establish *in rem* jurisdiction over the property in cases where the property was located outside of the district. The Government argued with some force that Congress must have intended the statutes to give the court *in rem* jurisdiction whether or not the property was found within the boundaries of the judicial district, because as venue statutes alone they would serve no purpose. A majority of courts agreed with this position.[42]

One circuit court ultimately held, however, that the statutes neither gave the court, in which the action was filed, automatic *in rem* jurisdiction over the property, nor did they implicitly empower that court to issue process to be served in another district in order to gain *in rem* jurisdiction over the property.[43] Under that ruling, the extended venue provisions in sections 981(h) and 881(j) allowed the court to resolve the forfeitability of the property as to the criminal defendant and any other person over whom the criminal trial court had obtained personal jurisdiction, but not as to any other potential claimant.

In 1992, Congress resolved all of these issues by enacting 28 U.S.C. § 1355(b), which provides for both venue and *in rem* jurisdiction in any district where the act giving rise to forfeiture occurred, where the property is found, or where venue would be proper under

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[42] *United States v. Maull*, 855 F.2d 514, 517 (8th Cir. 1988) (dicta); *United States v. All Funds on Deposit*, 767 F. Supp. 36, 39-40 (E.D.N.Y. 1991); *United States v. Contents of Account No. 11671-8*, 763 F. Supp. 53, 54-55 (S.D.N.Y. 1991); *United States v. Certain Real Property Known as 218 Panther Street*, 745 F. Supp. 118, 119 n.2 (E.D.N.Y. 1990) (dicta), *aff'd sub nom. United States v. Eng*, 951 F.2d 461 (2d Cir. 1991); *United States v. Parcel I, Beginning at A Stake*, 731 F. Supp. 1348, 1351 (S.D. Ill. 1990); *United States v. 5708 Beacon Drive, Austin, Tex.*, 712 F. Supp. 525, 527 (S.D. Miss. 1988), *aff'd*, 875 F.2d 859 (5th Cir. May 1989) (Table); *United States v. Premises Known as Lots 50 & 51, Etc.*, 681 F. Supp. 309 (E.D.N.C. 1988).

[43] *See United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill Lynch*, 971 F.2d 974 (3d Cir. 1992). *Accord United States v. Real Property Located at 11205 McPherson Lane*, 754 F. Supp. 1483, 1485-90 (D. Nev. 1991).

section 981(h) or 881(j).[44] Thus, civil forfeiture actions may now be consolidated in a single district irrespective of whether a criminal prosecution is pending against the property owner(s).[45]

Congress also added 28 U.S.C. § 1355(d) to authorize a court to perfect its *in rem* jurisdiction by issuing whatever process "may be required to bring the property before the court."[46] It is worth noting, however, that subsection (d) does not state that the service of such a process is necessary to give the court *in rem* jurisdiction. Indeed, subsection (d) refers to subsection (b) as the jurisdictional statute. Moreover, it is apparent from the legislative history of the 1992 amendment that Congress intended to base *in rem* jurisdiction *either* on the physical presence of the property within the district *or* on the fact that the act giving rise to the forfeiture had occurred in the district, thus satisfying in either way the constitutional requirement of minimum contacts between the property and the jurisdiction of the court.[47]

This point may be important with respect to property located outside of the United States where the nationwide service of process provision in 28 U.S.C. § 1355(d) would not apply. Because a court has *in rem* jurisdiction over property as long as the crime giving rise to the forfeiture occurred within the district, a court may, under 28 U.S.C. § 1355(b)(2), issue an order of forfeiture against property located outside of the United States before it obtains

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[44] Money Laundering Enforcement Improvements Act of 1991, Pub. L. 102-550, § 1521, 106 Stat. 4062, 102d Cong, 2d Sess. (Oct. 28, 1992). These new venue and jurisdictional provisions have retroactive application to all suits filed after its effective date. *United States v. Certain Funds at Hong Kong, Shanghai Bank*, 96 F.3d 20 (2d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 954 (1997); *United States v. One 1978 Piper Cherokee*, 91 F.3d 1204 (9th Cir. 1996); *United States v. 18900 S.W. 50th St., Fort Lauderdale*, 915 F. Supp. 1199 (N.D. Fla. 1994).

[45] *United States v. One 1978 Piper Cherokee*, 91 F.3d 1204 (9th Cir. 1996); *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993); *United States v. Contents of Account No. 2033301*, 831 F. Supp. 337 (S.D.N.Y. 1993).

[46] It is the view of the Asset Forfeiture and Money Laundering Section that 28 U.S.C. § 1355(d) allows a court in which a forfeiture could be brought under section 1355(b) to issue a seizure warrant pursuant to section 981(b) or 881(b), even if the property is located outside of the district. *See* discussion of this subject in chapter 2, part III.A.3, of this manual.

[47] *See* 137 Cong. Rec. S12,238 (daily ed. Aug. 2, 1991) (statement of Sen. D'Amato) (citing discussion of minimum contacts test in *United States v. Ten Thousand Dollars in U.S. Currency*, 860 F.2d 1511 (9th Cir. 1988)). *See also Republic National Bank v. United States*, 506 U.S. 80 (1992).

physical control over the property.[48] The cooperation of the property owner or the foreign government or both would be required to obtain actual repatriation of the property.[49]

3. Change of Venue

It has always been possible to move for a change of venue under 28 U.S.C. § 1404, based on the convenience of the parties and the interests of justice once the property has been seized and a claim has been filed.[50] This provision remains in effect under the 1992 amendment.

4. Removal or Substitution of the *res*

Before 1992, there was a great deal of litigation over whether removal of the property from the district after the forfeiture action had begun would deprive the district court of jurisdiction and bring the forfeiture action to a halt. The Supreme Court has now resolved this issue.

In *Republic National Bank v. United States,* 506 U.S. 80 (1992), the Government had brought a civil forfeiture action against a residence in the Southern District of Florida pursuant to 21 U.S.C. § 881(a)(6). The sole claimant was Republic National Bank, which asserted a secured interest in the subject property. The bank agreed that the property could be sold pending disposition of the case, with the proceeds of the sale to be held by the U.S. marshal.

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[48] *United States v. Certain Funds Contained at Hong Kong, Shanghai Bank*, 96 F.3d 20 (2d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 954 (1997); *United States v. All Funds Maintained in the Name of Meza*, 856 F. Supp. 759 (E.D.N.Y. 1994), *aff'd*, 63 F.3d 148 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1541 (1996). Before the enactment of 28 U.S.C. § 1355(b)(2), the law regarding the forfeiture of property abroad was unclear. *See United States v. U.S. Funds in the Amount of $3,035,648.50*, No. Civ-91-217E, 1991 WL 236843 (W.D.N.Y. Nov. 4, 1991) (unpublished), which held that United States courts had no jurisdiction to forfeit civilly property located abroad. *But see United States v. Certain Funds,* No. 91-598-CIV-J-10, 1993 WL 764752 (M.D. Fla. Nov. 19, 1993) (unpublished) (allowed the default forfeiture of certain foreign bank accounts under 21 U.S.C. § 881(j) when the account holder was a fugitive in related criminal proceedings). It would have been possible to argue that the action could commence in anticipation that property might later be brought into the country before an order of forfeiture was sought, but such an action would require the cooperation of a foreign government.

[49] *See* chapter 11 for a discussion of international forfeiture problems.

[50] *See Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960); *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993); *United States v. Contents of Account No. 2033301 in the name of Freixas*, 831 F. Supp. 337 (S.D.N.Y. 1993); *United States v. One Parcel of Real Property with Bldgs.*, 131 F.R.D. 27 (D.R.I. 1990). *Cf. Fettig Canning Co. v. Steckler*, 188 F.2d 715, 718-19 (7th Cir.), *cert. denied*, 341 U.S. 951 (1951). A change of venue was permitted in the following civil forfeiture case: *United States v. One Parcel of Real Property with Bldgs.*, 131 F.R.D. 27 (D.R.I. 1990) (21 U.S.C. § 881(a)(6)).

After a trial on the merits, the district court found that there was probable cause for the forfeiture and that the bank had failed to establish an innocent owner defense.[51] The bank appealed, but did not seek a stay of the judgment. Accordingly, the U.S. Marshals Service transferred the proceeds of the sale of the property to the Assets Forfeiture Fund, and the Government moved to dismiss the appeal.

The Eleventh Circuit granted the motion to dismiss, holding that the removal of the proceeds of the sale from the Southern District of Florida had terminated the district court's *in rem* jurisdiction over the property and, hence, the appellate court's jurisdiction over the appeal.[52] The Supreme Court reversed that decision, and remanded the case to the Eleventh Circuit with instructions to hear the appeal on the merits.

In an opinion by Justice Blackmun in which seven other justices joined, the Court held that "actual or constructive control" over property by the district court is essential only to the *initiation* of an *in rem* forfeiture action. Once jurisdiction is vested, the Court said, release or removal of the property to another district does not divest the court of jurisdiction unless the release would render judgment by the court "useless" because it would have no effect whatsoever.

The Government attempted to argue that a judgment in the instant case would be "useless" because even if the case were reversed on appeal, the court could not, consistent with the Appropriations Clause of the Constitution, order the Government to withdraw money from the Department of the Treasury without a congressional appropriation once the money had been deposited there. The Court rejected this argument on two grounds. The majority held that if the case were reversed, a sum of money equal to the proceeds of the sale of the subject property could be paid out of the Judgment Fund, 31 U.S.C. § 1304, notwithstanding the fact that money had been initially deposited into the Assets Forfeiture Fund. Since the Judgment Fund exists as a result of a congressional appropriation, there would be no constitutional bar to such a payment. Three other justices objected to this procedure, but would have held that the Government's argument nevertheless had no merit because the Appropriations Clause only applies to "public funds," and that property seized for a forfeiture that proves to be ill-founded never becomes public funds.

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[51] *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563 (S.D. Fla. 1990).

[52] *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 932 F.2d 1433 (11th Cir. 1991), *rev'd sub nom. Republic National Bank v. United States*, 506 U.S. 80 (1992).

In any event, the Court held that the district court retained the power to return the seized property to the claimant, and so the entry of a judgment by the appellate court would not be "useless." The Court did not rely in reaching its decision on the new statute, 28 U.S.C. § 1355(c), which imposes the same result statutorily that the court imposes in *Republic National Bank v. United States*. Under section 1355(c), an appellate court retains jurisdiction over an appeal in an *in rem* forfeiture case even if the property is removed from the district pending appeal. In a footnote, the Court simply noted that the new statute was enacted on October 28, 1992, and that a determination of whether it applied to the instant case or not was unnecessary in light of the Court's disposition of the case. Justice Thomas, however, would have held that the new statute applied retroactively and controlled the disposition of the case. In Justice Thomas' view, this was so because changes in jurisdictional statutes always apply retroactively. Justice Thomas' concurring opinion may, thus, be useful to the Government in arguing that the other jurisdictional aspects of the legislation enacted on October 28, 1992, should be applied retroactively.

5. Interlocutory Sales

Both the Supplemental Rules[53] and the Customs laws[54] expressly authorize the interlocutory sale of property that is subject to judicial forfeiture when it is perishable or liable to decay or injury, or when the expense of keeping and maintaining it during the pendency of the civil forfeiture proceeding are deemed excessive. Such interlocutory sales should be undertaken only after consultation with the U.S. Marshals Service and only pursuant to court order.[55] After the sale, the proceeds, which may be deposited with the court or placed into the Seized Asset Deposit Fund pursuant to court order, are treated as substitutes for the original property for purposes of jurisdiction and satisfaction of final judgment.[56] Information concerning stipulated and interlocutory sales may be found in *A*

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[53] Supplemental Rule E(9)(b).

[54] 19 U.S.C. § 1612, under procedures prescribed by 28 U.S.C. § 2001 *et seq.*

[55] Supplemental Rule E(9)(b); 19 U.S.C. § 1612. *See* 28 U.S.C. §§ 2001, 2002. According to 19 U.S.C. § 1612, interlocutory sales of administratively forfeitable property may occur without judicial approval. Even if the property is judicially or administratively forfeitable, however, an interlocutory sale should not be undertaken without prior ascertainment of the status of state law enforcement agency requests for equitable sharing of the subject property and requests by Department of Justice components for placing it into official use. *Attorney General's Guidelines* § VI.A.

[56] Supplemental Rule E(9)(b), (c); 19 U.S.C. § 1612. *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970).

Guide to Sales of Property Prior to Forfeiture (rev. November 1990), which is available from the Asset Forfeiture and Money Laundering Section.[57]

II. Initiation of Judicial Forfeiture Proceeding

Formal civil judicial forfeiture proceedings are initiated by the filing of a complaint against the property pursuant to Supplemental Rule C(2). Before preparing a complaint, the government attorney should carefully assess the available evidence and the legal basis for the proposed forfeiture and should attempt to identify those persons who are likely to file claims in the proceeding. If a number of property items have been or will be seized on the basis of the same investigation or the same underlying pattern of criminal conduct, the government attorney must also determine whether to file one complaint or a series of complaints against the subject property. It is Department of Justice policy that a single judicial action should be brought against all property items that are subject to forfeiture under the same statutory authority and on the same factual basis and in which one individual has an ownership interest.

A. Complaint for Forfeiture

1. Verification

Supplemental Rule C(2) provides that complaints in civil forfeiture actions must be verified.[58] The purpose of the verification requirement is to cause an authorized government official to satisfy himself that the allegations in the complaint are true, based either on personal knowledge or on information and belief.[59] The Supplemental Rules are silent on the correct form for a verification; therefore, the law of the state in which the district court is located determines what constitutes proper verification.[60]

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[57] Reported civil forfeiture cases in which an interlocutory sale was approved or disapproved include: *United States v. 87 Skyline Terrace*, 26 F.3d 923 (9th Cir. 1994); *United States v. Esposito, 8 Princess Court*, 970 F.2d 1156 (2d Cir. 1992); *United States v. Peters*, 791 F.2d 1270 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986); *United States v. Monkey*, 725 F.2d 1007 (5th Cir. 1984); *United States v. One 1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. 697 (W.D. Tex. 1992): *United States v. Real Property in Sevier County, Tenn.*, 703 F. Supp. 1306 (E.D. Tenn. 1989).

[58] *See United States v. $84,740.00 U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990).

[59] *See United States v. Banco Cafetero International*, 608 F. Supp. 1394, 1400 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 1154 (2d Cir. 1986).

[60] *See United States v. $84,740.00 U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990).

2. Contents

A complaint for civil forfeiture should contain the following facts, statements, and allegations[61]:

(1) the basis for the court's jurisdiction (28 U.S.C. §§ 1345, 1355, 1395);

(2) a description of the property that is the subject of the forfeiture proceeding, including its appraised value, and, if the action began as an administrative proceeding, a statement that a claim and a cost bond were filed;

(3) a statement showing that the property is subject to the jurisdiction of the district court either because it is within the particular judicial district or because of the existence of some other fact conferring jurisdiction on the district court;

(4) the place of seizure and whether it took place on land or navigable water[62];

(5) the date of seizure and the identity of the seizing agency;

(6) the circumstances from which the forfeiture claim arises, including the facts supporting probable cause and a citation of the statute or statutes allegedly violated;

(7) an allegation that the property is forfeitable to the United States; and

(8) a request for such relief as the court deems proper.

A civil forfeiture complaint must comply with Rule E(2) of the Supplemental Rules for Certain Admiralty and Maritime Claims rather than the notice pleading requirement of Fed. R. Civ. P. 8.

3. Particularity

Generally, in most civil lawsuits, a complaint may be pled as "notice pleading."[63] This is not the case, however, with complaints for civil forfeiture. Under the Admiralty Rules,

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[61] Supplemental Rules C(2), E(2)(a).

[62] A claimant's right to a jury trial depends upon this distinction. *See United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 459 (7th Cir. 1980).

[63] *See* Fed. R. Civ. P. 8.

forfeiture complaints must be pled "with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."[64]

Most of the litigation on the particularity requirement has occurred in the First Circuit. In a series of cases dealing with situations where the Government was unable to identify the specific property traceable to the illegal activity in its complaint, the courts in the First Circuit have held that Rule E(2)(a) requires only that the Government allege sufficient facts to support a reasonable belief that it will be able to demonstrate probable cause for the forfeiture at the time of trial.[65]

The particularity requirement may be satisfied in a number of ways. Most commonly, an agent's probable cause affidavit supporting a request for a seizure warrant is attached to the

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[64] Rule E(2)(a). *United States v. Two Parcels of Real Property*, 92 F.3d 1123 (11th Cir. 1996) (presenting one of the more liberal readings of specificity); *United States v. $87,060.00*, 23 F.3d 1352 (8th Cir. 1994); *See United States v. U.S. Currency in the Amount of $150,660.00*, 980 F.2d 1200 (8th Cir. 1992); *United States v. Daccarett*, 6 F.3d 37 (2d Cir.), *cert. denied*, 510 U.S. 1191 (1993); *United States v. 15145 50th St.*, 5 F.3d 1137 (8th Cir. 1993); *United States v. Premises & Real Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1266 (2d Cir. 1989); *United States v. One Parcel of Real Property*, 921 F.2d 370, 375 (1st Cir. 1990); *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636, 638 (1st Cir. 1988); *United States v. Real Property and Residence at 3097 S.W. 111th Avenue*, 921 F.2d 1551, 1554 (11th Cir. 1991); *United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987); *United States v. $39,000 in Canadian Currency*, 801 F.2d 1210, 1216 (10th Cir. 1986). *See also United States v. Funds in the Amount of $9,800*, 952 F. Supp. 1254 (N.D. Ill. 1996) (containing a detailed discussion of the requirements for specificity); *United States v. A 1966 Ford Mustang*, 945 F. Supp. 149 (S.D. Ohio 1996); *United States v. All Funds of Perusa, Inc. 269*, 935 F. Supp. 208 (E.D.N.Y. 1996) (complaint alleging structuring); *United States v. $639,470.00 U.S. Currency*, 919 F. Supp. 1405 (C.D. Cal. 1996) (complaint based on a traffic stop which uncovered drug money); *United States v. Premises Known as 5100 Whitaker Ave.*, 727 F. Supp 920, 924-25 (E.D. Pa. 1989); *United States v. Certain Real Property Located at 2323 Charms Rd.*, 726 F. Supp. 164, 166-67 (E.D. Mich. 1989); *United States v. Thirteen Thousand Dollars*, 718 F. Supp. 1441, 1442 (E.D. Mo. 1989); *United States v. $199,514.00 U.S. Currency*, 681 F. Supp. 1109, 1110-11 (E.D.N.C. 1988).

[65] *See United States v. One Parcel of Real Property*, 921 F.2d 370, 375 (1st Cir. 1990) ("Whether none, all, or only a portion of the defendant property is forfeitable is not determined at the pleadings stage, but at trial."); *United States v. Parcel of Property Located at 155 Bemis Road*, 760 F. Supp. 245 (D.N.H. 1991) (applying *One Parcel of Real Property* to forfeitures under section 981); *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722 (D. Me. 1991) (same). *See also United States v. TWP 17 R 4*, 970 F.2d 984 (1st Cir. 1992) (section 981 complaint alleging that property was purchased with drug proceeds by a fugitive using an alias between 1985 and 1988 was sufficiently particular to put the claimant on notice of the forfeiture action, and to allow him to investigate and answer the complaint). *Accord United States v. U.S. Currency in the Amount of $150,660.00*, 980 F.2d 1200 (8th Cir. 1992).

forfeiture complaint and explicitly incorporated by reference.[66] Such affidavits, however, typically have to be supplemented in the complaint to set forth the legal theories underlying the forfeiture. In most or all cases, the Government must not only allege the relevant facts with particularity, but must also identify the particular statutory violation giving rise to the forfeiture under section 981. Further, at least one court has criticized a forfeiture complaint that relied upon an attached seizure warrant affidavit and exhibits, but failed to separately outline the basic facts critical to understanding the forfeiture action in the complaint itself.[67] Although the court found the complaint to be sufficient, it strongly objected to having to delve into a lengthy, "verbose and confusing" affidavit simply to understand the facts underlying probable cause.

Finally, where the Government is seeking the forfeiture of "facilitating property," the facts demonstrating application of the facilitation theory must be pled with particularity so that the claimant is on notice as to how the Government believes the defendant property was used to facilitate the underlying offense.[68]

B. Other Preliminary Matters

1. Preparation of Warrant of Arrest *in rem*

The government attorney should prepare the warrant of arrest *in rem* pursuant to which the property will formally be brought within the control of the court. The warrant should set

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[66] *See United States v. Daccarett*, 6 F.3d 37 (2d Cir.), *cert. denied*, 510 U.S. 1191 (MEM) (1993) (18 U.S.C. § 981 and 21 U.S.C. § 881: in determining whether the particularity requirements are satisfied, the affidavit is included); *United States v. U.S. Currency, in the Amount of $150,660.00*, 980 F.2d 1200 (8th Cir. 1992) (affidavit is considered when determining whether complaint meets particularity requirements); *United States v. Parcels of Land...Laliberte*, 903 F.2d 36 (1st Cir. 1990); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989) (defects in the complaint can be cured by the affidavit).

[67] *United States v. Eighty-Eight (88) Designated Accounts*, 740 F. Supp 842, 847 n.8 (S.D. Fla. 1990). However, the court generally will read attached affidavits as part of the complaint when ruling on a Rule 12(b)(6) motion to dismiss the complaint. *United States v. Daccarett*, 6 F.3d 37 (2d Cir.), *cert. denied*, 510 U.S. 1191 (1993); *United States v. U.S. Currency, in the Amount of $150,660.00*, 980 F.2d 1200 (8th Cir. 1992); *United States v. Parcels of Land...Laliberte*, 903 F.2d 36 (1st Cir. 1990); *United States v. A 1966 Ford Mustang*, 945 F. Supp. 149 (S.D. Ohio 1996; *United States v. $600,000 in U.S. Currency*, 869 F. Supp. 836 (D. Kan. 1994); *United States v. 105,800 Shares of Common Stock of First Rock Bancorp, Inc.*, 830 F. Supp. 1101 (N.D. Ill. 1993); *United States v. All Assets of Statewide Auto Parts, Inc.*, 789 F. Supp. 537, 540 (E.D.N.Y. 1992), *aff'd*, 971 F.2d 896 (2d Cir. 1992) ("supporting affidavits may cure lack of particularity in complaint itself"); *United States v. 16899 S.W. Greenbrier*, 774 F. Supp. 1267 (D. Or. 1991).

[68] *See United States v. Certain Accounts*, 795 F. Supp. at 397-98 (deposit of structured funds into "primary" account creates reasonable belief that entire contents of account are forfeitable under facilitation theory, but transfer of some funds from "primary" account to "secondary" account does not, without more, create a reasonable belief that entire contents of "secondary" account are forfeitable as facilitating property).

forth the date of the filing of the forfeiture action and should notify the recipient of the requirement that a claim be filed within ten days and an answer within 20 days thereafter.[69] It should also command the U.S. marshal (or the Customs officer when the underlying offense is a violation of the Customs laws) to arrest the property.

2. Preparation of Marshals Form 285

The Marshals Form 285 (Process Receipt and Return) should be prepared for the property and for each person known to have an interest in the property, including lienholders, who will be personally served with notice of the forfeiture proceeding.

3. Preparation of Discovery Materials

In some districts, requests for production of documents and interrogatories may be served with the complaint.[70] Some local rules permit discovery in civil forfeiture cases only with the concurrence of claimant's counsel or permission of the court. For example, Local Rule 26.1(b) of the Northern District of Alabama states:

> **(b) Limits on formal discovery.** (1) Formal discovery under Fed. R. Civ. P. 30-36 is permissible in the following types of cases...only with prior approval of a judge of the court or upon the written stipulation of the parties:
>
> * * * *
>
> - Forfeiture and statutory penalty actions * * *

Local Rule 26.1(A) of the District of Colorado states:

> **A. Prohibition of formal discovery.** Formal discovery under Fed. R. Civ. P. 30-36 is permissible in the following types of cases only with prior approval of a judge or upon the written stipulation of the parties.
>
> * * * *
>
> 6. Forfeiture proceedings.* * *

[69] *See* Supplemental Rule C(6).

[70] *See* Fed. R. Civ. P. 33(a) and the local rules.

4. Motion for Substitute Custodian

Supplemental Rule E(4) requires the U.S. marshal to take physical or constructive custody of property seized pursuant to a warrant of arrest *in rem*. If the government attorney, the U.S. Marshals Service, and the seizing agency determine that a different custodial arrangement would be suitable, court authorization for a substitute custodian must be obtained.

5. Application for Fourth Amendment Search or Seizure Warrant

If the execution of the warrant of arrest *in rem* requires intrusion into an area where there is a legitimate expectation of privacy, entry into the constitutionally protected area should not be made without the consent of the persons whose rights will be affected thereby or without a search warrant authorizing the entry and the subsequent seizure or other activity.[71]

6. Preparation of Notice of *Lis Pendens*

As a general rule, if real property is the subject of the civil forfeiture action, a notice of *lis pendens* should be filed with the local official who is responsible for recording deeds.[72] The purpose of the notice is to let third parties know that an action is pending that could affect ownership of the property. Be aware that in some states these notices must be renewed periodically. Also, government attorneys should be careful not to file a notice of *lis pendens* until a forfeiture complaint has been filed, unless expressly permitted by state law, as doing so could subject a government attorney to civil liability.

C. Requirement that the United States has Probable Cause at the Time of Filing the Complaint

Some courts have held that the Government cannot prevail in a civil forfeiture action unless it had probable cause at the time it filed its complaint to show that the defendant property was forfeitable. This is a separate issue from the requirement that the complaint

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[71] *See G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977) (warrant required to seize contents of dwelling); *United States v. Device Labeled "Theramatic,"* 641 F.2d 1289, 1295 (9th Cir. 1981) (warrant required to seize property from private office). *Cf. United States v. Ladson*, 774 F.2d 436, 440 (11th Cir. 1985) (seizure warrant for house insufficient to authorize entry to inspect or take inventory); *United States v. United States Currency in Amount of $324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989) (inventory authorized pursuant to a seizure warrant does not bar plain view doctrine's application).

[72] 28 U.S.C. § 1964. Government attorneys should check state and local rules and federal court rules in their local area regarding procedures for filing a notice of *lis pendens*.

must show on reasonable grounds to believe that the Government will be able to establish probable cause at trial.[73] The Ninth Circuit held, in *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994), that if the United States did not, at the time it filed its complaint, possess evidence to prove probable cause, it will not be permitted to prove probable cause at trial by positing evidence discovered subsequent to the filing of the complaint. The Second Circuit has ruled that such evidence can be used.[74] The other circuits seem not to have established a position. (In researching the law on this point, note that several circuits have explicitly held that evidence acquired post-seizure may be used to establish probable cause at trial, but this is a different issue from whether evidence acquired after filing the complaint may be used.)

D. Issuance and Execution of Process

1. Issuance of Process

Upon filing of a proper complaint, the clerk of the court is required to issue a summons and warrant of arrest *in rem* for the property that is the subject of the civil forfeiture proceeding.[75] According to the specific language of the Supplemental Rules, no showing of exigent circumstances is necessary, nor is there a requirement for a review of probable cause and particularity by an impartial magistrate.[76] However, the Supreme Court has ruled that real property cannot be seized without notice and an opportunity for a hearing, unless there

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[73] Discussed further in part II.A.3 of this chapter, *supra*.

[74] *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir.), *cert. denied*, 510 U.S. 1191 (1993) ("The complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a 'reasonable belief that the [G]overnment can show probable cause for forfeiture at trial.'").

[75] Supplemental Rule C(3).

[76] Supplemental Rule C(3) expressly states that when the complaint is filed, the clerk shall issue a summons and warrant of arrest "without requiring a certification of exigent circumstances." The Notes of the Advisory Committee on Rules, in the discussion of the 1985 amendment, also comment that the "requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations." The Ninth Circuit clearly held, in *United States v. Real Property 874 Gartel Dr.*, 79 F.3d 918 (9th Cir. 1996), that the complaint needed be reviewed by a magistrate for a probable cause determination because it can be filed. Other Circuits have also held that a warrant of arrest may issue in a civil forfeiture case without a probable cause hearing. *United States v. Property at 2323 Charms Rd.*, 946 F.2d 437, 639 n.6 (6th Cir. 1991); *United States v. One DLO Model A/C, 30.06 Machine Gun*, 904 F. Supp. 622 (N.D. Ohio 1995). A district court's refusal to issue a warrant of arrest *in rem* is subject to interlocutory appeal. *In re Application to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307 (1st Cir. 1988). In a forfeiture case brought under the Federal Food, Drug, and Cosmetic Act, the Fifth Circuit held that where a district court issues and then rescinds a warrant for arrest under Supplemental Rule C(3), an interlocutory appeal may be taken. *United States v. Proplast II*, 946 F.2d 422 (5th Cir. 1991).

are exigent circumstances.[77] Moreover, some courts have held that this summary and automatic method for securing warrants of arrest *in rem* is constitutionally inadequate as applied to realty or to seizures resulting in the closure of a business.[78]

Following the Supreme Court decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Department of Justice has adopted a policy of "posting" real property, rather than seizing it, except where relevant considerations mandate taking actual possession. By definition, this policy applies to the seizures of most ongoing businesses as a seizure of realty is typically involved. Seizure of an ongoing business under 18 U.S.C. § 981 should not be undertaken without prior consultation with the Asset Forfeiture and Money Laundering Section.[79]

2. Execution of Process

Subsections (3) and (4) of Supplemental Rule E set forth the method for execution of process by the U.S. marshal.

a. Tangible Property[80]

If possible, the U.S. marshal must take actual custody of tangible property. When real estate is the subject of the forfeiture action, the U.S. marshal in the district where the property is located is to take constructive possession by affixing a copy of the warrant of arrest *in rem* to a conspicuous place on the property and serving a copy of the complaint and process on the person in possession or on his or her agent.[81] Such "posting," designed to establish jurisdiction over realty, does not offend due process.[82]

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[77] *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). *See* discussion of seizure of real property in chapter 2 of this manual.

[78] *See United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 901-05 (2d Cir. 1992). *See United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483 (2d Cir. 1995) (the entire business cannot be seized under 18 U.S.C. § 981(a)(1)(A) where part of the business was legitimate); *United States v. Victoria-21*, 3 F.3d 571 (2d Cir. 1993) (seizure of a company's bank accounts is not a closure because it can borrow replacement funds).

[79] *Asset Forfeiture Policy Manual*, Chap. 9, Sec. IV, at p. 9 — 31.

[80] Supplemental Rule E(4)(b).

[81] Often the U.S. marshal will enter into an occupancy agreement when a dwelling is seized, allowing the occupants to remain.

[82] *See United States v. TWP 17 R 4*, 970 F.2d 984, 989-90 (1st Cir. 1992).

b. Intangible Property[83]

Examples of intangible property against which forfeiture proceedings are brought include loans and shares of stock.[84] If intangible property is the subject of the forfeiture action, the U.S. marshal executes process by leaving a copy of the complaint and warrant of arrest with the obligor or by accepting payment to the court registry of the amount owed (to the extent of the amount claimed with interest and costs).[85]

E. Notice

If potential claimants are not properly notified of the pendency of the forfeiture proceeding, the proceeding may be invalid, requiring the Government to issue new notifications. In some case, the property owners may later be entitled to have the property returned or to be compensated for its value.[86]

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[83] Supplemental Rule E(4)(c).

[84] *See United States v. Approximately 2,538.85 Shares of Stock*, 988 F.2d 1281 (1st Cir. 1993); *United States v. 3 Parcels in La Plata County, Colo.*, 919 F. Supp. 1449 (D. Nev. 1995), *on remand from* 53 F.3d 341 (Table) (9th Cir. 1995) (holding that a debt secured by a promissory note is subject to seizure and forfeiture); and *United States v. 105,800 Shares of Common Stock of Firstrock Bancorp, Inc.*, 825 F. Supp. 191 (N.D. Ill. 1993) (concerning the seizure of common stock of a corporation).

[85] *See* Supplemental Rule E(4)(c), which permits service of process on intangible property by serving the "obligor." It may be better practice to serve both obligor and obligee. Perhaps an order could be obtained by the court requiring the obligee to surrender the loan note to the U.S. Marshals Service. Supplemental Rule C(3) provides that if the subject of the action is intangible property, "the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment."

[86] This proposition is a truism. Improper notification means lack of Fifth Amendment due process which invalidates the proceeding. *See Robinson v. Hanrahan*, 409 U.S. 38 (1972) (defining constitutional notice requirements in forfeiture case brought by State); *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 201-02 (C.D. Cal. 1978); *Jaekel v. United States*, 304 F. Supp. 993, 999 (S.D.N.Y. 1969). *See also United States v. Estevez*, 845 F.2d 1409, 1411-12 (7th Cir. 1988). However, note that the Constitution does not require that the notice be received, but only that the Government make a reasonable attempt to provide notification. The Supreme Court laid down the general notice requirement, applicable to all kinds of cases, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In any event, decisional law varies greatly as to what kind of notification the Government must attempt to make in a civil forfeiture case.

1. Publication

Supplemental Rule C(4) requires that notice of the forfeiture action be published in a newspaper of general circulation in the district where the lawsuit was filed.[87] Government attorneys should check the local rules of the district court for specific requirements as to the number and frequency of publications of notice.

2. Personal Notice

Although the Supplemental Rules do not so provide,[88] personal notice of the pending action must also be served upon all persons, including lienholders, whose identities and addresses are known or reasonably ascertainable and whose rights and interest in the property will be affected by the lawsuit.[89] Personal service, with proof supplied via the Marshals Form 285, is preferable. Where not feasible, personal notice should be accomplished by mailing a copy of the complaint and warrant of arrest *in rem* by registered mail, return receipt requested. Note that when a potential claimant is in jail, notice must be sent to the individual at the jail facility.[90] Where notice is sent to the wrong address, but the potential claimant obtains actual knowledge of the intended forfeiture, notice is adequate.[91] When documents must be mailed out of the country, it may not be possible to force the recipient to sign a receipt as a condition of delivery, so alternatives like delivery by international Federal

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[87] *See United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1546 n.16 (11th Cir. 1987).

[88] Note that personal notice is generally required to have been given in connection with the administrative forfeiture. 19 U.S.C. § 1607. This is the context in which this issue generally arises.

[89] The general standard, applicable to all types of cases, for giving notice, was stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) as: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The same rule applies in forfeiture proceedings. *Robinson v. Hanrahan*, 409 U.S. 38 (1972). In this regard, it is important to keep in mind that two separate standards apply: the statutory requirement of notice and the Fifth Amendment due process requirement of minimum notice. *See Winters v. Working*, 510 F. Supp. 14, 17 (W.D. Tex. 1980); *Jaekel v. United States*, 304 F. Supp. 993, 999 (S.D.N.Y. 1969). *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (per curiam) (holding that if a potential claimant is known to be in jail, notice of the forfeiture action must be sent there). *See generally Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). *Cf. United States v. U.S. Currency Totalling $3,817.49*, 826 F.2d 785, 787 (8th Cir. 1987) (lack of personal notice not prejudicial as evidenced by filing of claim).

[90] *See Robinson v. Hanrahan*, 409 U.S. 38 (1972).

[91] *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992); *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976).

Express should be considered, as a signed receipt may be required as a condition of delivery.[92]

A special problem is presented by incarcerated persons, who are potential claimants: Is it sufficient to mail notice to their last known place of incarceration, or does it have to be sent to their actual place of incarceration? Must the notice be sent return-receipt requested? If so, is it sufficient if a jailor signs the receipt or must the prisoner sign? The circuits do not seem to agree on the kind of notice required to be sent to prisoners. For example, the Tenth Circuit holds that a return-receipt letter signed for by a jailor is sufficient regardless of whether the prisoner received it.[93] The Fifth Circuit has held that notice sent to the prisoner's house and signed by his sister is inadequate where the notice sent to his actual place of incarceration was mysteriously marked "return to sender."[94] The Fifth Circuit also held that notice is inadequate in which it was signed for by a jailor, but the prisoner claimed he did not receive the notice.[95] When reading forfeiture cases on the adequacy of notice, one must be cognizant as to whether the notice being discussed was in the administrative or the judicial proceeding.

3. Contents

The following information about the forfeiture proceeding should be provided in both the public and the personal notice: a description of the property that is the subject of the action; the time, place, and reasons for the seizure of the property; the statutory authority for the forfeiture; the date on which process was executed against the property; and the procedure and time for filing a claim and answer.[96] It is also advisable to include the penalty for failure to file within the time limit[97] and the right of interested persons to file petitions for remission or mitigation of forfeiture.[98]

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[92] *See* the discussion of the wrong address issue in chapter 3, part II.D.3.b, of this manual.

[93] *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996). The opinion emphasized that the Government is only required to made a reasonable attempt to notice an incarcerated person. Notice will not be deemed constitutionally inadequate just because the notice never actually reached the prisoner.

[94] *Armendariz-Mata v. U.S. Department of Justice*, 82 F.3d 679 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 317 (MEM) (1996).

[95] *United States v. Robinson*, 78 F.3d 172 (5th Cir. 1996).

[96] *See United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1546 n.16 (11th Cir. 1987).

[97] *See Holladay v. Roberts*, 425 F. Supp. 61, 67 (N.D. Miss. 1977).

[98] *See United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 201 (C.D. Cal. 1978). *See also Kiefer v. U.S. Dept. of Justice*, 687 F. Supp. 1363 (D. Minn. 1988).

4. Proof of Publication and Service

Proof of publication of notice should be filed with the court immediately. The government attorney should also keep a record of returns of process from the U.S. Marshals Service and return receipts from the post office in order to have documented information on the identities of the persons served and the dates of service.

III. Processing of Civil Forfeiture Action

A. Unanswered Complaint

1. Time Limits

According to Supplemental Rule C(6), a verified claim setting forth the interest in the property, by virtue of which the claimant seeks its return and asserts the right to defend the forfeiture action, must be filed within ten days after process has been executed.[99] An answer must be filed within 20 days of the filing of the claim. Neither a prior claim to the seizing agency under 19 U.S.C. § 1608 nor a petition for remission or mitigation is considered sufficient to serve as a claim in the judicial forfeiture proceeding.[100] However, the filing of an answer without the filing of a claim has been deemed by some courts under some circumstances as compliance with the Rule.[101]

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[99] Supplemental Rule C(6). *See United States v. Approximately Two Thousand, Five Hundred Thirty-Eight Point Eighty-Five Shares (2,538.85) of Stock Certificates of the Ponce Leones Baseball Club,* 988 F.2d 1281 (1st Cir. 1993) (time limit runs from date of service on particular claimant, not later date of publication, provided warrant of arrest *in rem* was executed first; otherwise, time will run from date of execution of warrant of arrest *in rem*); and *United States v. $38,570 in U.S. Currency*, 950 F.2d 1108, 1114-15 (5th Cir. 1992) (noting conflict between language in Warrant of Arrest and that of Supplemental Rule C(6)). *But see United States v. One Parcel Property Containing Apartment Units,* 813 F. Supp. 283 (D. Del. 1993) (holding claimant has until ten days following last date of publication to file claim where notice issued pursuant to Rule C(4) so provides).

[100] *United States v. Tracts 10 and 11 of Lakeview Heights*, 51 F.3d 117 (8th Cir. 1995) (with judge's discretion to refuse to consider a remission petition tantamount to filing a claim); *United States v. United States Currency in the Amount of $2,857.00*, 754 F.2d 208, 213-14 (7th Cir. 1985); *United States v. One 1980 Ford Mustang*, 648 F. Supp. 1305 (N.D. Ind. 1986).

[101] *United States v. 1 Street A-1*, 885 F.2d 994 (1st Cir. 1989); *United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C*, 760 F. Supp. 1015 (E.D.N.Y. 1991); *United States v. One 1979 Mercedes 450SE*, 651 F. Supp. 351 (S.D. Fla. 1987) (and cases therein cited).

2. Motion for Default Judgment

If no cognizable "response" is filed within thirty days of the date process was executed, the government attorney should seek a default judgment pursuant to Fed. R. Civ. P. 55 by filing with the clerk an application for entry of default, along with an affidavit as to the failure of any person to file a claim and an answer. The government attorney should then move the court for a default judgment of forfeiture, accompanying the motion with a statement that notice of the action was served on all "interested" persons. A proposed default judgment of forfeiture should also be prepared for the court.

B. Answered Case

1. Time Limits

As stated in the previous section, a claim in a civil forfeiture action must be filed within ten days after the execution of process, and an answer must be filed within 20 days after the filing of a claim.[102]

[102] Supplemental Rule C(6).

2. Claim and Answer

a. Requirements for Claim[103]

A claim in a civil forfeiture action, just like the complaint, must be verified on oath or solemn affirmation.[104] It must set forth the interest in the property by virtue of which the claimant seeks its restitution and asserts the right to defend the forfeiture action. If the claim is submitted on behalf of the claimant by an agent, bailee, or attorney in a circuit or district where this is permitted, it must also contain a statement of authority to act for the claimant.[105]

b. Requirements for Answer

The Supplemental Rules do not establish any particular requirements as to the contents of the answer in a civil forfeiture case, and therefore the matter is generally controlled by Fed. R. Civ. P. 8.[106] One distinction between forfeiture proceedings and other civil actions,

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[103] *Id.*

[104] Failure to verify the claim may sometimes constitute grounds for a motion to strike and ultimately for entry of default judgment. *See* discussion of motion to strike in part III.B.2.d of this manual. *See United States v. Various Computers and Computer Equipment*, 82 F.3d 582 (3d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 406 (1996) (failure to verify should be forgiven because plaintiff was *pro se* and the Government knew that he owned the computers); *United States v. Three Parcels of Real Property*, 43 F.3d 388 (8th Cir. 1994) (courts can demand strict compliance with verification requirements); *United States v. One Parcel of Property Located at RR 2*, 959 F.2d 101 (8th Cir. 1992) (failure to verify claim justifies striking it), *cert. denied*, ___ U.S. ___, 116 S. Ct. 385 (1995); *United States v. U.S. Currency in the Amount of $103,387.27*, 863 F.2d 555, 559-60 (7th Cir. 1988). The Supreme Court has pointed out that, whenever possible, it should be the principal who verifies the claim, rather than an agent, who may "from his want of knowledge, be the dupe of cunning and fraud." *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 285 (1815). The Sixth Circuit has held that verification of a claim by an attorney does not satisfy Supplemental Rule C(6). *United States v. Currency $267,961.07*, 916 F.2d 1104, 1108 (6th Cir. 1990). The Second Circuit has held that a claim verified by an attorney on information and belief does not satisfy the Rule. *Mercado v. U.S. Customs Service*, 873 F.2d 641, 644-45 (2d Cir. 1989). *Contra United States v. Various Computers*, 82 F.3d 582 (3d Cir.) (failure to verify forgiven because claimant was *pro se* and because Court's prior dealing with this matter had informed it of claimant's interest in the *res*; *United States v. 116 Emerson St.*, 942 F.2d 74 (1st Cir. 1991) (failure to verify forgiven where claim clearly set forth its basis), *cert. denied*, ___ U.S. ___, 117 S. Ct. 406 (1996).

[105] Local district court rules may contain additional requirements as to how an agent, bailee, or attorney establishes his authority to act for the claimant.

[106] *See* Supplemental Rule A.

however, is that no one has the right to answer a forfeiture complaint unless he has first put himself in the position of a claimant.[107]

c. Standing to Defend Property

In a civil forfeiture case, two different kinds of standing are required. One is the standing required by the statute under which the case is brought. The other kind is the requirement of Article III of the Constitution that there be an actual case or controversy before a federal court may take jurisdiction over an action (*i.e.*, advisory opinions not cognizable).[108] The discussion below deals with statutory standing unless otherwise indicated.

A person must have standing in order to become a claimant in a civil forfeiture action. Statutory standing is a threshold issue.[109] Indubitably, constitutional standing is a threshold issue, but decisional law is not always clear as to whether constitutional or statutory standing is being discussed. To have standing, one must have an ownership or possessory interest in

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[107] *The Antoinetta*, 49 F. Supp. 148, 151 (E.D. Pa. 1943), *aff'd*, 153 F.2d 138 (3d Cir. 1945), *cert. denied*, 328 U.S. 863 (1946). Occasionally, failure to file a claim has been forgiven when an answer was filed, or filing an answer persuaded the court to extend the time for filing a claim. *United States v. 1 Street A-1*, 885 F.2d 994 (1st Cir. 1989) (where answer contained everything claim should, and was filed within 20 days, non-filing of claim was forgiven); *United States v. One 1986 Pontiac Firebird*, 959 F.2d 230 (Table) (1st Cir. 1992) (single document containing claim and answer, filed by *pro se* incarcerated claimant, excused); *United States v. One 1990 Mercedes Benz 300 CE*, 926 F. Supp. 1 (D.D.C. 1996) (answer which was filed before claim stricken because claim must be filed first); *United States v. Prop. Ident. as $88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (answer stricken because no claim filed). It should be noted that when an answer but no claim is filed, if the answer were not filed within ten days after service of process, the Assistant United States Attorney can argue that even if the answer is deemed to constitute a claim, it should be stricken as tardy.

[108] "The essence of the standing question in its constitutional dimension, is 'whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' [as] to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Id.* [*Warth v. Seldin*, 422 U.S. 490 (1975)] at 498-499. ...The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect..., but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions." *Vil. of Arlington Hts. v. Metro. Housing Dev.*, 429 U.S. 252, 260, 261 (1977).

[109] *United States v. 5000 Palmetto Dr.*, 928 F.2d 373 (11th Cir. 1991) (brought under 21 U.S.C. § 881(a)(7)) (brought under 21 U.S.C. § 881(a)(7); *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370 (5th Cir. 1986) (brought under 18 U.S.C. § 545), *cert. denied sub nom. Newton v. United States*, 481 U.S. 1014 (1987); *United States v. The Real Property Located at 5201 Woodlake Dr.*, 895 F. Supp. 791 (M.D.N.C. 1995) (explicitly discussing constitutional standing); *United States v. 500 Delaware St.*, 868 F. Supp. 513 (W.D.N.Y. 1994) (explicitly discussing statutory standing under 21 U.S.C. § 881(a)(7)); *United States v. $79,000 in Account Number...at the Bank of New York*, No. 96-CIV-3493 MBM, 1996 WL 648934 (S.D.N.Y. Nov. 7, 1996) (unpublished) (brought under 18 U.S.C. § 981).

the *res*, although the courts offer a number of variations on this theme.[110] Standing for the purpose of asserting an innocent owner claim varies slightly from this threshold requirement of standing. For example, to have standing to assert an innocent owner claim under 18 U.S.C. § 981, one must be an owner or lienholder.[111]

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[110] *United States v. Various Computers and Computer Equipment*, 82 F.3d 582 (3d Cir.) ("a colorable claim even though property obtained by fraud"), *cert. denied*, ___ U.S. ___, 117 S. Ct. 406 (1996); *United States v. 9844 South Titan Court*, 75 F.3d 1470 (10th Cir. 1996) (the interest must be choate); *United States v. $69,292.00 in U.S. Currency*, 62 F.3d 1161 (9th Cir. 1995) ("an ownership or possessory interest"); *United States v. Coluccio*, 51 F.3d 337 (2d Cir. 1995) ("to establish standing to contest a forfeiture, claimant must show some evidence of ownership"); *United States v. Ranch Located in Young, Arizona*, 50 F.3d 630 (9th Cir. 1995) (must establish an ownership interest under state law); *United States v. 16510 Ashton, Detroit*, 47 F.3d 1465 (6th Cir. 1995) ("at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement"); *United States v. Three Parcels of Real Property*, 43 F.3d 388 (8th Cir. 1994) ("identifiable ownership or possessory interest"), *cert. denied*, ___ U.S. ___, 116 S. Ct. 385 (1995); *United States of America v. One 1990 Chevrolet Corvette*, 37 F.3d 421 (8th Cir. 1994) (an ownership interest, which may be evidenced by "actual possession, control, title or financial stake); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154 (2d Cir. 1994) ("a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement"); *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994); ("an ownership or other interest in the forfeited property"); *United States v. $20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994) (unsecured creditors lack standing); *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480 (6th Cir. 1993) (interest acquired after institution of suit can confer standing); *United States v. 717 South Woodard St.*, 2 F.3d 529 (3d Cir. 1993) (assertion of creation of resulting trust by paying part of the down payment made on the *res* confers standing); *United States v. Ford 250 Pickup 1990*, 980 F.2d 1242 (8th Cir. 1992) (cannot obtain standing by placing one's name on the vehicle title document after seizure); *United States v. $38,570 U.S. Currency*, 950 F.2d 1108 (5th Cir. 1992) (claimant must show "facially colorable interest"); *United States v. 1977 Porsche Carrera*, 946 F.2d 30 (5th Cir. 1991) (client's oral promise to give car to attorney as legal fee gave attorney standing); *United States v. 116 Emerson St.*, 942 F.2d 74 (1st Cir. 1991) (oral promise to help pay mortgage affording standing on a resulting trust theory); *United States v. 190 Colebrook Rd.*, 936 F.2d 632 (1st Cir. 1991) (no standing where purported claimants deeded their home to another prior to seizure); *United States v. 5000 Palmetto Dr.*, 928 F.2d 373 (11th Cir. 1991) (claimant who bought a house and permitted son to live there as long as he made all payments had standing); *United States v. Lot 111-B*, 902 F.2d 1443 (9th Cir. 1990) (bare legal title without any other indicia of ownership is insufficient to confer standing); *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990) (wife whose name was not on deed lacked standing even though she would obtain ownership interest in the event of termination of the marriage); *United States v. $321,470.00 U.S. Currency*, 874 F.2d 298 (5th Cir. 1989) (mere possession of large amount of currency in vehicle, with no credible explanation as to its origin, does not confer standing); *Mercado v. U.S. Customs Service*, 873 F.2d 641 (2d Cir. 1989) (assertion of non-testimonial privilege defeats standing); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989) (separation agreement conveying half the property to wife in trust for the children gave them standing in state where an express trust in realty can be created in a document other than the deed).

A claimant cannot avoid his burden of proving standing by asserting his Fifth Amendment privilege against self-incrimination. *Mercado v. U.S. Customs Service*, 873 F.2d 641, 644 (2d Cir. 1989). The Sixth Circuit has held that a person, who has power of attorney over the property, has standing to file a claim. *United States v. Currency $267,961.07*, 916 F.2d at 1107. Bailees have standing. *United States v. $260,242.00 U.S. Currency*, 919 F.2d 686, 687-88 (11th Cir. 1990); *United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1544 (11th Cir. 1987). A claimant seeking to challenge forfeiture has the burden of establishing an ownership interest in the seized property sufficient to satisfy the court of his standing.

[111] 18 U.S.C. § 981(a)(2).

In order to determine standing, the court determines the nature of the property right asserted by the purported claimant. The nature of that property right is generally determined according to state law.[112] The fact that two persons claim exclusive title to the same *res* does not necessarily mean that neither enjoys standing.[113]

The following are some examples of particular instances where the courts have discussed the standing issue. In many or most of these situations, state law must first be looked at to determine the nature of the property interest in order to determine whether there is standing under federal law.

(1) Subsequent Purchasers

Under the relation back doctrine, codified at 21 U.S.C. § 881(h) and 18 U.S.C. § 981(f), title to property subject to forfeiture vests in the United States "upon the commission of the act giving rise to forfeiture." If this rule were strictly applied, no one who acquired property subsequent to the commission of the underlying criminal offense could ever acquire an ownership interest in the property sufficient to confer standing to contest the forfeiture.

Although there previously was some doubt about its exact meaning, the Supreme Court has now held that the relation back doctrine does not limit the application of the innocent owner defense, and upheld a Third Circuit decision holding that even donees have standing to raise the innocent owner defense.[114]

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[112] *United States v. 9844 South Titan Court*, 75 F.3d 1470 (10th Cir. 1996); *United States v. 9844 South Titan Court*, 75 F.3d 1470 (10th Cir. 1996) (whether wife had a marital interest in the *res*, even though it was titled only in husband's name, was determined by the law of the State); *United States v. Tracts 10 and 11 of Lakeview Heights*, 51 F.3d 117 (8th Cir. 1995); *United States v. Ranch Located in Young, Arizona*, 50 F.3d 630 (9th Cir. 1995) (state law determines whether the purported transfer of the property was fraudulent); *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154 (2d Cir. 1994).

[113] *United States v. $69,292.00 in U.S. Currency*, 62 F.3d 1161 (9th Cir. 1995).

[114] *United States v. A Parcel of Land Known as 92 Buena Vista Ave.*, 507 U.S. 111 (1993). This issue is discussed in more depth in part III.C.3.c.(3) of this chapter, *infra*.

(2) Assignees

An assignee *may* have standing as a claimant in a forfeiture action if he can show that the assignor had a legitimate ownership interest in the subject property when it was assigned and that the assignment was legally valid as a conveyance of that interest.[115]

(3) Straw Owners

Straw owners who hold nominal title to the subject property but do not exercise dominion and control over it, lack standing as claimants to defend the property from forfeiture.[116] Note that a person who is a straw owner but whose name is on a real property deed may be entitled to notice and a hearing prior to seizure.[117] Even if there is abundant

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[115] *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480 (6th Cir. 1993) (the Assignment of Claims Act is inapplicable to *in rem* forfeitures; purchase of claims after they were filed conferred standing); *United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars*, 661 F.2d 319, 327 (5th Cir. 1981). *See also United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480 (6th Cir. 1993) (purchaser of the claim after it was filed is entitled to prove innocence, the Assignment of Claims Act is inapplicable to forfeiture cases); *United States v. Thirteen Thousand Dollars in U.S. Currency*, 733 F.2d 581, 583 (8th Cir. 1984) (assignee may assert claim); *United States v. $22,640.00 in United States Currency*, 615 F.2d 356, 360 (5th Cir. 1980); (assignees lacked standing where they failed to perfect assignment prior to entry of default judgment); *United States v. Currency Totalling $48,318.08*, 609 F.2d 210, 215 (5th Cir. 1980) (assignee failed to perfect assignment prior to assignor's entry of guilty plea); *United States v. Eleven Thousand Five Hundred & Eighty Dollars ($11,580) in United States Currency*, 454 F. Supp. 376, 381 (M.D. Fla. 1978) (assignees lacked standing where assignor had disclaimed ownership of property at seizure).

[116] *United States v. Vacant Land at 10th St. and Challenger Way*, 6 F.3d 662 (9th Cir. 1993) (mere assertion that one is responsible for the mortgage payments not probative of whether he is a straw: he must state that he made the payments); *United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill Lynch*, 971 F.2d 974, 984-87 (3d Cir. 1992); *United States v. Real Property at 5000 Palmetto Drive*, 928 F.2d 373 (11th Cir. 1991); *United States v. Premises Known as 526 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1989); *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 630 (11th Cir. 1986); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28-29 (8th Cir. 1979) (titular owner of airplane lacking standing to contest its forfeiture when another had purchased it and was using absence of legal title as a subterfuge to conceal his financial affairs); *United States v. One 1976 Lincoln Continental Mark IV*, 584 F.2d 266, 267 (8th Cir. 1978) (registered owner of car lacked standing when possession and control were consistently in the wrongdoer). *See also United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4)*, 902 F.2d 1443, 1444 (9th Cir. 1990) (per curiam) (quoting *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d at 630); *United States v. 500 Delaware St.*, 868 F. Supp. 513 (W.D.N.Y. 1994) (holding that even a straw may file a claim and not be dismissed until the government makes a prima facie showing that he is indeed a straw); *United States v. All That Lot of Ground Known as 2511 E. Fairmount Ave.*, 737 F. Supp. 878, 882 (D. Md. 1990) (mere inclusion of claimants' names on deed not enough to establish standing).

[117] *United States v. 16510 Ashton, Detroit*, 47 F.3d 1465 (6th Cir. 1995).

evidence that a titleholder is a mere straw, he is nevertheless entitled to notice, and to notice and hearing prior to seizure of real property.[118]

(4) Owners of Area Where Property Found

An allegation of an ownership or possessory interest in the place where the subject property was found, but not in the property itself, is insufficient to confer standing in the civil forfeiture action.[119]

(5) Unsecured Creditors

Unsecured creditors who have a claim against the wrongdoer but no specific claim against the property to be forfeited, do not have standing to enter the forfeiture action as claimants.[120] For example, in *United States v. One 1987 Cadillac Deville*, 774 F. Supp. 221, 223 (D. Del. 1991), the claimant had allegedly loaned money to his cousin to purchase a car, and expected that the car would be the collateral for the loan. When the Government sought to forfeit the car from the cousin, the claimant attempted to assert his interest. The court held that the claimant had, at most, an interest *enforceable against the owner of the car*, but had no standing to challenge the forfeiture. "Unsecured creditors do not have a sufficient

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[118] *United States v. Certain Real Prop. Located at 16510 Ashton*, 47 F.3d 1465 (6th Cir. 1995). *Cf. United States v. 2030 East Monroe St.*, 884 F. Supp. 1218 (C.D. Ill. 1995) (holding that a straw owner is not entitled to notice and a hearing prior to seizure of realty).

[119] *United States v. Fifteen Thousand Five Hundred Dollars*, 558 F.2d 1359, 1361 (9th Cir. 1977) (involving an allegation of interest in a safety deposit box but not the money found in it); *United States v. $511,780 in U.S. Currency*, 847 F. Supp. 908 (M.D. Ala. 1994) (driver and passenger in truck who stated that they didn't know that there was currency in the back of truck lacked standing to file claims); *United States v. U.S. Curr. Amounting to Sum of $30,800.00*, 555 F. Supp. 280, 284 (E.D.N.Y.), *aff'd*, 742 F.2d 1444 (2d Cir. 1983) (Table) (involving an assertion of possession of the premises, but not the property discovered therein); *United States v. $24,000 in U.S. Currency*, 722 F. Supp. 1386, 1390 (N.D. Miss. 1989), *aff'd w/o op.*, 902 F.2d 956 (5th Cir. 1989) (mere ownership of premises or area where money found insufficient to confer standing), *cert. denied*, 498 U.S. 1024 (1990).

[120] *United States v. The Real Property Located at 5201 Woodlake Dr.*, 895 F. Supp. 791 (M.D.N.C. 1995) (an unsecured loan to persons whose property was civilly forfeited makes one an unsecured creditor without Title III standing); *United States v. 127 Shares of Stock in Paradigm Mfg., Inc.*, 758 F. Supp. 581, 583 (E.D. Cal. 1990) (minor children may not challenge the forfeiture of assets of their parents where the only interest the children have is for unpaid child support, because "unsecured general creditors do not have standing to contest the forfeiture of property of their debtor") (collecting cases); *United States v. One Rural Lot*, 739 F. Supp. 74, 77 (D.P.R. 1990) (same); *United States v. One 1965 Cessna 320C Twin Engine Airplane*, 715 F. Supp. 808, 810 (E.D. Ky. 1989) (claimant who failed to file or record financial statement as required by the Uniform Commercial Code to perfect security interest in airplane, was "an unsecured creditor and, as such, [did] not have standing to recover against the forfeiture of the seized aircraft"); *United States v. One 1951 Douglas DC-6 Aircraft*, 525 F. Supp. 13 (W.D. Tenn. 1979) (same holding on very similar facts), *aff'd*, 667 F.2d 502 (6th Cir. 1981) (Table), *cert. denied*, 462 U.S. 1105 (1983).

property interest to contest the forfeiture of seized property," the court said.[121] "If the claimant does indeed have a valid agreement with his cousin, the owner of the car, for repayment of a loan, he may seek redress from her."[122]

As noted previously, unsecured creditors lack standing in a money laundering civil forfeiture because 18 U.S.C. § 981(a)(1)(A) allows innocent ownership claims only by an "owner or lienholder." Therefore, the Ninth Circuit held, someone who innocently loans money to a money launderer is out of luck if that money is thereafter seized for forfeiture.[123] This case also holds that criminal forfeiture cases holding that unsecured creditors have standing to file petitions in the ancillary proceeding are not precedent for conferring standing on unsecured creditors in civil forfeiture cases.

(6) Spouses Whose Names are Not on the Title

Whether one has standing to assert an innocent owner interest in property (generally real property) titled only in his/her spouse's name is determined pursuant to state law.[124]

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[121] *United States v. One 1987 Cadillac Deville*, 774 F. Supp. 221, 223 (D. Del. 1991).

[122] *Id.* at 224 (citations omitted). *See United States v. $3,799.00 in United States Currency*, 684 F.2d 674, 678 (10th Cir. 1982) (claimant who asserts that seized property would have been used to satisfy gambling debt owed to him lacks standing to contest forfeiture); *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars ($4,255,000)*, 762 F.2d 895, 907 (11th Cir. 1985) (holder of check drawn on forfeited bank account is a mere creditor of the account holder with no standing to contest forfeiture of the account); *United States v. Contents of Account No. 11671-8*, 763 F. Supp. 53 (S.D.N.Y. 1991) (same); *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437, 1440 (11th Cir. 1984) (party to an incomplete foreign exchange transaction was a mere creditor with a choice in action against the party to whom he had disbursed the foreign exchange, but with "no interest in the seized funds sufficient to confer upon him standing" to contest the forfeiture of the dollars that would have been used to complete the foreign exchange transaction).

[123] *United States v. $20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994).

[124] *United States v. 9844 S. Titan Court, Unit 9, Littleton, CO*, 75 F.3d 1470 (10th Cir. 1996) (under Colorado law, a spouse's right to the other spouse's property does not vest until death or divorce); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154 (2d Cir. 1994) (even though wife's name is not on title to securities she nevertheless should have been allowed to prove that she was a constructive trustee under New York law); *United States v. 717 South Woodard St.*, 2 F.3d 529 (3d Cir. 1993) (under Pennsylvania law, a wife has no interest in property titled in husband's name until the marriage is terminated); *United States v. Weaver*, 89 F.3d 848 (9th Cir. 1996) (Table) (under Oregon law, spouses can own property separately and one acquires an interest in the other's property only upon dissolution of the marriage); *United States v. Nunez*, 932 F. Supp. 62 (D. Vt. 1996) (although property was titled only in husband's name and wife contributed to its cost she had no interest in the property unless they divorced); *Stocker v. Hood*, 927 F. Supp. 871 (E.D. Pa. 1996) (where wife agreed to forfeit property titled in her name only, her common law husband had no equitable interest under Pennsylvania law which would give him a cause of action against wife's attorney).

(7) Beneficiaries of Trusts

A beneficiary of a trust (probably either constructive or resulting) can thereby obtain standing to assert innocent ownership.[125] The nature of the trust relationship is defined according to state law.

(8) Bailees

A bailee has been held to have standing to asset an innocent ownership claim.[126] However, the logic of such a holding is subject to question. If the owner of money is not innocent it seems that the innocence of the person who is simply holding it for him is irrelevant.

(9) Wife's Claim to Interest in Husband's Proceeds of Crime

For example, in *United States v. 9844 S. Titan Court, Unit 9, Littleton, CO*, 75 F.3d 1470 (10th Cir. 1996), a wife asserted an interest in currency seized from her husband's person for forfeiture as drug proceeds. The Tenth Circuit held that state law must be looked to for a determination as to whether the wife had a property interest in the currency. It held that under state law the wife lacked standing, explaining:

> An unvested or inchoate interest in marital property is insufficient to constitute ownership under 21 U.S.C. § 881. Under Colorado law, a spouse's right to the other spouse's property does not vest until death or divorce. ...
>
> A spouse under Colorado law is free to dispose of his or her property in any manner as no interest in the other spouse vests until divorce.[127]

It concluded that since Colorado recognizes only an inchoate interest of a spouse in property titled in the other spouse's name, the non-titled spouse lacking standing with respect to the money. (The court ruled the wife did have standing with respect to currency found in their abode.) The same result would obtain in a federal civil forfeiture case brought in

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[125] *United States v. Coluccio*, 51 F.3d 337 (2d Cir. 1995); *United States v. Tracts 10 and 11 of Lakeview Heights, TX.*, 51 F.3d 117 (8th Cir. 1995); *United States v. 717 South Woodard St.*, 2 F.3d 529 (3d Cir. 1993) (assertion that one is a beneficiary of a resulting trust precludes summary judgment unless the Government's evidence demonstrates that he was involved in the crime).

[126] *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (dicta).

[127] *United States v. 9844 S. Titan Court, Unit 9, Littleton, CO*, 75 F.3d 1470, 1476-1477 (10th Cir. 1996).

Wisconsin.[128] A fair and lucid statement was made by the court in *United States v. 127 Shares of Stock in Paradigm Mfg.*, 758 F. Supp. 581 (E.D. Cal. 1990), brought to forfeit common stock which a husband had purchased with narcotics proceeds and placed in the names of his wife and children. The court ruled that the wife and children lacked standing to file a claim. The wife's community property interest could not attach to property which the husband had no right to possess.

d. Motion to Strike Claim and/or Answer

If the "responses" filed in a civil forfeiture proceeding are procedurally or substantively defective, the government attorney may make a motion to strike them.

(1) Failure to File Timely "Response"

A motion to strike a claim and/or an answer may be based upon the failure of the potential claimant to file either or both of them within the applicable time limits for such responses.[129]

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[128] *United States v. Marx*, 844 F.2d 1303 (7th Cir. 1988) (brought under 21 U.S.C. § 853).

[129] Supplemental Rule C(6) requires that a claim be filed within ten days of the execution of process and an answer within 20 days thereafter. *See United States v. One Parcel of Property Located at RR 2*, 959 F.2d 101, 104 (8th Cir. 1992) (citing cases); *United States v. United States Currency in the Amount of $2,857.00*, 754 F.2d 208, 213 (7th Cir. 1985); *United States v. Certain Real Property & Premises Known as 218 Panther Street*, 745 F. Supp. 118, 120 (E.D.N.Y. 1990), *aff'd sub nom. United States v. Eng*, 951 F.2d 461 (2d Cir. 1991). *But see United States v. $84,740.00 U.S. Currency*, 900 F.2d 1402, 1406 (9th Cir. 1990) (two-year late challenge permitted where court lacked jurisdiction to order default due to Government's failure to comply with state law requirement to verify complaint); *United States v. U.S. Currency in the Amount of $103,387.27*, 863 F.2d 555, 563 (7th Cir. 1988) (claimant allowed extension to refile claim when original timely claim was dismissed for lack of verification); *United States v. One Assortment of Eighty-Nine Firearms*, 846 F.2d 24, 27 (6th Cir. 1988) (claimant complied with filing requirement even though filing was premature, as claim and answer were filed after service of summons and complaint on him, but prior to execution of process on asset, which event actually triggered the ten-day filing period).

(2) Failure to File Claim

Even if an answer is filed, the Government may move to strike it if a proper claim has not been filed in the judicial forfeiture proceeding.[130] However, the court will sometimes treat the answer as a claim and answer or grant an extension of time to file a claim if an answer were filed without a claim.[131]

(3) Failure to Allege any Interest in Subject Property

Supplemental Rule C(6) specifically requires that the claim contain a statement of "the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action." Claimants may attempt to avoid this requirement by asserting the Fifth Amendment privilege against self-incrimination, which has been held to be applicable to civil forfeiture proceedings because they are deemed to be quasi-criminal in nature.[132] The Ninth Circuit has stated in dicta that the making of a claim of ownership in a civil forfeiture case cannot be used as evidence against the maker in a related criminal action.[133] Contrarily, it has also been held that invocation of the nontestimonial privilege prevents a person from

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[130] *United States v. $88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996); *United States v. $10,000.00 in U.S. Funds*, 863 F. Supp. 812 (S.D. Ill. 1994); *The Antoinetta*, 49 F. Supp. 148, 151 (E.D. Pa. 1943), *aff'd*, 153 F.2d 138 (3d Cir. 1945), *cert. denied*, 328 U.S. 863 (1946); *United States v. $72,857.00*, 725 F. Supp. 1071 (E.D. Mo. 1989); *United States v. Premises Known as Lots 14, 15, 16, Etc.*, 682 F. Supp. 288 (E.D.N.C. 1987); *United States v. One 1978 BMW*, 624 F. Supp. 491 (D. Mass. 1985). *See United States v. Eng*, 951 F.2d 461 (2d Cir. 1991) (a *pro se* prisoner's statement explaining why the property should be released will not substitute for a claim); *United States v. United States Currency in the Amount of $2,857.00*, 754 F.2d 208, 212-13 (7th Cir. 1985) (holding that the filing of a petition for remission with the seizing agency does not give the "claimant" any rights in the judicial forfeiture proceeding, even if an answer is filed in court); *United States v. One 1980 Ford Mustang*, 648 F. Supp. 1305 (N.D. Ind. 1986) (filing administrative claim with agency does not satisfy requirement to file claim with court); *United States v. Fourteen (14) Handguns*, 524 F. Supp. 395, 397 (S.D. Tex. 1981). *Cf. United States v. One Urban Lot Located at 1 Street A-1*, 885 F.2d 994, 999 (1st Cir. 1989) (where claimant timely filed a verified answer containing all information required in a claim, answer deemed to have fulfilled function of claim in terms of establishing standing); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1436 (9th Cir. 1985) (stating that the district court has the discretion to allow the late filing of a verified claim if an answer has been properly filed); *United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C*, 760 F. Supp. 1015 (E.D.N.Y. 1991) (filing of claim waived because intervener satisfied substantial requirements); *United States v. One 1979 Mercedes 450SE*, 651 F. Supp. 351 (S.D. Fla. 1987) (discusses which courts did and did not forgive filing of claim when answer filed, and why); *United States v. One 1979 Oldsmobile Cutlass Supreme*, 589 F. Supp. 477, 478 (N.D. Ga. 1984) (recognizing the necessity of a claim precedent to an answer, but allowing extra time for the filing of a claim based on the facts of the case).

[131] *See* chapter 4, part III.B.2.b, of this manual.

[132] *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

[133] *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 2528 (MEM) (1996).

asserting a claim.[134] Whether the assertion of the privilege can defeat or delay the forfeiture action by excusing the claimant from imperiling himself in defense of the property depends upon the facts of the particular situation,[135] but it does not automatically and necessarily preclude the continuation of the proceeding or the granting of a motion to strike the claim on the ground that it is fatally insufficient.[136]

(4) Failure to State Cognizable Interest in Subject Property (Lack of Standing)

When it is clear from the claim and answer filed in the forfeiture action that the "claimant" has not stated or does not have a cognizable interest in the property, the Government should request that the claim and answer be stricken on the basis of a lack of standing.[137]

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[134] *United States v. Taylor*, 975 F.2d 402 (7th Cir. 1992); *Mercado v. U.S. Customs Service*, 873 F.2d 641 (2d Cir. 1989); *Baker v. United States*, 722 F.2d 517 (9th Cir. 1983) (nontestimonial privilege cannot be used as excuse for failure to have filed claim); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (dicta: one may have to choose between invocation of the privilege against self-incrimination, and giving up a civil suit). There are also cases dealing with invocation of claimant's non-testimonial privilege after commencement of a civil forfeiture case. The principles enunciated in those cases may have applicability to the issue of whether the privilege may be invoked in connection with the filing of a claim.

[135] *United States v. U.S. Currency*, 626 F.2d 11, 16 (6th Cir.), *cert. denied,* 449 U.S. 993 (1980).

[136] *Baker v. United States*, 722 F.2d 517, 518-19 (9th Cir. 1983) (holding that the Fifth Amendment does not preclude the court from demanding more than conclusory allegations as to ownership). *See also United States v. Fifteen Thousand Five Hundred Dollars*, 558 F.2d 1359, 1361 (9th Cir. 1977).

[137] *See* discussion in part III.B.2.c of this chapter, *supra*. *See also United States v. Three Parcels of Real Property*, 43 F.3d 388 (8th Cir. 1994) (claim property stricken because it did not set forth identifiable ownership or possessory interests), *cert. denied*, ___ U.S. ___, 116 S. Ct. 385 (1995); *United States v. $321,470.00, U.S. Currency*, 874 F.2d 298, 303 (5th Cir. 1989); *United States v. $364,960.00 in U.S. Currency*, 661 F.2d 319, 326 (5th Cir. 1981) (party seeking to challenge forfeiture must first demonstrate an interest sufficient to satisfy the court of standing to contest the forfeiture); *United States v. One Rural Lot*, 739 F. Supp. 74, 77 (D.P.R. 1990) (claimant has burden to satisfy the court of standing).

e. Motion for Default Judgment Following Strike of Claim/Answer

If the Government's motion to strike the claim and/or answer is granted and no claimants remain to defend the property in the forfeiture action, the government attorney should move, pursuant to Fed. R. Civ. P. 61(b), for a default judgment of forfeiture to the United States.[138]

f. Disentitlement Doctrine

It was once accepted by the majority of courts that a fugitive was not entitled to use the courts to oppose the civil forfeiture of his property.[139] This was known as the "disentitlement doctrine." However, the Supreme Court has now ruled this doctrine inapplicable to civil forfeiture cases.[140] Specifically, *Degen v. United States*, 517 U.S. 820 (1996), holds that a district court may not strike a claimant's filings in a civil forfeiture case merely on the ground that the claimant failed to appear in a related criminal case. In *Degen*, the claimant was under indictment in a related narcotics case and refused to return from Switzerland to stand trial. *Degen* asserted various defenses in the civil case, including the bar of the statute of limitations. The district court struck his claim under the fugitive disentitlement doctrine. The Ninth Circuit affirmed. The Supreme Court reversed. It explained that there are certain legal arguments on which a claimant, although he be a fugitive, ought nevertheless to be heard. This includes whether the statute of limitations has expired because this kind of purely legal issue can be determined without discovery or an evidentiary hearing.

However, the *Degen* court did not rule that the fugitive could, with impunity, fully participate in the civil forfeiture proceeding. It held that if a claimant's "unwillingness to

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[138] *See United States v. One 1988 Dodge Pickup*, 959 F.2d 37, 41-42 (5th Cir. 1992). Default judgments are rather commonplace in civil forfeiture cases. Most of the reported cases involve decisions addressing motions to vacate default judgments. *See, e.g., United States v. One Urban Lot Located at 1 Street A-1*, 885 F.2d 994, 997-98 (1st Cir. 1989); *United States v. U.S. Currency in the Sum of $393,976*, 775 F. Supp. 43, 46-49 (E.D.N.Y. 1991). Probably the most common reason for setting aside a default under Fed. R. Civ. P. 60(b) is that the notice given the potential claimant was inadequate, either statutorily or constitutionally. *See, e.g., United States v. $184,505.01 in U.S. Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Indoor Cultivation Equipment*, 55 F.3d 1311 (7th Cir. 1995); *United States v. Tracts 10 and 11 of Lakeview Heights*, 51 F.3d 117 (8th Cir. 1995).

[139] *See, e.g., United States v. Timbers Preserve*, 999 F.2d 452 (10th Cir. 1993); *United States v. Contents of Accounts at Merrill, Lynch...Friko Corp.*, 971 F.2d 974 (3d Cir. 1992), *cert. denied*, 507 U.S. 985 (1993); *United States v. Eng*, 951 F.2d 461 (2d Cir. 1991) (fugitive fighting extradition to United States from jail cell in Hong Kong is "disentitled" to oppose civil *in rem* forfeiture action against his property in the United States); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane*, 868 F.2d 1214 (11th Cir. 1989). *But see United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984 (E.D.N.Y. 1992) (corporate claimant *not* barred by disentitlement doctrine where corporate representative is a fugitive on unrelated tax charges).

[140] *Degen v. United States*, 517 U.S. 820 (1996).

appear in person results in non-compliance with a legitimate order of the court respecting pleading, discovery, the presentation of evidence, or other matters, he will be exposed to the same sanctions as any other uncooperative party." Presumably, where claimants are fugitives and the Government is thereby thwarted in its attempts to take discovery, government counsel will seek to obtain appropriate sanctions. Depending on the court, these sanctions could include as little as merely being able to comment adversely on the claimant's failure to appear, to as much as barring the claimant from offering any evidence or argument on issues which he refused to make discovery. Additionally, government counsel may be able to use the fact of flight as evidence against the claimant.

IV. Civil Discovery

Discovery provides the government attorney with the opportunity to determine whether the claimants have standing,[141] to identify the defenses that may be raised in the case,[142] to establish the basis for impeaching witnesses at trial, and to assess the strength of the Government's case. Discovery, pursuant to the Federal Rules of Civil Procedure, ultimately assists in making the decision whether to move for summary judgment, proceed to trial, or settle the case.

A. Methods of Discovery

1. Requests for Production of Documents

A request for production of documents and tangible things is the means by which the government attorney gathers together physical evidence in the custody and control of others to prepare to present its case and rebut the claimant's defense.[143] For example, the Government may believe the claimant is trafficking in narcotics proceeds. The claimant may defend that he is a legitimate businessman without knowledge of any connection between his property and narcotics. Requests for production can aid in answering the question whether a claimant has standing. They can be used to request title documents, sales receipts, and bank documents showing deposits and withdrawals. A request for production addressed to

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[141] Questions on standing might relate to such matters as the recorded ownership of the subject property, the extent of the claimant's dominion and control over it, the validity of any alleged assignment, the date of purchase and the source of the purchase money, and the existence of cognizable non-possessory interests. A fuller discussion of standing issues appears in part V.C.1 of this chapter, *infra*.

[142] A discussion of defenses to forfeiture actions appears in part V.C.4 of this chapter, *infra*.

[143] Fed. R. Civ. P. 34(b).

documents showing the claimant's formal establishment in a business, his customer network, his profits, losses and tax portfolio, business bank accounts, and so forth may aid in rebutting the claimant's defense.

In a proceeds forfeiture case, and in cases in which the Government seeks to perform a modified net worth analysis, financial information reported to the Internal Revenue Service may serve as proof of the claimant's legitimate sources of income and the amounts of legitimate funds generated thereby. When the amount of funds from legitimate sources of income are compared to the amount of funds a claimant or defendant expended in a year, and are shown to be too meager to cover the claimant's extravagant purchases, the Government has evidence that infers that funds from criminal activity must have been used to make the purchases.

There are two ways in which a request for production of documents can be used to obtain a claimant's tax information. First, the government attorney might ask the claimant for his tax returns for several years relevant to the criminal activity that is the basis of the forfeiture. Second, the government attorney might ask the claimant to sign an authorization form, which is served with the request for production of documents, to release federal tax information. With the authorization, the government attorney may obtain the tax information directly from the Internal Revenue Service. State tax records can be obtained in the same manner. In instances where a comparison of the tax documents produced by the claimant and those obtained directly from the Internal Revenue Service will disclose discrepancies, a claimant may prefer to withdraw his claim than to proceed to contest the forfeiture.

Until 1991, the only way that bank records and other physical evidence in the possession of non-parties could be obtained was through the taking of a deposition of the property custodian pursuant to Rule 30. In 1991, Rule 45 was amended to make it possible to subpoena physical evidence from non-parties without the necessity of a deposition.[144]

In 1992, Congress enacted a statute, 18 U.S.C. § 986, that also was intended to make it more convenient for a party in a forfeiture case to obtain bank records. Section 986 applies only to money laundering forfeitures. It requires that the subpoena be issued by the clerk of the court, not by counsel, as is permitted under Rule 45. While under Rule 45, the subpoena must be personally served; under section 986, service may be accomplished by certified mail.

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[144] *See* Notes of Advisory Committee on Rules, Explanation of 1991 Amendment to Rule 45(a)(1). This rule now provides that an attorney for either party may issue a subpoena commanding any person "to produce and permit inspection and copying of designated books, documents, or tangible things in the possession, custody, or control of that person," whether or not the person is required to appear as a witness at a deposition or trial.

Responses to "request for production" must be made within 45 days of service if the requests are served with the complaint. If they are served later, responses must be made within 30 days. The failure to make a timely objection to a document request, or to assert a privilege relating to any request for production, results in the waiver of any objection or privilege under Rule 34.

It is wise to be sure that, prior to filing the complaint for forfeiture, the Government has compiled discoverable evidence in its possession in a way that is convenient to comply with discovery by a potential claimant. It may be difficult to explain to the district court judge that a complaint was filed, but that the documents needed to prove the allegations in the complaint are not accessible. Similarly, a government attorney who files a forfeiture complaint while his tape-recorded evidence of probable cause is being transcribed runs the risk of being required to produce the tape or transcript before transcription is complete or before it has been reviewed by the government witnesses whose voices are recorded. This problem can be further compounded where tape recordings have to be translated into English.

2. Interrogatories

Interrogatories are a clear, focused list of questions, addressed to a claimant, that are specifically tailored to the arguments made by, and facts relied upon by, that claimant.[145] Because they can provide the basis for further discovery, interrogatories can effectively be used prior to other forms of discovery. For example, interrogatories seeking information about the identity and location of knowledgeable witnesses and relevant documents facilitates further discovery by providing information about witnesses for subsequent Rule 30 depositions and about documents for subsequent Rule 34 requests.

Rule 33(a) permits a plaintiff to serve interrogatories with the summons and complaint. The same is also provided for in civil forfeiture cases pursuant to Rule C(6) of the Supplemental Rules For Certain Admiralty and Maritime Claims. Although the federal rules permit the early service of interrogatories, it is usually a better strategy to draft your interrogatories later, after you have learned who the claimants are and what interest in the assets they are asserting. Also, by waiting until the claims are filed, the government attorney can avoid squandering what might be his only opportunity to pose interrogatories.

Some government attorneys successfully use standardized sets of interrogatories. In a civil forfeiture case, in which the Government seeks to rebut a defense by using a net worth analysis, a standardized set of interrogatories can be of great value. The interrogatories can

[145] Fed. R. Civ. P. 33.

be drafted to look much like a ledger sheet accompanied by a request that the claimant fill in estimates of his income and assets from various sources. Standardized interrogatories can also be useful as a starting off point in the drafting process, or to supplement custom-tailored interrogatories. There is nothing *per se* wrong with referring to standardized sets of interrogatories. If a government attorney relies exclusively on these "canned" lists, however, he runs the risk of asking many questions that are not applicable to the case and inviting numerous objections.

In contrast to the usual interrogatories, which seek the identification of witnesses and documents that support or contradict a party's allegations, contention interrogatories specifically ask another party whether it makes some specified contention and to state all the facts on which it bases its contention. Contention interrogatories are premature if they are served before substantial documentary and testimonial discovery is completed. The obligation to respond to them is often postponed until near the end of the discovery period, unless the proponent carries the burden of demonstrating why they are necessary earlier on.[146] Contention interrogatories should be sparingly used, and perhaps interspersed with other interrogatories to avoid objections.

Once the Government receives a set of interrogatories or a request for admissions in a civil forfeiture case, a good practice is to immediately send them to the case agent and to request that draft responses be prepared. In a subsequent meeting with the case agent, the government attorney will be available to review the proposed responses, re-frame the answers, if necessary, to convince the claimant of the strength of the Government's position, and have the case agent verify them. The government attorney may also use the option to produce business records pursuant to Rule 33(d) in lieu of prepared responses. Reports of federal agencies should be redacted, however, to conceal privileged or unrequested information, *i.e.*, names of confidential informants and/or internal file numbers.

A response or objection to interrogatories must be made within 30 days of service, whether they are served on the claimants with the complaint and summons or later in the forfeiture process. In calculating the due date of responses, Rule 6(e) provides an additional three days when service is made by mail.

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[146] *Everett v. USAir Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1995); *see also Fischer and Porter Co. v. Tolson*, 143 F.R.D. 93 (E.D. Pa. 1992) (contention interrogatories are premature if filed before substantial discovery is completed.); *In Re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 338 (N.D. Cal. 1985) (contention interrogatories tracking all allegations in opponent's pleading is a "serious form of discovery abuse"). For a fuller discussion of interrogatory strategy and the use of the contention interrogatory, *see Asset Forfeiture News* [July/August 1992]: 8-11.

3. Depositions

Once the action is initiated, any party may take the testimony of any other party or person pursuant to Rule 30(a).[147] A deposition may be taken even before an answer is filed if the government attorney has identified a potential deponent who will be unavailable for deposition due to his imminent travel out of the country.[148]

Upon stipulation of the parties or by order of the court, a deposition may be taken by telephone.[149] In order to avoid a complicated, potentially useless deposition, a government attorney, who stipulates to a telephone deposition should be the party offering the witness, should be at the location where the witness is testifying, and no translator should be involved. In document intensive depositions where a telephone deposition is ordered, the deponent, each attorney, the translator, if any, and the court reporter must have identical sets of exhibits.

A government attorney who seeks to take a deposition outside the United States is advised to contact the Office of International Affairs, Criminal Division, to determine the procedure for conducting discovery in that country. A government attorney who seeks to take the deposition of (or to offer as a deponent) an inmate may do so in prison upon obtaining a court order and making arrangements with the correctional officials involved. A good practice is to request the permission of the inmate's former trial attorney before conducting the deposition, in case the inmate is still being represented in appellate or other criminal proceedings.

Rule 30(e) permits a deponent to review his deposition transcript and sign it, or to waive such review. In reviewing his transcript, some courts permit the deponent to make any substantive or formal changes even if they contradict his original testimony.[150] Other courts do not go so far, but limit any transcript changes to substantive or formal errors made by the court reporter. Those courts caution that Rule 30(e) should not be construed to provide for a

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[147] Fed. R. Civ. P. 30.

[148] Fed. R. Civ. P. 30(a).

[149] Fed. R. Civ. P. 30(b)7.

[150] *Rios v. Welch*, 856, F. Supp. 1499, 1502 (D. Kan. 1994) (deponent is not permitted to "virtually rewrite portions of a deposition"); *Conlin v. Mission Food Corp.*, 850 F. Supp. 856 n.4 (N.D. Cal. 1994) (objections to admission of deposition not persuasive when deponent's proposed modifications would substantially alter testimony contained therein); *United States ex rel. Burch v. Piqua Engineering*, 152 F.R.D. 565, 566-67 (S.D. Ohio 1993) (changed deposition answers of any sort are permissible); *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) (64 corrections to deposition improper).

"take home examination," in which a deponent may freely alter what was previously said under oath.

It is crucial that the government attorney knows when and how to make objections and whether the claimant is properly making objections in order to get the most out of a deposition. It is wise to be alert for objections to the form of questions posed to government witnesses. For example, a question that comprises multiple ideas or presents an "either or" choice might result in a "yes" or "no" answer that is ambiguous and can be used at trial to impeach or confront a witness. Further, any assertions of privilege must be done by the deponent, not his attorney, on a question by question basis.

Depositions are not closed proceedings. There is nothing wrong with having a tax agent present at a deposition of a claimant in a narcotics case, for example, nor with having your expert witness present to assist you in evaluating the claimant's responses and following up those responses.

4. Using Depositions in Court Proceedings

At trial or in a hearing on a motion, any part or all of a deposition—so far as admissible under the Federal Rules of Evidence—may be used against a party to contradict or impeach the deponent's testimony.[151] Attorneys are rarely adept at impeaching witnesses with deposition testimony. The government attorney, who sees the claimant dragging the proceedings on in a vain attempt to impeach a government witness with a deposition, may wish to interpose the objection of improper impeachment. Unless the deposition testimony directly contradicts the in-court testimony, the court may discourage the claimant from continuing by sustaining the objection.

Using a deposition in lieu of live testimony is also difficult to do effectively. The government attorney might seek a stipulation with the claimant to make an audio tape of the deposition of a witness who is expected to be unavailable at trial. The fact-finder may then follow the transcript while the tape is played at trial. The audiotape will provide a clearer picture of what transpired than would a transcript alone.

5. Requests for Admissions

The matters addressed in requests for admissions are deemed to be admitted unless answers or objections are made within 30 days of the service of the requests (or within 45

[151] Fed. R. Civ. P. 32.

days if the requests are served with the complaint).[152] The admissions made, including those accruing by a party's default in responding, may serve as grounds for a motion for summary judgment. However, district courts have discretion to enlarge the period for serving responses. It is generally a good strategy to serve Rule 36 requests only after other discovery, such as interrogatories and depositions, has been completed.

In some cases, defense attorneys have adopted the strategy of serving the Government with a request for admissions early in the case; hoping to take advantage of the fact that prosecutors unfamiliar with civil procedure rules will not realize that the assertions will be deemed to be admitted if no response is filed in 30 days. Government attorneys must be on guard against this tactic.

Requests for admissions are used mostly to confirm certain basic facts or to resolve issues concerning the admissibility of evidence. If undertaken at the beginning of litigation, they may avoid costly discovery. When requests for admissions are on items that your adversary knows—or should know—will be readily provable through discovery, claimants have no choice but to admit them.

Admissions sought to confirm facts should be drafted so that each item on the list of facts the claimant is asked to admit contains only one discrete fact. No compound requests should be made. For example, if the claimant's vehicle is being forfeited as facilitating property, the government attorney might request admissions regarding ownership of the vehicle and its involvement with a particular narcotics transaction. Likewise, if narcotics are manufactured and distributed from a claimant's residence, the Government might seek the claimant's admission that certain precursor chemicals were purchased at the residence.

Admissions to resolve evidentiary issues save time and avoid trial confusion. Such admission requests can aid in establishing such things as the authenticity of records or the foundation requirements for exceptions to the hearsay rule. For example, obtaining an admission that certain documents constitute business records obviates the need to establish this fact prior to the admission of these documents at trial.

Where in response to the Government's request for admission, the claimant states that he is unable to admit or deny a statement at the time of the request, or denies the admission

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[152] Fed. R. Civ. P. 36; *United States v. 2204 Barbara Lane*, 960 F.2d 126, *reh'g denied,* (11th Cir. 1992) (failure to respond to Request for admissions conclusively established claimant used the defendant property to facilitate drug transactions.); *but see United States v. $30,354.00 in U.S. Currency*, 863 F. Supp. 442 (W.D. Ky. 1994) (district court declined to deem admission to be admitted where no prejudice to Government would result).

outright without indicating that a portion of the requested admission is true, a government attorney might contact counsel and ask if there is a way to word the specific request for admission so that the claimant can admit to it. To minimize the likelihood of this situation, requests for admission should be carefully phrased and narrowly tailored to the specific fact of which admission is sought. Admissions gained may be used as the factual basis for the pretrial stipulation.

A limitation on the use of requests for admissions is that, like interrogatories, they can only be served on parties to the action and not on third-party witnesses.

B. Motion to Compel Discovery

If the claimant fails to respond to the Government's discovery requests within the applicable time limits, or provides only evasive or incomplete answers, Rule 37 permits the Government to move the court for an order compelling discovery.[153] Where a claimant disobeys an order compelling discovery, an array of sanctions are available under Rule 37(b)(2), some as harsh as striking pleadings and dismissing claims.

Some discovery defaults have self-executing sanctions, that do not require a prior order of the court compelling discovery. For example, the failure to disclose information required by the Rules to be disclosed results in the automatic exclusion of the evidence at trial, unless the failure to disclose was harmless. Upon a motion and opportunity to be heard, further sanctions are available, including the award of attorney's fees and reasonable expenses to the moving party.[154]

The court may order sanctions against a party on motion if the claimant (1) fails to appear at his own deposition, upon reasonable notice given, or (2) fails to serve answers to interrogatories or respond to request(s) for inspection. For sanctions to be available for the failure to respond to interrogatories or to a request for inspection, the Government is obligated to seek compliance with discovery informally and certify that it did so in good faith in the motion for sanctions. The government attorney should also consult the local district court rules relating to discovery motions. Many local rules require attorneys to first contact

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[153] The procedures for compelling responses and imposing sanctions set forth in Rule 37 must be followed in order to obtain sanctions, even where interrogatories are being propounded pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(6), which contains no requirement that a court order compelling responses be obtained first before sanctions can be imposed. *See United States v. One 1987 BMW 325*, 985 F.2d 655 (1st Cir. 1993) (trial court order striking claim for failure to answer reversed because not in violation of preceding district order).

[154] Fed. R. Civ. P. 37(c).

and confer with opposing counsel before filing any Rule 37 motion to compel. Failure to follow the local rules in this respect could provide grounds to deny the motion.[155]

The Government should fully document its informal attempts to obtain the claimant's compliance with the outstanding discovery requests and then carefully weigh its decision to file a motion to compel.[156] The district court has the power to require a party over whom it has jurisdiction to comply with a discovery request even if the effect of such order would require the party to decide between violating foreign law or withdrawing its claim.[157] If the Government's motion to compel is denied, however, and the court finds that it was not substantially justified, the court may assess against the Government all reasonable expenses incurred by the claimant in opposing the motion.[158]

C. Motion for Protective Order or Stay of Civil Proceedings

1. Pre-indictment Stay of Forfeiture Proceedings

Occasionally, it is necessary for the Government to seek a stay of civil discovery in order to protect its confidential informants or the integrity of an ongoing, covert criminal investigation. A stay of discovery is difficult to obtain pre-indictment because it is a matter of court discretion whether to enter a pre-indictment stay,[159] and because the balance of the equities usually favor a claimant who objects to the stay. A court might reasonably find that justice requires an un-indicted person to be given an opportunity to have an early judicial

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[155] *Wetherill v. Bank IV Kansas*, No. CIV-A-96-2159-GTV, 1996 WL 297326 (D. Kan. May 29, 1996) (unpublished) (unopposed motion to compel denied for failure to comply with Fed. R. Civ. P. 37's conference requirement); *Adolph Coors Company v. American Insurance Company*, 164 F.R.D. 507, 518 (D. Colo. 1993) (party who terminated informal discovery discussions and filed a motion for sanctions was justified after numerous letters and telephone contacts); *Ballou v. University of Kansas Medical Center*, 159 F.R.D. 558 (D. Kan. 1994) (one letter could not satisfy duty to confer).

[156] Copies of correspondence to claimant's counsel or memoranda to the file reflecting the Government's attempts to obtain voluntary compliance by the claimant should be attached as an exhibit to any motion to compel.

[157] *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (litigant barred by Swiss law from complying with discovery; although dismissal of complaint was a remedy, litigant's good faith merited reversal of sanction); *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur*, 105 F.R.D. 16, 28, 30 (S.D.N.Y. 1984) (in action of French agency against an American company, French agency not shielded by French law from discovery obligations).

[158] Fed. R. Civ. P. 37(a)(4).

[159] *United States v. Account #87303569 in the Name of Down East Outfitters, Inc.*, No. 5:96-CV-293-BO, 1996 U.S. Dist. LEXIS 14555 (E.D.N.C. Sept. 11, 1996) (unpublished).

determination of his claim to recover property.[160] A claimant might reasonably argue in opposition to the stay that the Government has created its own dilemma by initiating the civil forfeiture action in the face of its criminal investigation. The Government's counter-argument might be that if the Government had waited to seize the property until the investigation was completed and the Government was ready to proceed to indict a criminal, the property subject to forfeiture could have been placed beyond the jurisdiction of the court and the opportunity to seize would have been lost

2. Post-indictment Stay by the Government

In enacting 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g), Congress expressed concern that "[a]bsent such a stay, the [G]overnment may be compelled in the context of a civil forfeiture action to disclose aspects of its criminal case prematurely."[161]

To minimize that concern, government attorneys often have moved the trial court for a stay of the civil forfeiture proceedings pending the close of all the evidence in any related criminal prosecution. Indeed, once a federal indictment or criminal information has been filed, the Government has a statutory right to a stay of a pending civil forfeiture action, for

[160] *United States v. Account #87303569 in the Name of Down East Outfitters, Inc.*, No. 5:96-CV-293-BO, 1996 U.S. Dist. LEXIS 14555 (E.D.N.C. Sept. 11, 1996) (unpublished) (stay denied because un-indicted defendant has a right to early judicial determination of his claim to recover property); *United States v. District Council of New York City and Vicinity*, 782 F. Supp. 920 (S.D.N.Y. 1992) (absence of indictment precludes a stay of civil case); *United States v. One Parcel of Real Estate at 12525 Palm Road*, 731 F. Supp. 1057 (S.D. Fla. 1990) (absence of indictment precludes a stay under 21 U.S.C. § 881(i)).

[161] S. Rep. No. 225, 98th Cong., 1st Sess. 215-16 (1983).

good cause shown, so long as it is related to the criminal action. [162] Courts have differed widely, however, in their interpretation of what constitutes "good cause" for the stay.

Consequently, before moving for a stay, government attorneys might consider whether the problem of premature disclosure of the Government's case can be avoided by pursuing criminal forfeiture instead of civil forfeiture. Where criminal forfeiture is a viable option, the district court may be less likely to find that the Government has shown good cause for the stay.[163]

Under the preliminary injunction "good cause" standard, the Government would be required to establish that there is a substantial likelihood that the Government would prevail on the merits, that there is a substantial threat that the Government would suffer irreparable injury if the stay is not granted, that the threatened injury to the Government outweighs any threatened harm to the claimant from the stay, and that granting the stay will not deserve the public interest.[164]

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[162] *See* 18 U.S.C. § 981(g), which provides:

> The filing of an indictment or information alleging a violation of law, [f]ederal, [s]tate or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

See also 21 U.S.C. § 881(i) (substantially the same provision relating to the narcotics laws). It is not necessary that the civil claimant be a defendant in the related criminal case in order to obtain a stay. *United States v. All Right, Title and Interest in Real Property (228 Blair Ave.)*, 821 F. Supp. 893 (S.D.N.Y. 1993); *United States v. Leasehold Interests in 118 Avenue D, et al*, 754 F. Supp. 282, 289 (E.D.N.Y. 1990) (although the Government's argument for a stay is not as compelling when the claimant is not a criminal defendant or target of a criminal investigation, the considerations supporting a stay remain the same where the claimant is related to or associated with the criminal defendant). *See also In re Ramu Corp.*, 903 F.2d 312, 319 (5th Cir. 1990); *United States v. Parcel of Property, 4808 S. Winchester*, No. 88 C 1312 (N.D. Ill. Oct. 11, 1988) (unpublished). Although *In re Ramu Corp.* involved a pre-indictment stay, the court nonetheless construed 21 U.S.C. § 881(i), and held that defining "related" proceedings requires a "common-sense, fact-bound analysis" and need not involve identical parties, transactions, and issues. However, the court remanded for further evidence as to the relationship between the civil action and criminal case where the putative defendant was the husband and father of the claimants.

[163] *United States v. Four (4) Contiguous Parcels*, 864 F. Supp. 652 (W.D. Ky. 1994) (stay denied where result would be indefinite delay of claimant's right to determination of his claim for return of property); *United States v. All Right, Title and Interest in Real Property (228 Blair Ave.)*, 821 F. Supp. 893 (S.D.N.Y. 1993) (conclusory allegations of adverse effect of discovery on related criminal case insufficient where stay would be for an indefinite period and claimant's business is suffering under government management).

[164] *In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990); *United States v. Certain Real Property Located at 5137/5139 Central Avenue*, 776 F. Supp. 1090 (W.D.N.C. 1991) (stay granted to protect identity of confidential informants); *United States v. One Parcel of Real Estate at 1303 Whitehead St.*, 729 F. Supp. 98 (S.D. Fla. 1990); *United States v. $151,388.00 in United States Currency*, 751 F. Supp. 547 (E.D.N.C. 1990) (adopting *Whitehead*; good cause shown where claimant sought to depose informants).

In demonstrating the potential threat of injury or harm to the Government, some courts find "good cause" merely upon the assertion that a criminal case must be protected from potentially broader civil discovery, while others require a showing in greater detail[165] and have declined to adopt the preliminary injunction standard altogether. Those courts hold that to establish "good cause" the Government need only make some showing of potential harm if the requested civil discovery is disclosed.[166] A government attorney, who is successful in obtaining a stay of discovery pending the resolution of the criminal case, may move to dismiss any appeal of the order by the claimant as a non-final order.[167]

3. Claimant's Right to Protective Order or Stay of Civil Proceeding

Only the Government is entitled to a statutory stay of the forfeiture proceeding under 18 U.S.C. § 981(g) and 21 U.S.C. § 881(i). Nevertheless, several courts have granted a claimant's request for a stay where the claimant was able to establish that participation in discovery in the civil case would force him to choose between defaulting in the civil case or

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[165] *United States v. All Funds Etc. Held in Fidelity Investments*, 162 F.R.D. 4 (D. Mass. 1995) (no good cause shown for continuation of stay where there were criminal forfeiture counts against the same *res* and the Government could voluntarily dismiss civil case with no adverse affect on its position; stay lifted); *United States v. All Funds on Deposit*, 767 F. Supp. 36 (E.D.N.Y. 1991) (stay not warranted where the Government failed to present any specific discovery request, abuse, or other compelling reason); *United States v. Leasehold Interests in 118 Avenue D, et al*, 754 F. Supp. 282, 287 (E.D.N.Y. 1990) (sufficient good cause established by relying upon broad civil discovery requests already made by the claimant); *United States v. Premises & Real Property at 297 Hawley St.*, 727 F. Supp. 90, 91 (W.D.N.Y. 1990) (Government entitled to protection from premature disclosure of its case through potentially broad discovery); *United States v. One Single Family Residence Located at 2820 Taft St.*, 710 F. Supp. 1351 (S.D. Fla. 1989) (same).

[166] *United States v. Leasehold Interests in 118 Avenue D et al*, 754 F. Supp. 282, 287 (E.D.N.Y. 1990) (claimant was not defendant, but his girlfriend and mother of his child). *But see United States v. Four Contiguous Parcels*, 864 F. Supp. 652 (W.D. Ky. 1994) (Government did not meet burden of showing "good cause" where extension of 18-month delay since seizure raised serious due process concerns and prejudice could be avoided by pursuing criminal forfeiture); *United States v. All Right, Title, and Interest in Real Property and Buildings Known as (228 Blair Avenue)*, 821 F. Supp. 893 (S.D.N.Y. 1993) (stay based upon need to protect identities of confidential informants denied where *res* was a wasting asset).

[167] *United States v. Section 17 Township 23 North*, 40 F.3d 320 (10th Cir. 1994) (appeal of stay of civil forfeiture action dismissed as presenting an issue not immediately reviewable).

waiving his or her right against self-incrimination in the criminal proceeding.[168] In these cases, courts have acted to protect claimants from the Government's use of the civil forfeiture proceeding as a means of forcing the claimant to make a "Hobson's Choice" between defending his property in the civil case and defending his liberty in the criminal one.[169] This "Hobson's Choice" is further complicated by rulings that adverse inferences in the Government's favor may be drawn against a claimant who resists discovery by invoking the privilege.[170] Further, a claimant who asserts the Fifth Amendment privilege during discovery

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[168] *See United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992) (district courts—absent some sort of extraordinary—against the claimants); *In Re Phillips, Beckwith & Hall*, 896 F. Supp. 553 (E.D. Va. 1995) (stay not warranted despite self-incrimination concerns where the property is not in the Government's possession and stay would frustrate the Government's ability to recover the property); *United States v. A Certain Parcel of Land*, 781 F. Supp. 830, 833 (D.N.H. 1992) (stay granted where permitting discovery could force claimants who allegedly purchased property in structured transaction to waive Fifth Amendment rights). *But see United States v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F.3d 359, 363 (11th Cir. 1994) (blanket assertion of the Fifth Amendment privilege is insufficient to warrant a stay) and *United States v. Certain Real Property Known as 6250 Ledge Road*, 943 F.2d 721, 728-29 (7th Cir. 1991) (claimant waived right to challenge district court's denial of stay by going to trial on stipulated facts; alternatively, blanket assertion of the Fifth Amendment privilege was improper).

[169] *See United States v. Parcels of Land (Laliberte)*, 903 F.2d 36 (1st Cir.) (claimants insistence on asserting Fifth Amendment rights in civil proceeding could result in dismissal of claim), *cert. denied,* 498 U.S. 916 (1990); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (one may have to choose between invocation of the privilege or abandonment of the civil case).

[170] *See United States v. $506,641 in U.S. Currency*, No. 93-C-1603, 1996 WL 396082 (N.D. Ill. July 11, 1996) (unpublished) (where claimant asserted Fifth Amendment privilege in response to questions about source of the defendant currency, adverse inference was permitted); *United States v. Two Parcels in Russell County*, 92 F.3d 1123, 1129 (11th Cir. 1996) (court may draw adverse inference from invocation of Fifth Amendment in civil forfeiture case, except when a claimant is also a defendant in a criminal case and is forced to choose between waiving the privilege and losing the case on summary judgment); *United States v. Premises Located at Route 13*, 946 F.2d 749 (11th Cir. 1991) (Fifth Amendment violated when a defendant in both a civil and a criminal case is forced to choose between waiving his privilege or losing the civil case); *United States v. Parcels of Land (Laliberte)*, 903 F.2d 36, 43 (1st Cir. 1990) (witness' direct testimony may be stricken if he invokes Fifth Amendment on cross-examination); *Mercado v. U.S. Customs Service*, 873 F.2d 641 (2d Cir. 1989) (claimant cannot avoid his burden of proving standing by asserting his Fifth Amendment privilege); *United States v. $250,000 in United States Currency*, 808 F.2d 895 (1st Cir. 1987) (shifting the burden of proof does not violate the claimant's rights by forcing him to testify); *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625 (11th Cir. 1986) (Fifth Amendment privilege does not forbid adverse inferences from claimant's refusal to answer questions); *United States v. Two Parcels...2730 Highway 31*, 909 F. Supp. 1450 (M.D. Ala. 1995) (adverse inference properly drawn from assertion of Fifth Amendment privilege once related criminal charges were dismissed); *United States v. $75,040.00 in U.S. Currency*, 785 F. Supp. 1423 (D. Or. 1991) (adverse inference permissible when claimant invokes Fifth Amendment during discovery); *United States v. Sixty Thousand Dollars in United States Currency*, 763 F. Supp. 909 (E.D. Mich. 1991) (claimant who invoked Fifth Amendment privilege at deposition not permitted to testify at trial); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991) (circuits are divided on whether an adverse inference may be drawn from a witness' invocation of the privilege as opposed to a claimant's invocation).

may not waive the privilege and submit evidence when the Government moves for summary judgment.[171]

4. Protective Order

Some courts have attempted to lessen the burden on the claimant, who is simultaneously the subject of a criminal proceeding, by entering a protective order limiting discovery. Rule 26(c) allows any person to move the court for an order protecting him from discovery. The person making the motion must show good cause for the order, which may relate to specific issues and topics or provide total protection from discovery. In entering such orders, the courts have attempted to accommodate both the rights of the claimant and the interests of the Government without actually staying the civil proceeding.[172]

Because the competing interests have proven to be very difficult to balance,[173] the government attorney must be on guard against arrangements that are patently unfair to the Government. For example, a claimant who is also a target in a related Grand Jury proceeding may commence discovery of the Government's evidence against him in the civil forfeiture case, while invoking his Fifth Amendment privilege and seeking a protective order to deny the Government full discovery of his case. A court's decision to issue a protective order in such a case limits the Government's right to take discovery while allowing the other party free reign. The Supreme Court has warned that the party who bears the burden of proof, the claimant in civil forfeiture cases, should not be permitted to convert the Fifth Amendment

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[171] *See United States v. Sixty Thousand Dollars in United States Currency*, 763 F. Supp. 909 (E.D. Mich. 1991) (claimant who invoked Fifth Amendment privilege at deposition not permitted to testify at trial).

[172] *United States v. Parcels of Land (Laliberte)*, 903 F.2d 36, 44 (1st Cir. 1990) ("So long as a district court attempts to accommodate a claimant's Fifth Amendment interests, the nature and extent of accommodation should be left primarily to that court's discretion."); *United States v. $250,000 in U.S. Currency*, 808 F.2d 895, 901 (1st Cir. 1987) ("Even if the forfeiture would genuinely prejudice the claimant's Fifth Amendment rights, the court should not dismiss the forfeiture, but should seek alternative means of accommodating both the claimant's rights and the government's interest in the forfeiture."); *United States v. U.S. Currency*, 626 F.2d 11, 15 (6th Cir.) (claimants "should not be compelled to choose between the exercise of their Fifth Amendment privilege and the substantial sums of money which are the subject of this forfeiture proceeding...[H]owever, the [G]overnment should not be compelled to abandon the forfeiture action which Congress...intended to create. Therefore, the courts must seek to accommodate both [rights]"), *cert. denied*, 449 U.S. 993 (1980).

[173] *See In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988) (court cannot necessarily preserve the claimant's privilege by sealing the discovery documents, because they remain amenable to subpoena by a Grand Jury in another district).

privilege from a shield into a sword.[174] In cases where such unfairness to the Government would result, the court may simply stay the civil case.[175]

Another dilemma is created when the government attorney must comply with the mandatory initial disclosures provided in Rule 26 (a)(1).[176] Government attorneys must consult the local rules for the district court in which the litigation is pending to determine whether the mandatory initial disclosures apply. The Local Rules of some jurisdictions exempt civil forfeiture actions from the mandatory disclosure rule,[177] and some do not.[178] Some jurisdictions have opted out of compliance with the rule altogether.[179] If the mandatory disclosure rules apply, the Government may move the court for a stay or a protective order to avoid premature exposure of its case.

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[174] *United States v. Rylander*, 460 U.S. 752, 757 (1983).

[175] *See United States v. Parcel of Property Located at 155 Bemis Road*, 760 F. Supp. 245 (D.N.H. 1992) (stay of civil forfeiture case entered after attempts to protect Fifth Amendment rights with protective order proved unworkable as claimant continued to seek discovery from the Government while the Government was limited in its ability to take discovery from the claimant).

[176] Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularly in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings; ...

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosure because another party has not made its disclosures.

[177] The D.N.J. and the M.D.N.Y., among others, have Local Rules that exempt civil forfeiture from the rule.

[178] The following districts, among others, are not exempt: N.D. Ala., W.D. Ala., E.D. Ark., W.D. Ark., E.D. Cal., and C.D. Cal.

[179] Examples of jurisdictions opting out are E.D. Va. and E.D.N.C.

As an alternative strategy, in a jurisdiction where a stay is difficult to obtain, the Government might move for a protective order pending the claimant's establishment that he has standing to litigate. Although a court may disfavor the entry of stays in favor of the Government, it may nevertheless be reluctant to cause the Government to expose its criminal case to a claimant, who lacks standing to contest the forfeiture. Finally, the Government might move the court for an order directing the claimant to post a bond. If the claimant posts a bond, and the *res* is returned to the claimant, the Government's interest is protected by the bond, and a stay can be ordered without prejudice to claimant's use of the property pending the outcome of the case. This strategy is best used where the *res* is a conveyance.

D. Privileges

The scope of discovery in the federal courts is defined by Rule 26(b)(1) which permits discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action. ..." For the government attorney, the assertion of a privilege is not merely a trial strategy but also involves the exercise of a duty inherent in the obligation to further the public interest by protecting the integrity of the decision making process.[180]

All governmental privileges derive from public policy and result from a balancing of the need for disclosure of information against the interest in nondisclosure as a necessary means to promote the efficient functioning of desirable government objectives, such as law enforcement and national defense. The courts have recognized distinct governmental privileges that protect defense and foreign affair matters,[181] the Government's deliberative process,[182] the identity of government informants,[183] and certain other information given to the Government on a pledge of confidentiality.

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[180] *See Dellums v. Powell*, 561 F.2d 242, 247-48 (D.C. Cir. 1977); *Sun Oil Co. v. United States*, 514 F.2d 1020, 1027 (Ct. Cl. 1975); *United States v. Nixon*, 418 U.S. 683, 708 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 449-50 (1977).

[181] *United States v. Weber Aircraft Corp.*, 465 U.S. 702 (1984) (Air Force's internal memoranda privileged); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1979) (case dismissal affirmed, where to require the Government to admit or deny whether plaintiff's communications had been intercepted would reveal the Government's capability to collect foreign intelligence).

[182] *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979) (documents shielded by deliberative process privilege remain privileged even after the decision to which they pertain has been made to prevent inhibition of the free flow of advice); *United States v. Nixon*, 418 U.S. 683, 705-6 (1974); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971) (document embodying the "outcome" of the deliberative process is not privileged).

[183] *Roviaro v. United States*, 353 U.S. 53 (1957) (Government may withhold identity of informants, but unless disclosure would reveal identity, the substance of that person's assistance is not privileged).

The government attorney should be aware that certain procedures must be followed when information, whether privileged or not, is sought from a present or former employee of the Department of Justice, and the Department of Justice is not a party to the suit. The procedures, which are set forth in 28 C.F.R. § 16.21 and have been upheld by the Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), prevent an employee from producing documents or revealing Department of Justice information without prior approval of certain specified Department officials. If the employee is requested to testify, the party seeking the testimony must furnish the Department of Justice with an affidavit or written statement setting forth a summary of the testimony desired.

E. Other Pretrial Matters and Procedures

1. Rule 41(e) Motions

A motion for return of seized property filed in the district court is treated under Fed. R. Crim. P. 41(e),[184] or when no criminal action is pending, as an independent civil action based upon equitable principles.

Where no forfeiture proceedings have yet been instituted, a motion for return of seized property subjects the seizure to a review of the magistrate's finding of probable cause. A lack of probable cause to seize the property mandates its return.[185] In responding to such motions, to avoid this result, the government attorney should demonstrate that forfeiture proceedings have been commenced. If no forfeiture proceedings have been commenced, a Complaint for Forfeiture *in rem* should be filed.[186] When administrative or judicial forfeiture

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[184] Fed. R. Crim. P. 41(e) provides in part:

> (e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property.

[185] *In re Seizure of All Funds...Registry Publishing, Inc.*, 887 F. Supp. 435, 449 (E.D.N.Y. 1995) (Rule 41(e) motion filed before a forfeiture action is initiated subjects probable cause for seizure to review by district court); *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993) (portion of funds from bank account returned pretrial through exercise of authority to review magistrate's probable cause determination).

[186] *Muhammed v. DEA*, 92 F.3d 648 (8th Cir. 1996).

proceedings are pending, courts routinely dismiss motions for return of seized property since that proceeding provides the claimant with an adequate remedy at law.[187]

Where administrative forfeiture proceedings have been initiated and concluded prior to the motion for return of seized property being filed, the courts have found that they have jurisdiction to review only the limited question whether the procedures leading to the forfeiture afforded the movant due process.[188] The most common hurdle in proving that the procedures that lead to administrative forfeiture comported with due process is proving that notice was adequately given. In cases where notice was valid, courts generally decline to set aside administrative forfeitures.[189] Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[190]

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[187] *United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (Rule 41(e) motion should be dismissed if claimant has an adequate remedy at law); *United States v. An Antique Platter of Gold*, No. 95-MAG-2167 (NRB), 1995 WL 758762 (S.D.N.Y. Dec. 22, 1995) (unpublished) (where claimant has an available statutory or civil remedy to contest the seizure and forfeiture of property, Rule 41(e) motions should be dismissed). *But see Muhammed v. United States,* 92 F.3d 648, 651 (8th Cir. 1996) (court may review pending administrative forfeiture proceeding where a DEA notice was not adequate to apprise claimant of his opportunity to contest it).

[188] The district court may not review an administrative forfeiture proceeding on the merits. *See United States v. Valencia*, 97 F.3d 1463 (9th Cir. 1996) (Table) (claimant cannot obtain judicial review of an administrative forfeiture on ground of untimeliness, but only on due process grounds); *Infante v. DEA*, 938 F. Supp. 1149, 1156 (E.D.N.Y. 1996) (court has jurisdiction to review the procedural adequacy of the administrative forfeiture, but not to review the legal basis for forfeiture); *Concepcion v. United States*, 938 F. Supp. 134, 138-39 (E.D.N.Y. 1996) (court lacks jurisdiction to review Eighth Amendment challenge to administrative forfeiture); *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996) (district court lacked jurisdiction to review administrative forfeiture on grounds other than due process grounds); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (28 U.S.C. § 1331 provides jurisdictional basis for due process review of administrative forfeitures); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (court's jurisdiction is limited to reviewing the adequacy of the notice given); *Linarez v. Department of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) ("A forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not."); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) (court has jurisdiction to determine claimant was given adequate notice, and if not, to permit claimant to file a claim); *United States v. Schiavo*, 897 F. Supp. 644, 647 (D. Mass. 1995) (court could review adequacy of notice but not Fourth Amendment objection to seizure that claimant could have raised if he had filed a claim).

[189] *United States v. Inufele*, No. 92-CR-1310 (SJ), 1995 WL 761815 (E.D.N.Y. Dec. 12, 1995) (unpublished) (repeated attempts to notify defendant of administrative forfeiture in English satisfied due process although defendant's native language was Yoruba); *Ovelles v. United States*, Nos. 96-CIV-954 RJW and 93-CR-285 (RJW), 1996 WL 409200 (S.D.N.Y. July 22, 1996) (unpublished) (motion for return of seized property dismissed where notice was given and no claim filed); *Zapata v. United States*, No. M18-65, 1996 WL 617369 (S.D.N.Y. Oct. 25, 1996) (unpublished) (Rule 41(e) motion dismissed where claimant received notice but failed to file a claim).

[190] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), *Muhammed v. DEA,* 92 F.3d 648 (8th Cir. 1996).

Notice is more than sufficient, even if the claimant never actually receives the notice, when it consists of sending notice to a potential claimant's last known address, to his address of incarceration, and to his attorney, combined with notice by publication.[191] When a claimant receives actual notice, he lacks grounds to challenge the adequacy of the notice provided.[192]

Where civil judicial forfeiture proceedings have been initiated and concluded, courts generally decline to exercise their equitable jurisdiction because the claimant has an adequate remedy at law by way of a motion under Fed. R. Civ. P. 60(e).[193] The government attorney

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[191] *Scott v. United States*, 950 F. Supp. 381 (D.D.C. 1996) (mailing notice to inmate's place of incarceration is sufficient; personal service not necessary); *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996) (same); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996) (notices sufficient where sent to prison by certified mail and return receipts were signed); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995) (attempts to send notice to defendant's home, attorney and place of confinement were sufficient, even if actual receipt did not occur); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996) (publication and notice sent to prison is adequate notice whether or not potential claimant actually received it); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (notice sent to fugitive's last known address sufficient, even if never received by fugitive). *See also United States v. Igbonwa*, No. CRIM-A-90-375, 1996 WL 515517 (E.D. Pa. Aug. 26, 1996) (unpublished) (notice sent to defendant's home, when authorities knew defendant was incarcerated, did not comport with due process); *United States v. Combs*, 98 F.3d 1347 (9th Cir. 1996) (notice received by defendant's father at home was inadequate where the Drug Enforcement Administration knew that defendant was incarcerated).

[192] *Scott v. United States*, 950 F. Supp. 381 (D.D.C. Dec. 19, 1996) (notice was clearly sufficient because the DEA agent told defendant that his car was being seized for forfeiture and constructive notice was given); *U-Series International Service, Ltd. v. United States*, No. 94-CIV-27733 MBM, 1995 WL 617567 (S.D.N.Y. Nov. 7, 1995), *aff'd*, 104 F.3d 355 (2d Cir. 1996) (Table) (unpublished) (no due process violation where claimant had actual notice); *United States v. Giovanelli*, 807 F. Supp. 351 (S.D.N.Y. 1992) (claimant with actual knowledge lacks grounds to allege that the Government's efforts to provide notice were inadequate); *United States v. One 1987 Jeep Wrangler*, 972 F.3d 472 (2d Cir. 1992) (lack of publication was not a due process violation where claimant had actual notice); *Lopes v. United States*, 862 F. Supp. 1178, 1188 (S.D.N.Y. 1994) (no due process violation where claimant had actual notice). *But see United States v. $184,505.01*, 72 F.3d 1160 (3d Cir. 1995) (actual notice of administrative forfeiture does not satisfy due process if the Government files a judicial forfeiture action).

[193] *United States v. Madden*, 95 F.3d 38 (10th Cir. 1996) (denial of Rule 41(e) motion upheld because in civil forfeiture cases Rule 60(b) provides an adequate remedy at law); *United States v. Mosquera*, 845 F.2d 1122, 1126 (1st Cir. 1988) (claimant cannot challenge civil judicial forfeiture by Rule 41(e), but by Rule 60(b)); *Concepcion v. United States*, 938 F. Supp. 134, 136 (E.D.N.Y. 1996) (petition seeking return of property forfeited in prior judicial proceedings not properly before district court since no appeal of the prior proceedings taken).

must then persuade the court that none of the provisions of Rule 60(b) permit the court to set aside the forfeiture judgment.[194]

Finally, some courts decline to entertain motions for the return of seized property that are filed outside of the six-year statute of limitations for civil actions against the United States.[195]

2. Motions to Dismiss the Complaint

The purpose of a motion to dismiss is to allow the court to dismiss a complaint which, on its face, fails to allege facts sufficient to satisfy the probable cause requirement. Thus, where a complaint fails to state any basis for forfeiture of all or part of the defendant property, or where no set of facts could support a finding of probable cause, the complaint should be dismissed and the warrant of arrest *in rem* vacated.[196]

Motions to dismiss the Complaint for Forfeiture *in rem* commonly make one of two arguments: the Government lacks probable cause or it impermissibly relies on evidence acquired after the seizure of the res to prove probable cause. The Government is not limited in drafting its Complaint for Forfeiture *in rem* to evidence it acquired prior to seizure.

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[194] Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[195] *Mouawad v. United States*, No. CV-96-2609 (RJD), 1996 WL 518080 (E.D.N.Y. Aug. 30, 1996) (unpublished) (civil action for return of property filed eight years after seizure is time-barred); *Ikelionwu v. United States*, No. 95-CV-4622, 1997 WL 177859 (E.D.N.Y. Mar. 25, 1997) (unpublished) (doctrine of laches bars motion for return of seized currency filed five years after seizure).

[196] *See United States v. Funds in the Amount of $9,800*, 952 F. Supp. 1254 (N.D. Ill. 1996) (facts failed to show airport seizure upon probable cause); *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 445-46 (E.D.N.Y. 1992) (where no set of facts could support probable cause with respect to portion of funds in account, arrest warrant *in rem* must be vacated in part, and funds returned); *United States v. Certain Accounts*, 795 F. Supp. 391, 397-99 (S.D. Fla. 1992) (where complaint fails to state any basis for forfeiture of untainted portion of funds in account, motion to dismiss for failure to comply with particularity requirement must be granted).

These issues, as they arise in the money laundering forfeiture context, are discussed in Cassella, Stefan D., "Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases," *New York Law School Law Review* [1994]: 1-2 .

Rather, the Government must establish only a reasonable belief that it can show probable cause for forfeiture at trial. Although the Government is required to have probable cause for forfeiture at the time that it institutes forfeiture proceedings,[197] it need not meet its ultimate trial burden of establishing probable cause at the pleading stage. When the Government is meeting its ultimate trial burden, some circuits hold that the Government may rely on evidence obtained during discovery, and through any ongoing investigation, while some limit the Government's proof to evidence obtained prior to the filing of the complaint.[198]

3. Motions for Summary Judgment

Once the discovery process is complete, the government attorney should consider moving for summary judgment pursuant to Fed. R. Civ. P. 56. As a general rule, such a motion should be made if the pleadings and the depositions, admissions, answers to interrogatories, and documents procured through discovery, along with supporting affidavits, show that no genuine issue of material fact remains to be resolved, and that the United States is entitled to a judgment of forfeiture as a matter of law.[199]

In a forfeiture case, the Government may seek summary judgment as to probable cause alone or as to both probable cause and the claimant's affirmative defenses. If the Government seeks summary judgment as to both issues, but the court grants the motion only as to probable cause, the case goes to trial only on the affirmative defenses, for which the

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[197] 19 U.S.C. § 1615 provides that probable cause shall be shown for "the institution of such suit or action."

[198] In the First, Eighth and Ninth Circuits, the Government is limited to evidence of probable cause obtained prior to the time that forfeiture proceedings were initiated. *See United States v. One 1978 Piper Cherokee Aircraft*, 91 F.3d 1204, 1208 (9th Cir. 1994) (held that the Government had probable cause at time of initiation of forfeiture proceedings, but declined to evaluate probable cause as of the time of the Government's summary judgment motion); *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1065-71(9th Cir. 1994) (after-acquired evidence irrelevant); *United States v. $639,470.00 in U.S. Currency, et al*, 919 F. Supp. 1405, 1416 (C.D. Cal. 1996) (Government must have probable cause at the time it initiates forfeiture proceedings, after-acquired evidence cannot be relied upon, but is not required to establish probable cause until trial); *United States v. Parcels of Property*, 9 F.3d 1000, 1004 (1st Cir. 1993) (holding that the court is limited to considering evidence of probable cause the Government had at the time of filing the forfeiture action); *United States v. $91,960.00*, 897 F.2d 1457, 1462 (8th Cir. 1990) (court should only consider "evidence obtained up to the point at which the [G]overnment institutes forfeiture proceedings"); *United States v. $87,118.00 in U.S. Currency*, 95 F.3d 511, 515 (7th Cir. 1996) (Government's evidence of probable cause developed prior to initiation of judicial forfeiture proceedings, thus, issue of after-acquired evidence would not be decided). *But see United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 651 (E.D. Mich. 1992) (probable cause is assessed at time of forfeiture hearing not time of seizure).

[199] *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

claimant bears the burden of proof.[200] The virtue of seeking partial summary judgment on the probable cause issue is that it eliminates any doubt before trial that the Government will be able to meet its burden on this issue, and focuses trial preparation on the claimant's ability to meet his or her burden of establishing an affirmative defense. This situation could lead to a pretrial settlement.

a. Summary Judgment on Probable Cause Issue

In civil forfeiture cases, as in any civil case, summary judgment is appropriate if the opposing party fails to show the existence of a genuine issue of material fact that may only be resolved at trial.[201] The materiality of any issue depends, of course, on what the respective parties in the case are required to prove or disprove.[202]

In most civil forfeiture cases, the Government has the burden of establishing probable cause.[203] Thus a "genuine issue of material fact" is one that could lead a reasonable trier of fact to conclude that the Government had failed to establish probable cause—*i.e.*, that the Government lacks reasonable grounds, supported by more than mere suspicion, to believe that the property was involved in a criminal offense. Stated differently, if a given fact is in dispute, but the finding of that fact in favor of the claimant would not affect the Government's ability to establish probable cause, the factual dispute is not "material," and the existence of the dispute will not be a reason to deny summary judgment to the Government on the probable cause issue.[204]

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[200] *See United States v. Route 2, Box 472, 136 Acres More or Less*, 60 F.3d 1523, 1526 (11th Cir. 1995) (motion for summary judgment granted as to probable cause but denied as to affirmative defense).

[201] *See* Fed. R. Civ. P. 56(c).

[202] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden"); *United States v. One Parcel of Property Located at 15 Black Ledge Drive, Marlboro, Connecticut*, 897 F.2d 97 (2d Cir. 1990) (summary judgment procedures must be construed in light of the statutory law of forfeitures).

[203] The Government's burden of proof is probable cause only under statutes which incorporate by reference the procedural provisions of the Customs laws, 19 U.S.C. § 1602, *et seq.* Although the more commonly used statutes, such as 18 U.S.C. § 981 and 21 U.S.C. § 881, do incorporate those laws; other statutes, such as 26 U.S.C. § 7302 and 18 U.S.C. § 492, do not. The failure to incorporate the procedural provisions of the Customs laws has resulted in the Government's burden of proof being the preponderance of the evidence standard. Some recently enacted forfeiture statutes, such as 18 U.S.C. § 2319A, make no reference to procedural provisions. The omission of the cross-reference to the Customs laws may also mean that the Government will be held to a preponderance standard under these new forfeiture statutes.

[204] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

In most forfeiture cases, where the Government has at least some credible evidence to believe that the subject property was involved in a criminal offense, it is extremely difficult for the claimant to demonstrate the existence of a factual dispute that, if resolved in his favor, would negate the finding of probable cause. The Government's burden in establishing probable cause for forfeiture is the same as its burden in establishing the basis for a search warrant.[205] The Government does not have to negate every possible explanation or defense offered by an opposing party. It need only show a logical basis for belief that the seized property was derived from or was used to facilitate an illegal act.[206]

The claimant may have a competing explanation for the facts set forth by the Government, just as a suspected murderer may have a competing explanation for the blood stains on his clothes. But such explanations go to the claimant's affirmative defense; they do not negate probable cause in a forfeiture case any more than the suspect's explanation of the blood stains would negate probable cause for a search of his home for the murder weapon. If the Government's evidence is sufficient to establish probable cause despite the claimant's

[205] *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995); *United Sates v. $149,442.43 in U.S. Currency*, 965 F.2d 868, 876 (10th Cir. 1992); *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990).

[206] *See United States v. Parcels of Land (Laliberte)*, 903 F.2d 36, 38-39 (1st Cir.), *cert. denied*, 498 U.S. 916 (1990); *United States v. $5,644,540 in U.S. Currency*, 799 F.2d 1357, 1362-3 (9th Cir. 1986); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 251 (E.D. Va. 1993).

attempts to explain it away, there is no issue of material fact for trial, and a motion for summary judgment should be granted on the probable cause issue.[207]

For example, in a money laundering case, the Government may be able to show that on numerous occasions cash in amounts just under $10,000 had been deposited into a bank account. The account-holder may claim that there was an innocent explanation for these transactions, *i.e.*, that he did not have the requisite intent or that he had nothing to do with them at all. Such objections, however, are relevant only to the claimant's affirmative defenses; they do not raise any material issue as to whether the available facts present *prima facie* evidence of a structuring offense in violation of 31 U.S.C. § 5324(a)(3). Thus, the Government would be entitled to summary judgment on the issue of probable cause.

The Government may establish probable cause for summary judgment through the use of hearsay, as well as through generally admissible evidence such as the conviction of the claimant or the property's owner on the underlying criminal offense.[208]

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[207] When the Government's evidence is sufficient to establish probable cause notwithstanding the claimant's attempts to explain it, there is no issue of material fact for trial, and a motion for summary judgment should be granted on the probable cause issue. *See United States v. One Lot of U.S. Currency ($36,674)*, 103 F.3d 1048 (1st Cir. 1997) (airport seizure shows probable cause for summary judgment purposes, judgment for claimant reversed); *United States v. Funds Seized From Account Number 20548408 at Baybank, N.A.*, No. 93-CIV-12224 (MEL), 1995 WL 381659 (D. Mass. Jun. 16, 1995) (unpublished) ($100,000 in structured money orders); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (pattern of structured transactions sufficient to show probable cause in section 981 case); *United States v. $200,000*, 805 F. Supp. 585 (N.D. Ill. 1992) (pattern of structured transactions sufficient to show probable cause in a section 981 case); *United States v. $81,990.47*, No. 3: 92-CV-117 (JAC), 1992 U.S. Dist. LEXIS 19002 (D. Conn. Nov. 25, 1992) (unpublished) (complaint alleges probable cause to believe bank accounts involved in section 5324 structuring violation); *United States v. $506,641 in U.S. Currency*, No. 93-C-1603, 1996 WL 396082 (N.D. Ill. July 11, 1996) (unpublished) (summary judgment for the Government on probable cause issue appropriate where even if claimant's challenge to other facts had merit, undisputed facts would support probable cause).

On the other hand, when the Government seeks summary judgment on the entire case, the claimant's assertion of an affirmative defense may raise a triable issue of fact. *See United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (apparently confusing the Government's ability to demonstrate probable cause to believe a structuring offense occurred, with issue of whether the Government was entitled to summary judgment on the affirmative defense that a crime did not occur because the claimant lacked the requisite intent); *see also United States v. All Funds on Deposit*, 767 F. Supp. 36 (E.D.N.Y. 1991) (motion for summary judgment on probable cause issue denied where there was a question of fact as to whether the subject property "represented the fruits of the illegal [structuring] activity").

[208] *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181, 1184 (7th Cir. 1995) (use of hearsay); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 805 (3d Cir. 1994); *United States v. Premises and Real Property at 4492 South Livonia Road, Livonia, New York*, 889 F.2d 1258, 1266-67 (2d Cir. 1989); *United States v. "Monkey,"* 725 F.2d 1007, 1010 (5th Cir. 1984) (use of conviction); *United States v. $200,000*, 805 F. Supp. 585 (N.D. Ill. 1992) (allowing hearsay to show probable cause in a section 981 case); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (same).

b. Summary Judgment on Affirmative Defenses

If probable cause is established, the claimant must assert one of his affirmative defenses. That is, he must show that: (1) no underlying crime occurred; (2) the defendant property was not in fact derived from, or used to facilitate, a criminal offense; (3) he meets any statutory "innocent owner" defense to the forfeiture of the defendant property; or (4) the statute of limitations bars litigation. Here the situation regarding summary judgment is much different for, as mentioned above, whether there is a material issue of fact for trial depends on the evidentiary burdens that the law places on each party.[209]

The claimant bears the burden of proof by a preponderance of the evidence on his affirmative defenses.[210] In regard to an issue for which the non-moving party has the burden of proof, the moving party is not required to produce any evidence, but is entitled to summary judgment if "the nonmoving party has failed to make a sufficient showing on an essential element of [his] case."[211] As the Supreme Court has said:

> In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[212]

A claimant cannot sustain his burden with a mere conclusory denial of the property's guilt or an unsubstantiated assertion of an innocent ownership defense. He must offer some admissible evidence that would be sufficient to establish his defense.[213] If he does not do so,

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[209] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986).

[210] This rule applies to all affirmative defenses, not just innocent owner defense. *See United States v. One Parcel of Property Located at 755 Forest Road, Northford, Connecticut*, 985 F.2d 70, 72 (2d Cir. 1993); *United States v. Land, Property Currently Recorded in Name of Neff*, 960 F.2d 561 (5th Cir. 1992).

[211] *Celotex Corp. v. Catrett*, 477 U.S. 321, 323 (1986).

[212] *Id.* at 322-323.

[213] *United States v. All Right, Title and Interest in Real Property and Appurtenances thereto known as 143-147 East 23d Street, New York, N.Y.*, 77 F.3d 648, 654 (2d Cir. 1996) (unsworn letter in response to government allegations insufficient); *United States v. Parcel of Land & Residence at 18 Oakwood Street*, 958 F.2d 1 (1st Cir. 1992) (to sustain burden of showing existence of material issue of fact on innocent owner defense, claimant must offer evidence admissible at trial as to his lack of knowledge and consent); *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (claimant cannot avoid summary judgment "merely by offering any unlikely but legitimate excuse," but may negate Government's motion by offering "a reasonable and legitimate explanation" which, if believed, "would enable a rationale jury to conclude by a preponderance of the evidence" that the property should not be forfeited).

the Government is entitled to summary judgment based on its showing of probable cause alone.[214]

If the claimant comes forward with some evidence in support of his affirmative defense, the Government must attempt to rebut the claimant's case with uncontroverted, admissible evidence,[215] and show that, in light of such evidence, the claimant will not be able to establish his defense by a preponderance of the evidence, even if all inferences are drawn in his favor.[216] In cases where the affirmative defense is based on an objective factual issue, the case can often be resolved in the Government's favor at the summary judgment stage on the strength of such uncontroverted rebuttal evidence. Where the affirmative defense involves the mental state of the claimant, however, resolution of the case by summary judgment may

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[214] *United States v. All Right, Title and Interest in Real Property and Appurtenances thereto known as 143-147 East 23d Street, New York, N.Y.*, 77 F.3d 648 (2d Cir. 1996) (when claimant did not dispute hotel was used for drug trafficking and admitted knowledge, his token efforts to correct problems fell short of diligence required to establish lack of consent); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (structuring case); *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (mere allegation of unlikely legitimate source of income without more cannot constitute an issue of material fact defeating summary judgment); *United States v. $200,226.00 in United States Currency*, 57 F.3d 1061 (1st Cir. 1995) (summary judgment not appropriate even though claimant offered incredible statement regarding source of funds); *United States v. Premises Known as RR #1*, 14 F.3d 864 (3d Cir. 1994) (assertion that property was not used to facilitate drug offense raises triable issue of fact; summary judgment denied); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994) (where entire contents of account are forfeitable under facilitation theory, evidence that some property had legitimate source will not defeat summary judgment); *United States v. Eleven Vehicles*, 836 F. Supp. 1147 (E.D. Pa. 1993) (assertion that some of the property was not used to facilitate a drug offense; summary judgment denied); *United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30, 32 (1st Cir. 1991) (claimant failed to contradict Government's showing but rested on pleadings; summary judgment granted); *United States v. One Parcel Property Located at Lot 85, Country Ridge*, 894 F. Supp. 397, 402 (D. Kan. 1995) (nonmoving party may not rest on pleadings).

[215] The Government's right to rely on hearsay and other inadmissible evidence applies only to its burden of establishing probable cause. Once that burden is met and the burden shifts to the claimant, the Government, like the claimant, must establish its case according to the rules of evidence. *See United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992) (trial of civil forfeiture case under section 881 should be bifurcated so that jury does not hear hearsay evidence in support of Government's case on probable cause), and *United States v. All Monies in Account No. 90-3617-3*, 754 F. Supp. 1467, 1471 (D. Haw. 1991). This is the reason forfeiture trials should be bifurcated, with the probable cause determination being subject either to a summary judgment motion or a pretrial bench proceeding, and with the jury present only for the determination of those issues on which admissible evidence must be offered, but with a narrative statement of probable cause provided.

[216] *See United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 398 (3d Cir. 1990) ("where the full record, taken together, could not lead a rational trier of fact to find for the non-moving party, no genuine issue exists for trial"); *United States v. 1980 Red Ferrari*, 827 F.2d 477, 480 (9th Cir. 1987) (claimant's deposition testimony in support of innocent owner defense not sufficient to create genuine issue of fact; summary judgment for the Government upheld).

be inappropriate because a party's mental state is a question of fact that turns on credibility.[217] Such cases generally have to go to trial.

Thus, in a case where the claimant alleges that he purchased the seized property with legitimately derived funds, but does not offer any evidence to support any contention that the seized property itself was not illegally derived, the Government is entitled to summary judgment without having to place any additional evidence before the court. Similarly, where the claimant offers an innocent owner defense but does not offer evidence that would be sufficient, in light of admissible evidence offered by the Government, to sustain his burden of meeting the applicable legal standard—*i.e.*, absence of willful blindness; exercise of due care—by a preponderance of the evidence, the Government is also entitled to summary judgment on that issue.[218] Where the claimant offers a reasonable explanation for his actions, supported by admissible evidence sufficient, if believed, to negate the finding of the *mens rea* element of the underlying crime, or to support an innocent owner defense, the case must be tried.

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[217] *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (where wife disclaims knowledge of the illegal transactions [structuring], there is material issue of fact); *United States v. Certain Funds on Deposit in Scudder Tax Free Investment Account*, 998 F.2d 129 (2d Cir. 1993) (summary judgment inappropriate where there was a material issue whether alleged perpetrator possessed the intent required to commit the specified unlawful activity for money laundering); *United States v. Dollar Bank Money Market Account*, 980 F.2d 233, 240-1 (3d Cir. 1992) (no summary judgment where affirmative defense is that underlying crime did not occur because of absence of requisite *mens rea* element, and claimant offers "reasonable and legitimate" explanation for events that would permit jury to find that perpetrator lacked requisite intent); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1161 (E.D. Pa. 1993) (no summary judgment for claimant on innocent owner defense where assertions raise material issue of fact regarding claimant's knowledge); *United States v. $200,000*, 805 F. Supp. 585 (N.D. Ill. 1992) (same); *United States v. All Monies in Account No. 90-3617-3*, 754 F. Supp. 1467, 1471 (D. Haw. 1991) (no summary judgment on innocent owner defense where reasonableness of owner's action in purchasing drug money on black market was question for the jury). Even where mental state is at issue, the Government is entitled to summary judgment where denial of knowledge is totally inconsistent with uncontested facts. *See United States v. Premises Known as 717 South Woodward Street*, 2 F.3d 529 (3d Cir. 1993) (general denial of knowledge by claimant sufficient to create material issue of fact for jury unless denial incredible); *United States v. One Parcel of Property (755 Forest Road)*, 985 F.2d 70 (2d Cir. 1993) (denial of drug use in the home inconsistent with presence of drug paraphernalia throughout the bedroom); *United States v. $705,270.00 in U.S. Currency*, 820 F. Supp. 1398 (S.D. Fla. 1993) (summary judgment for the Government where claimant offered only general denials and did not offer evidence to show that he was unaware of CTR requirements).

[218] *See United States v. 1980 Red Ferrari*, 827 F.2d 477, 480 (9th Cir. 1987) (claimant's unlikely "understanding" of origin of *res* insufficient to overcome summary judgment); *United States v. One Parcel of Property Located at 755 Forest Road*, 985 F.2d 70 (2d Cir. 1993) (claimant's denial of drug use in home inconsistent with evidence of drug paraphernalia in bedroom).

When making a motion for summary judgment, the government attorney should prepare proposed findings of fact and conclusions of law for the court, as well as the judgment of forfeiture itself.[219]

F. Exclusionary Rule and Civil Forfeiture

Because the Fourth Amendment exclusionary rule applies to civil forfeiture actions, the Government's case cannot be sustained on evidence derived from or tainted by an illegal search or seizure. Therefore, either prior to or during trial, the claimant may move to suppress evidence that was allegedly gathered illegally.[220]

The mere fact that the challenged evidence will be used against the claimant in the forfeiture action does not automatically give him standing to seek its suppression.[221] In order to establish such standing, the claimant must show that he had a legitimate expectation of privacy in the items seized, in the area searched, or in the area from which the evidentiary items were taken.[222] He then has the burden of proving the illegality of the search or seizure that produced the evidence he seeks to have excluded.[223]

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[219] For other forfeiture cases discussing summary judgment issues, *see generally United States v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991); *United States v. One Lot of $25,721.00 in Currency*, 938 F.2d 1417 (1st Cir. 1991); *United States v. On Leong Chinese Merchants Association Building*, 918 F.2d 1289 (7th Cir. 1990) (gambling forfeiture under 18 U.S.C. § 1955(d)), *cert. denied*, 502 U.S. 809 (1991); *United States v. All Right, Title & Interest in Real Property Known as 303 West 16th Street*, 901 F.2d 288 (2d Cir. 1990); *United States v. One Parcel of Real Property*, 900 F.2d 470 (1st Cir. 1990); *United States v. Twenty (20) Cashiers Checks*, 897 F.2d 1567 (11th Cir. 1990).

[220] *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965); *United States v. 2751 Peyton Wood Trail*, 66 F.3d 1164 (11th Cir. 1995); *U.S. v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982); *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 352 (9th Cir. 1974) (per curiam).

[221] *See United States v. Montgomery*, 620 F.2d 753, 759 (10th Cir. 1980) (suppression may only be urged by those whose rights are infringed by search or seizure).

[222] *United States v. Salvucci*, 448 U.S. 83, 93 (1980); *United States v. One 1977 Mercedes Benz 450*, 708 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

[223] *See* Fed. R. Crim. P. 41(f), 12(b)(3). *See also United States v. Parcel of Land at 5 Bell Rock Road*, 896 F.2d 605, 610 (1st Cir. 1990) (federal courts not required to suppress evidence seized in violation of state law).

1. Warrantless Seizures

Several of the more commonly used civil forfeiture statutes have provisions authorizing warrantless seizures of property subject to forfeiture. The circumstances in which these statutes apply vary considerably from permitting warrantless seizures incident to a lawful arrest or search under 18 U.S.C. § 981(b)(2)(A) to the various circumstances listed in 21 U.S.C. § 881(b)(1)-(4), including a provision authorizing a warrantless seizure where the Attorney General has probable cause to believe that the property in question is subject to forfeiture.

A government attorney must be cautious in utilizing these authorities inasmuch as some courts have permitted such seizures only where the presence of exigent circumstances make it difficult or impossible to obtain a warrant.[224] Indeed, the Second Circuit has recently construed the broad language of 21 U.S.C. § 881(b)(4) as granting no greater authority for a warrantless seizure than those under the judicially recognized exceptions to the Fourth Amendment warrant requirement.[225] Regardless of whether or not the "restrictive" interpretation of the statutory authorities is legally correct, it is clearly preferable to obtain a warrant whenever possible. Government attorneys should note that the statutory exceptions to the warrant requirements in 21 U.S.C. § 881(b)(3) and (4) are coupled with a requirement that forfeiture proceedings be "instituted promptly."

2. Effect of Illegal Seizure or Search

The illegal seizure of the *res* that is the subject of the *in rem* forfeiture does not automatically require dismissal of the case. Although the *res* itself may not be used to establish probable cause, probable cause may be established with independently derived, untainted evidence. The circuits do not agree on what remedies might be available for an illegal seizure of the *res* in a civil forfeiture proceeding.

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[224] *Compare United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992) *and United States v. Pappas*, 613 F.2d 324, 329-30 (1st Cir. 1980) *with United States v. Pace*, 898 F.2d 1218, 1241-42 (7th Cir. 1989) (construing state statute similar to section 881(b)(4); citing cases), *cert. denied sub nom. Cialoni v. United States*, 497 U.S. 1030 (1990); *United States v. Valdes*, 876 F.2d 1554, 1557-58 (11th Cir. 1989).

[225] *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992).

In the case of real property, absent exigent circumstances, the Fifth Amendment requires the Government to afford owners pre-seizure notice and an opportunity for a hearing.[226] In some circuits, the remedy for the seizure of real property without due process is dismissal of the forfeiture action.[227] In some circuits, the remedy is to suppress any evidence impermissibly obtained as a result of the seizure.[228] The Government's "post and walk" policy, however, whereby the Government obtains a warrant of arrest *in rem* and posts it on the property, serves owners with process, and files in the county land records a *lis pendens*, fully satisfies due process requirements without the necessity of affording the owners pre-seizure notice and opportunity for a hearing.[229]

In the case of personal property, the Fourth Amendment prohibits the Government from engaging in unreasonable searches and seizures. A seizure is reasonable for Fourth Amendment purposes if the length of the detention of the property is sufficiently short, and the government agents act with diligence meanwhile in pursuit of their investigation.[230]

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[226] *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (10th Cir. 1994) (*Good* applies to pending cases). Some recent cases construing the term "exigent circumstances" under *Good* are: *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (Government failed to show that it even considered less restrictive measures to preserve the property for forfeiture, or that less restrictive measures would have been insufficient to preserve the availability of the property for forfeiture); *United States v. All Right, Title and Interest...Kenmore Hotel*, 888 F. Supp. 580 (S.D.N.Y. 1995) (exigent circumstances justified seizure of hotel where drug activity was rampant); *United States v. All Right, Title and Interest in Real Property Title in the Name of Taipei Partners*, 927 F. Supp. 1324 (D. Haw. 1996) (threat of continued drug activity at the property insufficient to establish exigent circumstances).

[227] *One Parcel of Real Property, Located 9638 Chicago Heights*, 27 F.3d 329 (8th Cir. 1994).

[228] *United States v. Real Property Located at 20832 Big Rock Drive, Malibu, CA 90265*, 51 F.3d 1402, 1405-06 (9th Cir. 1995); *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265-66 (2d Cir. 1989) (illegal seizure of forfeitable property, standing alone, will not immunize that property from forfeiture).

[229] *See United States v. Twp. 17 R 4*, 970 F.2d 984 (1st Cir. 1992) (issuance of warrant of arrest *in rem* without a hearing does not violate the Fifth Amendment, where unoccupied property was posted, and no interference with owner's use occurred); *United States v. Real Property...429 South Main Street*, 906 F. Supp. 1155 (S.D. Ohio 1995) (*lis pendens* and occupancy agreement had no impact on claimant's use and enjoyment of his property; therefore no seizure occurred).

[230] *United States v. Place*, 462 U.S. 696, 709 (1983) (90-minute detention of luggage without probable cause was unreasonable under Fourth Amendment).

Upon a proper motion, courts will suppress illegally seized personal property, notwithstanding that the item suppressed is the *res* in the judicial forfeiture proceeding.[231]

G. Claimant's Demand for a Jury Trial

The Seventh Amendment provides a right to jury trial in "suits at common law." Civil forfeiture proceedings are considered to be "at common law" when the subject property is seized on land, and "in admiralty" when it is seized on navigable waters.[232] Therefore, the claimant's right to a jury trial generally depends on the place of seizure. To the extent that a claimant is entitled to a jury trial, the claimant must file and serve a written demand for a jury trial pursuant to Rule 38(b). However, if the only contested issue is the existence of probable cause for forfeiture, which is a question of law, the claimant is not entitled to a jury trial, regardless of where the property was seized.[233]

H. Pretrial Conference

Many district courts require the parties in civil actions to engage in a pretrial conference.[234] In general, a pretrial conference provides a forum for such matters as a discussion of possible settlement, an examination of exhibits to facilitate their presentation at trial, an exchange of witness lists, the identification of pending and unresolved motions, the

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[231] *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (mere fact that funds were illegally seized does not immunize them from forfeiture, but precludes their admission into evidence upon proper suppression motion); *United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868, 872 (10th Cir. 1992) (Government is barred from introducing illegally seized funds into evidence); *United States v. $639,558.00 in U.S. Currency*, 955 F.2d 712, 715 n.5 (D.C. Cir. 1992) (illegally seized funds may be offered into evidence for the limited purpose of establishing its existence, and the court's *in rem* jurisdiction over it); *United States v. $91,960.00*, 897 F.2d 1457, 1462, n.5 (8th Cir. 1990) (funds seized in violation of the Fourth Amendment are subject to exclusion from evidence, but remain subject to forfeiture if the Government proves probable cause with untainted evidence); *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722 (D. Me. 1991) (remedy for unconstitutional seizure of property in forfeiture action is not dismissal of action, but exclusion of evidence produced in forfeiture proceedings); *United States v. $144,600.00 U.S. Currency*, 757 F. Supp. 1342, 1345 (M.D. Fla. 1991) (same); *One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983) (illegally seized property cannot be introduced as evidence in a forfeiture proceeding), *cert. denied sub nom. Webb v. United States*, 464 U.S. 1071 (1984).

[232] *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 459 (7th Cir. 1980); *United States v. $5,372.85 United States Coin & Currency*, 283 F. Supp. 904, 906 (S.D.N.Y. 1968).

[233] 19 U.S.C. § 1615. *See United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 471 (7th Cir. 1980) (Sprecher, J., dissenting). *See also United States v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir.) (noting that probable cause is a question of law), *cert. denied*, 469 U.S. 831 (1984); and *United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars*, 661 F.2d 319, 323 (5th Cir. 1981) (same).

[234] *See* Fed. R. Civ. P. 16 and local rules of court.

setting of a schedule for other pretrial matters and trial, and the preparation of a pretrial stipulation.

The pretrial stipulation, which is aimed at simplifying the legal and factual questions that may arise at trial, should include citations of law on all pertinent issues, such as the standing of the claimant, the proper burden of proof, the admissibility of hearsay, and the elements and validity of potential defenses. Government attorneys should be cautious about the matters included in the stipulation, always keeping in mind the types of evidence that they need or want to have admitted in the upcoming trial.[235]

As a final step in pretrial preparation, the government attorney should prepare proposed findings of fact and conclusions of law for the court. With leave of court, generally, the findings of fact and conclusions of law may be supplemented after trial.

V. Trial

A. Burden of Proof

In civil actions generally, the burden is on the party bringing the civil action to prove its case by a preponderance of the evidence. However, most civil forfeiture statutes incorporate the forfeiture procedures of the Customs laws which require the Government to show only probable cause to forfeit the property.[236] At that point, the burden shifts to the claimant to defend the property or his interest in it by a preponderance of the evidence, which may be refuted or rebutted by the Government. Accordingly, in civil forfeiture actions brought pursuant to 18 U.S.C. § 981, 21 U.S.C. § 881, or any other statute that incorporates the forfeiture procedures of the Customs laws, the burden of proof shifts from the Government to the claimant once the Government establishes probable cause to forfeit the property.[237] This burden-shifting has been upheld against constitutional attack because, although forfeiture statutes are considered quasi-criminal in nature for Fourth and Fifth Amendment purposes,[238]

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[235] For instance, a stipulation that probable cause for forfeiture exists may preclude the use of hearsay evidence at trial.

[236] 19 U.S.C. §§ 1602-1621. However, the Department of Justice has proposed legislation requiring the Government to prove by the preponderance of evidence, as opposed to probable cause, that the crime was committed and the property is subject to forfeiture.

[237] 19 U.S.C. § 1615.

[238] *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

they are "not criminal enough to prevent Congress from imposing the burden of proof on the claimant."[239]

In actions brought under forfeiture statutes that do not incorporate customs procedures, it would seem the burden of proof should be on the Government to prove its case by preponderance of the evidence as it is generally with civil cases. However, when the pertinent forfeiture statute is silent on the issue, some courts have held that the burden-shifting procedure of the Customs laws is applicable even absent its incorporation.[240] Other courts have stated that the burden begins and remains squarely on the Government to prove the forfeiture by a preponderance of the evidence.[241]

This section focuses primarily on forfeiture trials conducted under Customs procedures. However, the evidentiary examples given may also be helpful in cases where Customs laws are not applicable.

B. Government's Showing of Probable Cause

1. Definition

The probable cause requirement means the Government must have "reasonable grounds" to believe that the property is subject to forfeiture that is supported by more than mere

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[239] *United States v. One Parcel...194 Quaker Farms Road*, 85 F.3d 985 (2d Cir. 1996); *United States v. One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65, 66 (9th Cir. 1976). *Accord United States v. $250,000 in United States Currency,* 808 F.2d 895, 900 (1st Cir. 1987); *United States v. $2,500 in United States Currency,* 689 F.2d 10, 12 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *Bramble v. Richardson*, 498 F.2d 968, 979 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

[240] *United States v. Twenty Thousand Seven Hundred Fifty-Seven Dollars and Eighty-Three Cents ($20,757.83) Canadian Currency*, 769 F.2d 479, 481 (8th Cir. 1985); *United States v. Four Million Two Hundred & Fifty-Five Thousand, Six Hundred & Twenty-Five Dollars & Thirty-Nine Cents*, 551 F. Supp. 314, 323-24 (S.D. Fla. 1982), *aff'd,* 762 F.2d 895 (11th Cir. 1985), *cert. denied,* 474 U.S. 1056 (1986); *United States v. Eleven Thousand Five Hundred & Eighty Dollars ($11,580) in United States Currency*, 454 F. Supp. 376, 381 (M.D. Fla. 1978). Each of these cases deals with the forfeiture section of the Bank Secrecy Act, 31 U.S.C. § 5317.

[241] *See United States v. $5,372.85 United States Coin & Currency*, 283 F. Supp. 904, 908 (S.D.N.Y. 1968) (discussing an Internal Revenue Code forfeiture provision). *See also* H.R. Rep. No. 91-975, 91st Cong., 2d Sess. 4404 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4404 (indicating the intent of Congress to place the burden on the Government to prove its forfeiture case by a preponderance of the evidence under the Bank Secrecy Act).

suspicion.[242] Probable cause for forfeiture is tested by the same criteria used for search and seizure in criminal cases.[243] Most courts have held that the Government must establish that there is a substantial connection between the property and the underlying criminal offense, particularly in money laundering cases.[244] However, the Second, Fifth, and Seventh Circuits currently require only that the Government demonstrate a "nexus" between the property and the crime, which is arguably a lesser degree of connection than "substantial connection."[245] In money laundering cases, the Government need not link the seized property to a particular money laundering transaction; it is sufficient that the Government demonstrate that the property facilitated, or the proceeds are traceable to, money laundering activity generally.[246] The same is true for drug cases. The Government need not link the seized property to any specific drug transaction. Whether probable cause exists is a question of law to be judged by the court and, appropriately, may be determined before trial.[247] As discussed below, probable cause may be based upon direct, circumstantial or reliable hearsay evidence. In several

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[242] *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993); *United States v. Thomas*, 913 F.2d 1111, 1114 (4th Cir. 1990) (probable cause determination requires the court to make a practical, common-sense decision whether, given all the circumstances set forth...there is a fair probability that the properties to be forfeited are proceeds or facilitating property of illegal activity); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 251 (E.D. Va. 1993) ("the probable cause standard requires courts to make a practical, common sense decision whether, given all the circumstances, there is a fair probability that the property to be forfeited was involved in or the subject of a transaction that fits within section 1956 or 1957"); *United States v. $200,000*, 805 F. Supp. 585, 589 (N.D. Ill. 1992); *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984, 990 (E.D.N.Y. 1992); *United States v. A Certain Parcel of Land*, 781 F. Supp. 830, 833 (D.N.H. 1992).

[243] *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995); *United States v. $ 149,442.43 in U.S. Currency*, 965 F.2d 868, 876 (10th Cir. 1992); *United States v. Lot 9, Block 2 of Donneybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990).

[244] *United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995); *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 953 (4th Cir. 1985); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985).

[245] *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (the Government must demonstrate only a "nexus" not a "substantial connection"); *United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 653-54 (7th Cir. 1993); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982).

[246] *United States v. Parcels of Land*, 903 F.2d 36, 42 (1st Cir. 1990); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

[247] *See* 19 U.S.C. § 1615; *United State v. On Leong Chinese Merchants Ass'n Building*, 918 F.2d 1289, 1292 (7th Cir. 1990) (gambling case); *United States v. Property at 4492 Livonia Rd*, 889 F.2d 1258, 1269 (2d Cir. 1989) (drug case); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (summary judgment entered where facts clearly show money laundering offense occurred and that property was involved in it).

circuits, probable cause may also be based upon evidence acquired after the seizure of the property and after the complaint is filed.[248]

2. Methods of Establishing

a. Direct Evidence

Probable cause for forfeiture may be shown by direct evidence, such as eyewitness testimony or a claimant's admissions against interest.[249] The introduction of the actual controlled substances exchanged in the underlying illegal transaction may also be useful to the Government's case, although the results of field tests on the drugs are considered sufficient if the drugs themselves are unavailable.[250]

b. Circumstantial Evidence

Circumstantial evidence may also be used to establish probable cause in civil forfeiture cases.[251] For instance, probable cause to believe that cash was or would have been used in exchange for illegal drugs[252] may be established by a showing that the cash was discovered in large amounts along with drug paraphernalia and other indicia of drug dealing.[253] Likewise, probable cause to believe that property constitutes proceeds derived from an illegal drug transaction[254] may be proven by a showing that the subject items were purchased (usually in

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[248] *See, e.g., United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996).

[249] *See Ted's Motors, Inc. v. United States*, 217 F.2d 777, 780 (8th Cir. 1954).

[250] *United States v. One (1) 1982 28' International Vessel*, 741 F.2d 1319, 1322 (11th Cir. 1984).

[251] *See, e.g., United States v. Thomas*, 913 F.2d 1111, 1117 (4th Cir. 1990); *United States v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Certain Real Property Situated at Route 3*, 568 F. Supp. 434, 436 (W.D. Ark. 1983).

[252] 21 U.S.C. § 881(a)(6).

[253] *United States v. $95,945.18*, 913 F.2d 1106, 1111 (4th Cir. 1990); *United States v. $93,685.61 in U.S. Currency*, 730 F.2d at 572; *United States v. Twenty-Two Thousand, Two Hundred Eighty-Seven Dollars ($22,287.00) United States Currency*, 709 F.2d 442, 449 (6th Cir. 1983).

[254] 21 U.S.C. § 881(a)(6).

cash) when the buyer had no known legitimate source of income.[255] Introduction of the wrongdoer's recent tax returns under 26 U.S.C. § 6103(i)(4)(A) may be helpful in this regard.[256] Other types of circumstantial evidence which have been used to establish probable cause include: (1) the prior criminal history of the individuals involved in the underlying crime[257]; (2) whether those individuals made false statements to law enforcement officers incident to an arrest, search, or other questioning[258]; and (3) whether those individuals attempted to conceal assets from law enforcement officers.[259] The results of dog sniff tests may also be used to establish probable cause in drug cases,[260] although some courts look at such evidence with disfavor.[261]

c. Hearsay

Although otherwise inadmissible in a civil forfeiture trial, reliable hearsay evidence may be used by the Government to establish probable cause to believe that the subject property is

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[255] *United States v. A Parcel of Land (92 Buena Vista)*, 937 F.2d 98, 104 (3d Cir. 1991), *aff'd on other grounds*, 507 U.S. 111 (1993) (where drug dealer drops off sack of cash containing $250,000, and wires a portion to third party to buy a house, house is forfeitable as proceeds since there was reasonable basis to believe cash probably was derived from drug transactions); *United States v. Thomas*, 913 F.2d 1111, 1115 (4th Cir. 1990) (evidence that cash expenditures hugely exceeded any verifiable income suggest that money derived illegally); *United States v. Certain Real Property Situated at Route 3*, 568 F. Supp. 434, 436 (W.D. Ark. 1983); *United States v. $131,602.00 in U.S. Currency*, 563 F. Supp. 921, 923 (S.D.N.Y. 1982). *Cf.* 21 U.S.C. § 853(d) (rebuttable presumption as to forfeitable drug proceeds in criminal forfeiture trial).

[256] *See, e.g., United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road,* 916 F.2d 808, 813 (2d Cir. 1990), *cert. denied,* 498 U.S. 1091 (1991). *But see* procedures and restrictions on use of tax information set forth in I.R.C. § 6103(h), (i).

[257] *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722, 725 (D. Me. 1991) (history of drug trafficking and use of large quantities of cash to purchase real property sufficient under section 981 to support reasonable belief that money laundering violations had occurred.); *United States v. Thomas*, 913 F.2d 1111, 1116 (4th Cir. 1990).

[258] *United States v. $215,300*, 882 F.2d 417, 419 (9th Cir. 1989); *United States v. $83,310.78*, 851 F.2d 1231 (9th Cir. 1988).

[259] *Id.*

[260] *See, e.g., United States v. $39,873.00*, 80 F.3d 317 (8th Cir. 1996); *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995); *United States v. Hubbard*, 61 F.3d 126, 1274 (7th Cir. 1995); *United States v. Patterson*, 65 F.2d 68 (7th Cir. 1995); *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994).

[261] *See United States v. $30,060*, 39 F.3d 1039 (9th Cir. 1994) (dog sniff not probative where 75 percent of the currency in the community is contaminated); *United States v. $53,082*, 985 F.2d 245 (6th Cir. 1993).

"guilty."[262] Indeed, the probable cause showing may be made entirely with otherwise inadmissible hearsay.[263] If the Government uses hearsay to establish probable cause in a jury trial, however, the trial may have to be bifurcated so the jury does not hear the inadmissible hearsay.[264]

d. Criminal Conviction on Underlying Offense

A criminal conviction for the illegal conduct underlying the civil forfeiture may be used in the civil forfeiture trial. A criminal conviction precludes the claimant from denying that the illegal conduct occurred and from relitigating in the civil case those facts necessarily determined by the jury in the criminal case.[265] Further, a claimant cannot create a material issue of fact in a summary judgment proceeding by contradicting sworn statements made in his earlier guilty plea.[266]

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[262] *United States v. $200,000*, 805 F. Supp. 585 (N.D. Ill. 1992) (allowing hearsay to show probable cause in section 981 case); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (same). There must be a substantial basis for crediting the hearsay. *See United States v. Parcel of Land & Residence at 18 Oakwood Street*, 958 F.2d 1, 4 (1st Cir. 1992). In other words, the hearsay must be "reliable." *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991); *United States v. $250,000 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir. 1982) (per curiam), *cert. denied sub nom. Preston v. United States*, 461 U.S. 914 (1983); *United States v. One 1974 Porsche 911-S*, 682 F.2d 283, 286 (1st Cir. 1982) (sanctioning the use of Drug Enforcement Administration reports to establish probable cause); *United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road*, 916 F.2d 808, 814 (2d Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991).

[263] *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991).

[264] *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

[265] *United States v. "Monkey,"* 725 F.2d 1007, 1010 (5th Cir. 1984); *United States v. United States Currency Amounting to the Sum of Thirty Thousand Eight Hundred Dollars ($30,800.00)*, 555 F. Supp. 280, 282 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1444 (2d Cir. 1983) (holding that the conviction of a codefendant in a criminal trial in which the subject money was used as evidence may be used to establish probable cause for forfeiture of the money under 21 U.S.C. § 881(a)(6)); *United States v. All Right, Title & Interest in Real Property Known as 303 West 116th Street*, 901 F.2d 288 (2d Cir. 1990) (holding state conviction sufficient to establish probable cause for forfeiture).

[266] *See United States v. $31,697.59 Cash*, 665 F.2d 903, 906 (9th Cir. 1982) (holding that claimants are estopped from raising matters disposed of by guilty pleas in a related criminal case); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994).

e. Testimony of Government Agents

Probable cause may be based upon the expert opinion of Government agents familiar with the case.[267]

f. Summary Judgment on Probable Cause Issue

If the Government's evidence is sufficient to establish probable cause notwithstanding the claimant's attempts to explain it away, there is no issue of material fact for trial, and a motion for summary judgment should be granted on the probable cause issue.[268] However, where the Government seeks summary judgment on the entire case instead of just the probable cause issue, a claimant's assertion of an affirmative defense may raise a triable issue of fact.[269] To avoid summary judgment, a claimant must do more than make general denials; he must offer evidence to support his affirmative defenses.[270] When the mental state of the claimant is at issue, summary judgment is often inappropriate because mental state is a question of fact which often turns on witness credibility.[271] However, even where the mental state of the claimant is at issue, the Government is entitled to summary judgment where the claimant's denial of knowledge is totally inconsistent with the uncontested facts.[272]

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[267] *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993); *United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868 (10th Cir. 1992).

[268] *United States v. On Leong Chinese Merchants Ass'n Building*, 918 F.2d 1289, 1292 (7th Cir. 1990) (gambling case); *United States v. Property at Livonia Rd*, 889 F.2d 1258, 1269 (2d Cir. 1989); *United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991).

[269] *United States v. Premises Known as RR #1*, 14 F.3d 864 (3d Cir. 1994) (claim that property did not facilitate drug trafficking raises triable issue of fact).

[270] *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (the mere allegation of highly unlikely legitimate source of income without some support to give the allegation credibility cannot constitute an issue of material fact defeating summary judgment); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (structuring case); *United States v. Parcel of Land (18 Oakwood Street)*, 958 F.2d 1 (1st Cir. 1992) (to sustain burden of showing existence of material fact on innocent owner defense in drug forfeiture under section 881, claimant must offer evidence admissible at trial as to his lack of knowledge and consent).

[271] *United States v. Real Property at 874 Gartel Drive*, 79 F. 3d 918 (9th Cir. 1996); *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992); *United States v. $200,000*, 805 F. Supp. 585, 591 N.D. Ill. 1992).

[272] *United States v. Premises Known as 717 South Woodward Street*, 2 F.3d 529 (3d Cir. 1993); *United States v. One Parcel of Property (755 Forest Road)*, 985 F.2d 70 (2d Cir. 1993).

C. Claimant's Case

1. Standing to Defend the Property

If standing remains an issue at the time of trial, the burden is on the claimant to establish that he has a judicially cognizable interest in the property before he can proceed to defend the lawsuit on the merits.[273]

2. Lack of Probable Cause

As suggested earlier, a claimant might try to challenge the Government's showing of probable cause for forfeiture by filing a dispositive motion. However, it is important to note that, except in the Ninth Circuit, a complaint need not meet the ultimate trial burden of establishing probable cause. The complaint need only establish "reasonable belief" that the Government can show probable cause for forfeiture at trial.[274] The Government may rely upon evidence acquired after the complaint is filed to establish probable cause.[276] Since probable cause is determined at the time of trial, a motion to dismiss for failure to establish a sufficient nexus between the property and the criminal act should generally be denied.[277]

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[273] *United States v. United States Currency Amounting to the Sum of Thirty Thousand Eight Hundred Dollars ($30,800.00)*, 555 F. Supp. 280, 282-83 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1444 (2d Cir. 1983); *United States v. Eleven Thousand Five Hundred & Eighty Dollars ($11,580) in United States Currency*, 454 F. Supp. 376, 377 (M.D. Fla. 1978). *See also United States v. Fifteen Thousand Five Hundred Dollars ($15,500.00) United States Currency*, 558 F.2d 1359, 1360-61 (9th Cir. 1977). A discussion of standing requirements in civil forfeiture proceedings appears in part III.B.2.c of this chapter, *supra*.

[274] *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (unless claimant challenges seizure, as in a motion to suppress, the Government is not required to prove probable cause until the time of trial). *See* Cassella, Stefan D., "Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases," *New York Law School Law Review* [1994]: 163. For Ninth Circuit law, *see United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (construing 19 U.S.C. § 1615 to require that the Government have probable cause at the time it files its complaint or suffer dismissal).

[276] *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996).

[277] *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (unless claimant challenges seizure, as in a motion to suppress, the Government is not required to proved probable cause until the time of trial). *See* Cassella, Stefan D., "Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases," *New York Law School Law Review* [1994]: 163. Motion to dismiss may be granted where complaint on its face fails to state any basis for forfeiture. *See United States v. Certain Accounts*, 795 F. Supp 391, 397-99 (S.D. Fla. 1992); *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 445-446 (E.D.N.Y. 1992).

a. Insufficient Proof by the Government

As stated earlier, probable cause in forfeiture proceedings need not be supported by a *prima facie* case, but it must be based on more than a mere suspicion.[278] Thus, a claimant may challenge the Government's case on the ground that it is purely or largely speculative in nature and does not give rise to a "reasonable" belief in the guilt of the property.[279]

The attack on probable cause could also be based on the Government's alleged failure to produce any evidence with respect to one of the elements of the underlying crime,[280] or the claimant could assert that the Government's probable cause evidence relates to part, but not all, of the property subject to forfeiture.[281] Nevertheless, given that probable cause may be demonstrated by inadmissible hearsay and circumstantial evidence, it is almost always very difficult for the claimant to negate the Government's showing of probable cause.

b. Suppression of Evidence Supporting Probable Cause

Because the Fourth Amendment is applicable to civil forfeiture proceedings, the claimant may seek to exclude the Government's evidence of probable cause on the ground that it was obtained through a search or seizure that violated his constitutional rights.[282] It should be emphasized, however, that even if the seizure of the subject property itself is declared illegal and the evidence derived from it is excluded, the forfeiture may nonetheless be sustained by independent, untainted evidence.[283]

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[278] *See United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110 (4th Cir. 1990); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 n.3 (5th Cir. 1982).

[279] *See United States v. One 1975 Mercury Monarch,* 423 F. Supp. 1026, 1032 (S.D.N.Y. 1976) (finding only speculation as to the connection between the subject vehicle and the intended illegal transportation).

[280] *See United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (Government must establish probable cause as to *mens rea* element in money laundering case involving structured transactions).

[281] *See United States v. All Monies in Account No. 90-3617-3*, 754 F. Supp. 1467 (D. Haw. 1991) (claimant concedes probable cause as to part of money in bank account but contests probable cause with respect to balance).

[282] A fuller discussion of this issue appears in part V.B of this chapter, *supra*.

[283] *United States v. One 1977 Mercedes Benz 450*, 708 F.2d 444, 450-51 (9th Cir. 1983); *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 352 (9th Cir. 1974) (per curiam).

3. Other Pretrial Issues

a. Statute of Limitations

Civil forfeiture cases filed under statutes which incorporate the Customs procedures must be commenced within five years from the time the alleged offense was discovered as specified in 19 U.S.C. § 1621.[284] It is unclear when the offense is "discovered" for forfeiture purposes. Some courts have held that the statute runs from the time the underlying criminal offense is discovered.[285] However, a logical reading would be that the term "discovered" refers to the discovery that the property is subject to forfeiture because that is the moment when the Government's cause of action first accrues. The discovery of the criminal offense and the discovery of the property's involvement in that offense may occur at very different times. Civil forfeiture actions commenced under statutes, which do not incorporate the Customs procedures, are governed by 28 U.S.C. § 2462. Section 2462 requires that lawsuits be instituted within five years from the time the cause of action accrued.

b. Bifurcation

If the Government intends to rely upon inadmissible hearsay evidence to support probable cause, the prosecutor should consider whether the trial of the civil forfeiture case should be bifurcated so that the jury does not hear the hearsay evidence.[286]

c. Joinder and Severance

Separate trials are not required where multiple claimants' interests are not hostile.[287] *In rem* actions against separate bank accounts should be filed as separate actions under section 981.[288]

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[284] *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

[285] *United States v. Real Property at 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996); *United States v. Real Property and Improvements Located at 9167 Rock Road*, No. C-94-20004-PVT, 1995 WL 68440 (N.D. Cal. Feb. 10, 1995) (unpublished).

[286] *United States v. One Parcel of Real Estate (1012 Germantown Road)*, 963 F.2d 1496 (11th Cir. 1992).

[287] *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984 (E.D.N.Y. 1992).

[288] *United States v. Certain Accounts*, 795 F. Supp. 391, 399 (S.D. Fla. 1992).

d. Adverse Inferences

A court may draw an adverse inference from a claimant's invocation of his Fifth Amendment rights in a civil forfeiture case except where that claimant is also a criminal defendant.[289]

e. Fugitive Defendants

Based upon the Supreme Court decision in *Degen v. United States*, 517 U.S. 820 (1996), fugitive criminal defendants are not barred from opposing civil forfeiture of their property. However, a fugitive should not be given an undue advantage because of his fugitive status. A court retains the right to impose sanctions, including dismissal, if a fugitive becomes obstructive.

4. Affirmative Defenses to Forfeiture

As mentioned above, once the Government establishes probable cause to believe that the property was involved in a criminal offense, the burden shifts to the claimant to establish the affirmative defense by a preponderance of the evidence.[290]

a. The Underlying Crime Did Not Occur

The claimant may attempt to prove that the underlying crime, which the Government asserts is the basis for the forfeiture, did not occur. As in the case of all other affirmative defenses, the claimant must prove this defense by a preponderance of the evidence. For example, in *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir.

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[289] *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996); *United States v. $506,641 in U.S. Currency*, No. 93-C-1603, 1996 WL 396082 (N.D. Ill. July 11, 1996) (unpublished); *United States v. Two Parcels...2730 Highway 31*, 909 F. Supp. 1450 (M.D. Ala. 1995).

[290] *See United States v. Land, Property Currently Recorded in Name of Neff*, 960 F.2d 561 (5th Cir. 1992) (burden shifting applies to all affirmative defenses, not just innocent owner); *United States v. One Single Family Residence Located at 15603 85th Ave. N.*, 933 F.2d 976 (11th Cir. 1991); *United States v. $215,300 United States Currency*, 882 F.2d 417, 420 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990); *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars ($4,255,000)*, 762 F.2d 895, 904-07 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *United States v. $200,000*, 805 F. Supp. 585 (N.D. Ill. 1992) (rule applies to "no criminal violation" defense.) The burden shifting is not unconstitutional. *United States v. One Parcel...194 Quaker Farms Road*, 85 F.3d 985 (2d Cir. 1996); *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984 (E.D.N.Y. 1992) (citing cases), *aff'd sub nom. United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

1992),[291] the claimant alleged that the crime of structuring under 31 U.S.C. § 5324(a)(3) had not been committed because the claimant, as the perpetrator of the alleged offense, had lacked the mental intent necessary to satisfy the *mens rea* element of that crime. In denying the Government's motion for summary judgment on this issue, the Third Circuit held that the claimant would prevail at trial if he were able to establish that he lacked such intent by a preponderance of the evidence.[292]

b. Legitimate Source Defense

If the claimant is unable to prove that no criminal offense occurred, he may attempt to prove that all or part of the seized property "had an independent innocent source and had not been used illegally."[293] This defense is typically known as the legitimate source defense.

In order to establish a legitimate source defense, a claimant has the burden of tracing that portion of the seized property that is "clean."[294] The claimant must have records to prove the legitimate source.[295] In practice, claimants tend to assert one of the two following versions of the legitimate source defense: (1) that the seized property was acquired by the claimant with clean funds derived from legitimate business activities after the criminal violation occurred (therefore, property should be considered traceable to the legitimate activity); or (2) that the seized property represents a commingling of clean and dirty money and that at least the portion traceable to the clean money should be considered as having a legitimate source and therefore not be subject to forfeiture.

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[291] *See also United States v. $200,000*, 805 F. Supp. 585, 589 (N.D. Ill. 1992).

[292] *United States v. Dollar Band Money Market Account*, 980 F.2d 233 (3d Cir. 1992). *See United States v. $200,000*, 805 F. Supp. 585 (N.D. Ill. 1992). While the substantive law discussed in this case is superseded by the Supreme Court decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), which in turn was superseded by statute, 31 U.S.C. § 5324(c), the analysis is useful in understanding the assertion which claimants may make that the Government failed to prove all elements of the underlying crime.

[293] *United States v. $215,300 United States Currency*, 882 F.2d 417, 420 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990).

[294] *United States v. 1990 Chevrolet Silverado Pickup Truck*, 804 F. Supp. 777 (W.D.N.C. 1992).

[295] *United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868 (10th Cir. 1992) (without records, evidence of innocent source was insufficient); *United States v. $87,118.00 in U.S. in Currency*, 95 F.3d 511 (7th Cir. 1996) (claimant's explanation that he kept large number of small bills to facilitate car sales or to realize better exchange rate in Nigeria insufficient to establish legitimate source).

(1) Tainted Property Obtained in Exchange for Legitimately Derived Funds

The rebuttal to the first defense turns on the distinction between the money or other property that is the subject of the forfeiture action—the tainted property—and the money that the claimant may have given in exchange for that property when he obtained it. It is no defense to a forfeiture action to assert that the property seized by the Government was purchased with clean money.[296] The defendant is the property seized, not any funds that the claimants may have used to purchase that property at an earlier time. Therefore, what is relevant is the source of the seized property, not the source of the funds used to buy the seized property.[297] Using legitimately derived funds to acquire an interest in tainted funds does not purge the acquired funds of their taint. Therefore, it makes no difference whether the claimant purchased the seized property with money from his business, from his savings, or from an inheritance from his great-aunt.

For example, in *United States v. One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276 (9th Cir. 1983), the seized property was a motor yacht. It was assumed in that case that the claimant was a bona fide purchaser who had bought the yacht with untainted property.[298] Nevertheless the property was forfeited because the issue in that case was whether the *seized boat* had been involved in illegal activity, not whether *the money used to buy the boat* was illegally derived.[299]

Applying this principle in money laundering cases often leads to confusion, since money is generally regarded as fungible. But the proper perspective is to view the money involved in such a case as a commodity that is being bought and sold. A money launderer, for example, may buy tainted money from a drug dealer in exchange for untainted money derived from legitimate business activities. In such a case, the launderer will offer evidence of his legitimate business in an attempt to establish that the money sought by the Government had an independent, innocent source. But the Government may rebut this claim by showing that the claimant has given away his legitimate money in exchange for the tainted property the Government seeks to forfeit. In other words, once probable cause has been established,

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[296] *But see* discussion of innocent owner defense in part V.C.4.c of this chapter, *infra*.

[297] *See United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars ($4,255,000)*, 762 F.2d 895, 905 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

[298] *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1279 (9th Cir. 1983).

[299] The question of whether a bona fide purchaser, such as the purchaser in *Tahuna*, would be entitled to assert an innocent owner defense is discussed in part V.C.4.(c) of this chapter, *infra*.

the tainted money becomes forfeitable, even though the purchaser may have paid good money for such tainted money.

For example, in *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars ($4,255,000)*,762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986), the claimant had purchased United States currency from a South American money exchanger, using Colombian pesos as the medium of exchange. The claimant first argued that he had purchased the currency from a legitimate money exchange house, and that this satisfied his burden of proving that the money came from a legitimate source. The Eleventh Circuit rejected this argument:

> That [claimant] may not have received the money *directly* from drug dealers does *not* prove that the money was free from a substantial drug connection.[300]

Secondly, the claimant argued that even if the dollars had come originally from drug dealers, he had bought them with untainted pesos, and that any taint on the dollars had been cleansed in this transaction. The appellate court rejected this argument as well.[301]

The focus, the court said, was on the dollars acquired by the claimant, not the pesos he had used to purchase them. If the dollars were derived from illegal activity, they were subject to forfeiture, regardless of how the claimant had acquired them. "Congress clearly contemplated the forfeiture of property that once belonged to drug dealers, but subsequently was transferred, via 'legitimate transactions,' to third parties."[302]

If the claimant could claim that the taint on the seized property had been removed through his supposedly legitimate purchase, the court said, there would be no need for the innocent owner defense.[303]

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[300] *United States v. Four Million, Two Hundred Fifty Thousand Dollars ($4,255,000)*, 762 F.2d at 905 n.22 (11th Cir. 1985) (emphasis in original).

[301] *Id.*

[302] *Id.*

[303] *Id. See United States v. All Monies in Account No. 90-3617-3*, 754 F. Supp. 1467 (D. Haw. 1991) (where the claimant was a cambista who had purchased the tainted funds on the black market in Peru). *See also United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868 (10th Cir. 1992) (evidence of possible legitimate sources of income insufficient to establish legitimate source defense without records). *See* discussion of innocent owner defense in part V.C.4.c of this chapter, *infra*.

(2) Commingled Funds

Another version of the legitimate source defense which may be raised by a claimant is that the seized property represents the commingling of clean and dirty money, and that the portion of the property traceable to the clean money should be considered as having a legitimate source and therefore not be subject to forfeiture. In cases where claimant is able to show that a portion of the property seized is not traceable to illegal activity, the claimant may prevail in his legitimate source defense as to that portion because he will have rebutted the Government's showing of probable cause.[304] This rule would not apply, however, to cases where the commingling of clean and dirty money is a part of the criminal offense giving rise to forfeiture.[305] For example, in section 1956(a)(1)(B)(i) money laundering cases where the clean money was used to conceal or disguise the dirty money, the Government may assert that it is entitled to forfeit all of the money, both clean and dirty, because it was all "involved in" the money laundering offense.[306] However, a claimant may prevail in his legitimate source defense in structuring and section 1957 money laundering cases where the traceable clean money is not involved in the criminal offense. For example, if a claimant structures $20,000 into an account containing $100,000, only the $20,000 is forfeitable if the claimant can demonstrate that the $100,000 was from a legitimate source and was not involved in the structuring offense.

Generally, courts consider the legitimate source defense and the innocent owner defenses[307] as separate defenses, and failure to prevail on an innocent owner defense does not preclude a claimant from raising a legitimate source defense.[308] However, in *United States v. One Single Family Residence Located at 15603 85th Ave. N* [hereinafter *United States v.*

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[304] *See United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 446 (E.D.N.Y. 1992) (Government must establish probable cause in money laundering case to all of the seized property; where a portion of the bank account is not traceable to criminal activity and no facilitation theory applies, Government has failed to establish probable cause with respect to a portion of the funds).

[305] *See, e.g., United States v. One Single Family Residence Located at 15603 85th Ave,* 933 F.2d 976 (11th Cir. 1991) (once property owner knowingly commingles legitimate property with tainted property, he loses all right to assert that a portion of the property subject to forfeiture had a legitimate source); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (car purchased in part with laundered funds is forfeitable in its entirety even if legitimate funds were also invested).

[306] *United States v. All Monies*, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991) (untainted money in account provided "cover" for laundering operation); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994) (legitimate funds used to conceal or disguise laundering forfeited; cases involving structuring offenses distinguished).

[307] Discussed in part V.C.4.c, of this chapter, *infra*.

[308] *United States v. Real Property...20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995).

15603 85th Ave. N.], 933 F.2d 976 (11th Cir. 1991), the Eleventh Circuit held that one who knowingly commingles clean money with tainted property of another loses his right to assert a legitimate source defense as to the portion of the property traceable to the legitimate source.[309] In essence, the court said that the innocent owner claim must be evaluated first. If a person is an innocent owner, "no amount of that person's or entity's funds are forfeitable."[310] If a person is not an innocent owner, however, the full value of the property is forfeitable, even if property traceable to illegal activity has been commingled with legitimately derived funds.[311] The court concluded that "when a claimant to a forfeiture action has actual knowledge, at any time prior to the initiation of the forfeiture proceeding, that claimant's legitimate funds are commingled with drug proceeds, traceable in accord with the forfeiture statute, the legitimate funds are subject to forfeiture."[312] The policy underlying this holding is that "those who normally do business with drug dealers do so at their own risk."[313]

While a few courts have adopted the Eleventh Circuit's approach,[314] it has not been widely accepted.[315] Further, the forfeiture statutes seem to contemplate two distinct defenses: (1) the legitimate source defense, which focuses on whether the property is forfeitable under the statute as proceeds or facilitating property; and (2) the innocent owner defense, which provides protection for owners of forfeitable property who had no knowledge of the illegal

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[309] In this case two brothers combined resources to purchase a single family residence. One brother contributed drug proceeds while the other acquired his interest with legitimately derived property. When the Government sought forfeiture of the house as proceeds of drug trafficking under 21 U.S.C. § 881(a)(6), the "clean" brother argued that the portion of the property acquired with clean money had a legitimate source and therefore, could not be forfeited as proceeds.

[310] *United States v. 15603 85th Ave. N.*, 933 F.2d 976, 981 (11th Cir. 1991).

[311] *Id.*

[312] *Id.* at 982.

[313] *Id.*, quoting *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars ($4,255,000)*, 762 F.2d 895, 905 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

[314] *See United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (car purchased in part with legitimate funds forfeitable in its entirety); *see also United States v. One Parcel of Real Estate Located at 6640 SW 48th Street*, 41 F.3d 1448 (11th Cir. 1995) (court applied *United States v. 15603 85th Ave. N.* and held claimant could not raise legitimate source defense as to any portion of the seized property because he had commingled forfeitable property with allegedly nonforfeitable property).

[315] The First and Fifth Circuits have a different view. *See United States v. One 1980 Rolls Royce VIN SRL 39955*, 905 F.2d 89 (5th Cir. 1990) (claimant may avoid forfeiture of real estate to the extent he can prove what portions of the properties were purchased with legitimate funds despite his admission that some drug proceeds were used to purchase the real estate); *United States v. One Parcel of Real Property*, 921 F.2d 370 (1st Cir. 1990).

use and did not consent to it. Except in very limited cases, a claimant's innocence is irrelevant to whether the property is derived from a legitimate source and the innocent owner defense is not dependent upon a showing that the property was derived from a legitimate source.[316]

c. Innocent Owner Defense

The "innocent owner defense" is the term used generically to describe the statutory defenses available to a claimant who asserts that he had nothing to do with the illegal acts giving rise to the forfeiture action against his property. In *Bennis v. Michigan*, ___ U.S. ___, 116 S. Ct. 994 (1996), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not embody or require an innocent owner defense to forfeiture. Therefore, there is no innocent owner defense in absence of a statute providing for it. Unfortunately, Congress has not been consistent in its enactment of innocent owner defenses; some forfeiture statutes contain no statutory defenses, while other forfeiture statutes expressly include innocent owner provisions. Moreover, the innocent owner provisions differ from statute to statute making it difficult to apply case law interpreting one provision to a case law interpreting another.

For example, the money laundering forfeiture statute contains an innocent owner provision. Under 18 U.S.C. § 981(a)(2), the claimant may avoid forfeiture if he proves by a preponderance of the evidence that he did not know that his property was involved in a money laundering offense. "Knowledge," however, is undefined. Some courts which have interpreted section 981(a)(2) rely upon case law interpreting the older and more familiar innocent owner provisions in the drug forfeiture statutes for guidance in determining what it is that a claimant must prove to establish his affirmative defense.[317] Some courts have held that the Government need only show that the claimant had knowledge of the acts giving rise to money laundering and need not show the claimant knew the acts were illegal.[318]

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[316] *See, e.g., United States v. Real Property...20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995) (a claimant may establish either the innocent owner defense or the legitimate source defense because these defenses are separate and distinct).

[317] *See United States v. All Monies in Account No. 90-3617-3*, 754 F. Supp. 1467 (D. Haw. 1991) (discussing scope of section 981(a)(2) in detail).

[318] *United States v. 5709 Hillingdon Road*, 919 F. Supp. 863 (W.D.N.C. 1996). *See also United States v. Rogers*, Nos. 94-CR138 (FJS) and 93-CV-156 (FJS), 1996 WL 252659 (N.D.N.Y. May 8, 1996) (unpublished) (innocent owner defense rejected where claimant was present when defendant used structured cashiers checks to purchase car).

While 18 U.S.C. § 981(a)(2) requires the claimant to prove only lack of knowledge, the drug forfeiture statutes 21 U.S.C. § 881(a)(6) and (a)(7) require proof of lack of knowledge or consent, and 21 U.S.C. § 881(a)(4) requires proof of lack of knowledge, consent, or willful blindness. These differences may be of great importance, and government attorneys must therefore be cautious in applying case law interpreting one forfeiture statute to forfeitures based upon another statute.

Further, there is some confusion over what constitutes an "owner" for purposes of the innocent owner defense.[319] However, for purposes of an innocent owner defense, an owner is a person with a recognizable legal or equitable interest in the property seized.[320] State law controls whether a claimant has such an interest in the property.[321]

(1) The *Calero-Toledo* Standard

Some civil forfeiture statutes provide no innocent owner defense at all.[322] Prior to the Supreme Court's decision in *Bennis v. Michigan*, the Department of Justice, and many district courts, acquiesced in the suggestion of the Supreme Court that due process might require that a truly innocent property holder have some defense to an *in rem* forfeiture action. The scope of this defense was based upon dicta in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), which suggests that a property owner may defeat a forfeiture action if the owner proves that the owner took all reasonable steps to prevent the use of his property in the illegal activity giving rise to the forfeiture. Many of the earlier reported civil forfeiture cases involving vehicles, vessels, and aircraft applied this "all reasonable steps" or "due care" standard, since the statute governing the forfeiture of such property in drug cases, 21 U.S.C. § 881(a)(4), contained no innocent owner provision until it was amended in 1988.[323]

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[319] *See* discussion of standing in part V.C.1 of this chapter, *infra*.

[320] *See, e.g., United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984 (E.D.N.Y. 1992).

[321] *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160 (E.D. Pa. 1993) (state law controls question whether claimant is an owner or not); *United States v. 1989 Lear Jet*, 25 F.3d 793 (9th Cir. 1994).

[322] *See, e.g.*, 18 U.S.C. § 1955(d) (forfeiture of property used in violation of gambling statutes); 18 U.S.C. § 2254(a)(1) (forfeiture of book containing visual depiction shipped in interstate commerce in violation of child exploitation statute); 31 U.S.C. § 5317 (currency reporting requirement).

[323] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 6075, 102 Stat. 4324 (Nov. 18, 1988). Some courts have held that this defense may not be used by owners who acquired their interest in the seized property after the violation. *See United States v. Eighty-Three Rolex Watches*, 992 F.2d 508 (5th Cir. 1993).

The Supreme Court declined to adopt this standard in *Bennis v. Michigan* holding that there is no innocent owner defense to forfeiture under the Due Process Clause. *Bennis* was a state forfeiture case involving the constitutionality of a Michigan nuisance abatement statute which allows the State to forfeit property without regard to the innocence of the property owner. The Supreme Court reaffirmed a "long and unbroken line of cases" holding that "an owner's interest in property may be forfeited by reason of the use to which the property is made even though the owner did not know that it was to be put to such use."[324] Accordingly, the Court upheld the state forfeiture of a car jointly owned by a husband and wife despite the wife's claim that her husband used the car for illegal purposes (soliciting prostitution) without her knowledge. The Court specifically rejected the wife's argument that the State must demonstrate that she was personally culpable before forfeiting her interest in the property.[325]

Bennis decided only a matter of constitutional law; it does not bar the enactment of laws or promulgation of policies by the legislative and executive branches which provide citizens with greater protection than that afforded by the Constitution. The Asset Forfeiture and Money Laundering Section believes that the United States should not forfeit property that belongs to an innocent owner. Thus, prosecutors should screen forfeiture cases and decline to seek forfeiture of the interests of an owner, who in accordance with *Calero-Toledo* standard, took all reasonable steps to prevent the illegal use of his property. Where the Government applies this test and determines that the forfeiture action should be brought, and a claimant nevertheless files an innocent owner claim, the Government may properly move to dismiss under *Bennis* for failure to state a claim upon which relief can be granted.[326]

In other words, the Government's internal policy should be to forego forfeiting the property of truly innocent owners. However, it is important to note that this policy does not confer any rights on claimants in forfeiture cases. Thus, if the Government files a forfeiture action relying upon a statute lacking an innocent owner defense, and it determines that no innocent person's interests are implicated, the Government may rely upon *Bennis* and need not give the claimant the opportunity to argue that the Government misapplied its policy and

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[324] *Bennis v. Michigan*, ___ U.S. ___, 116 S. Ct. 994, 998 (1996).

[325] Chief Justice Rehnquist wrote the 5-4 majority opinion which was joined by Justices O'Connor, Scalia, Thomas, and Ginsburg.

[326] *See United States v. $83,132.00 in United States Currency*, No. 95-CV-2844, 1996 WL 599725 (E.D.N.Y. Oct. 11, 1996) (unpublished) (property owners have no right to contest forfeiture on grounds of "innocence" unless the forfeiture statute provides for such a defense).

the case should never have been filed because the claimant satisfied the "all reasonable steps" test.[327]

(2) Lack of Knowledge or Consent Under 21 U.S.C. § 881(a)(6)-(7)

Two commonly used drug forfeiture statutes—*i.e.*, those involving forfeiture of drug proceeds, 21 U.S.C. § 881(a)(6), and real property used to facilitate drug offenses, 21 U.S.C. § 881(a)(7)—have contained statutory innocent owner provisions for some time.[328] Two significant issues have divided the courts in their attempt to interpret the scope of these provisions.

First, courts differ as to whether a claimant must prove *both* lack of knowledge and lack of consent, or whether he may prove one or the other. In the Ninth Circuit, these terms are interpreted conjunctively—*i.e.*, a person who proves lack of knowledge must also prove lack of consent.[329] In the Second and Third Circuits, however, the terms are read disjunctively and a person, who has knowledge that his property is being used for an illegal purpose, may

[327] In the wake of the *Bennis* decision, commentators and news organizations throughout the country have called on Congress to enact statutory protection for innocent owners. The Department of Justice's response is: (1) most federal forfeitures are brought under statutes which contain an innocent owner defense, thus, *Bennis* will have little effect on the federal forfeiture program; (2) the Department of Justice, as a matter of long-standing policy, will not seek to forfeit the property of innocent owners; and (3) the Department of Justice, prior to the decision in *Bennis*, proposed legislation to Congress which, if enacted, would extend statutory protection for innocent owners to forfeitures under Titles 8, 18, and 21 of the United States Code.

[328] Similar provisions appear in other forfeiture statutes. *See, e.g.*, 18 U.S.C. § 2254(a)(2)-(3) (relating to forfeiture of property used to commit child exploitation offenses).

[329] *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996); *United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4)*, 902 F.2d 1443, 1445 (9th Cir. 1990) ("knowledge" and "consent" are conjunctive terms, and claimant must prove lack of both); *United States v. Real Property Located at Section 18, Township 23*, 976 F.2d 515 (9th Cir. 1992) (same); *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1440 n.3 (D. Haw. 1990) (claimant must show that he did not consent in advance to illegal use of his property even if he proves that he did not actually know whether such illegal use ever occurred). It appears that the Eighth Circuit also reads these terms conjunctively. *See United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172 (8th Cir. 1992) (held in a 21 U.S.C. § 881(a)(4) case that a claimant who could show lack of knowledge and lack of consent still had to show lack of willful blindness). The Fourth Circuit may also follow this rule. *See United States v. All That Property, Piece and Parcel Situated in St. Thomas Parish*, 14 F.3d 597 (4th Cir. 1994) (Table) (unpublished disposition).

nevertheless avoid forfeiture if he shows that he did not consent to that use of his property.[330] Moreover, the Seventh and Second Circuits (*in dicta*) assert that since a person cannot consent to what he does not know, a claimant who establishes lack of knowledge need not prove lack of consent.[331]

The second significant issue which divides the courts is that courts differ as to what the terms "knowledge" and "consent" mean. Most courts have interpreted the term "knowledge" to mean actual knowledge as opposed to constructive knowledge.[332] And as discussed below, some courts have incorporated the all reasonable steps standard suggested in *Calero-Toledo* into either the "knowledge" or "consent" prong, or both.

The Second and Ninth Circuits hold that the *Calero-Toledo* standard is part of the "consent" prong of the statutory innocent owner defense.[333] For example, in *United States v.*

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[330] *See United States v. Real Property Located at 19 and 25 Castle Street*, 31 F.3d 35 (2d Cir. 1994) (parents knew children were selling drugs from the family residence and consented to the use of the property for that purpose because they failed to take all reasonable steps to prevent the drug activity); *United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2d Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), *cert. denied*, 498 U.S. 1109 (MEM) (1991); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 626 (3d Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use). *See also United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 1000 (5th Cir. 1990) (reserving judgment on this issue).

[331] *See United States v. 141st Street Corp.*, 911 F.2d 870, 878 (2d Cir. 1990); *United States v. One Parcel of Land Located At 7326 Highway 45 North*, 965 F.2d 311, 315 (7th Cir. 1992).

[332] *See e.g., United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 995 F.2d 1558, 1561 (11th Cir. 1993) ("innocent owner defense turns on the claimant's actual knowledge, not constructive knowledge"); *United States v. One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311 (7th Cir. 1992).

[333] *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996); *United States v. One Parcel of Property Located At 121 Allen Place*, 75 F.3d 118 (2d Cir. 1996) ("where, as here, it is undisputed that the claimant had knowledge of the drug-related activity, consent will be inferred unless the claimant can prove that he took all reasonable means to rid the property of the illegal conduct"); *Two Parcels of Property Located At 19 and 25 Castle Street*, 31 F.3d 35 (2d Cir. 1994) (parents failure to take all reasonable steps to prevent children from using the family property to sell drugs constituted consent to such use); *United States v. One Parcel of Property Located at 755 Forest Road*, 985 F.2d 70 (2d Cir. 1993) (claimant's willful blindness inconsistent with taking all reasonable steps); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992) (proof of lack of consent requires claimant to show that he "took all reasonable steps to prevent illegal use of his property"); *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990). *See also United States v. 5.382 Acres*, 871 F. Supp. 880 (W.D. Va. 1994) (property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property; unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture); *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064 (D. Md. 1996) (claimant who fails to take affirmative steps to prevent the property's illegal use cannot show lack of consent).

141st Street Corp. and *United States v. One Parcel of Property Located at 121 Allen Place*, the Second Circuit held that for a landlord to establish lack of consent to the use of his property for illegal drug-related activities, he would have to prove that he did all that reasonably could be expected to stop the illegal use once he learned that it was occurring.[334] The Third Circuit has held that proof of having taken all reasonable steps to prevent the underlying illegal use is not required unless the statutory owner provision at issue contains a "consent" element.[335]

Some courts hold that the more onerous burden of showing that one has done all that reasonably could be expected to prevent the illegal use of one's property, as required by *Calero-Toledo*, is not part of the statutory innocent owner provisions. In such cases, the concepts of knowledge and consent are interpreted more narrowly, and the claimant's burden is therefore easier to meet.[336]

As the various cases illustrate, it is not feasible to develop a bright-line rule that governs all instances where the innocent owner defense might apply. Whether a claimant should be required to prove both lack of knowledge and lack of consent, or merely one or the other, depends upon: (1) the language of the pertinent forfeiture statute; (2) when the property interest being asserted, or the knowledge of the illegal activity, was acquired; and (3) the law of the applicable circuit. Thus, whether a claimant should be required to prove both lack of knowledge and lack of consent, or merely one or the other, should vary depending on the facts of the case.

If a claimant is defending an interest in property acquired *before* the act giving rise to the forfeiture occurred, and the claimant knew at the time of the act that his property was being used to commit an illegal act, the "disjunctive" rule followed in the Second and Third

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[334] *United States v. 141st Street,* 911 F.2d 870, 879 (2d Cir. 1990); *United States v. One Parcel of Property Located at 121 Allen Place,* 75 F.3d 118, 121 (2d Cir. 1996), citing *United States v. 141st Street.*

[335] *United States v. Various Computers*, 82 F.3d 582 (3d Cir. 1996).

[336] *See, e.g., United States v. Covarrubias*, 79 F.3d 769 (9th Cir. 1996) (the "innocent owner defense formulated by *Calero-Toledo* does not apply where the forfeiture statute at issue supplies its own requirement to enable an innocent owner to challenge the forfeiture"); *United States v. $124,813 in Currency*, 53 F.3d 108 (5th Cir. 1995) ("*Calero-Toledo* did not create a general 'innocent owner' defense to statutory forfeiture."); *United States v. Lots 12, 13, 14 & 15, Keeton Heights Subdivision*, 869 F.2d 942, 946-47 (6th Cir. 1989) (*Calero-Toledo* standard not applicable to innocent owner defense under section 881(a)(7)); *United States v. One Urban Lot Located at 1 Street A-1*, 865 F.2d 427, 430 (1st Cir. 1989) (same with respect to section 881(a)(6)); *United States v. 316 Units of Municipal Securities*, 725 F. Supp. 172, 180 (S.D.N.Y. 1989) (statutory innocent owner defense requires only a showing of ignorance of the illegal transactions); *United States v. Certain Real Property*, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (test for innocent ownership does not require proof that claimant did everything reasonably possible to prevent the illegal activity).

Circuits should apply. A person who knows that his property is being used illegally should still have an opportunity to show that he did everything possible to stop the illegal use of that property—*i.e.*, that he did not "consent" to its illegal use. This rule would be particularly appropriate where a spouse is aware of, but does not consent to (*i.e.*, takes all reasonable steps under the circumstances to prevent) his or her partner's use of marital property for an illegal purpose.[337]

But a claimant who is able to prove lack of knowledge of an illegal act should not automatically be absolved from having to prove lack of consent. As one court has pointed out, even though a person may be able to show lack of knowledge of illegal activity, he may have consented to that activity in advance.[338] For example, a person may lend his boat to a friend with the understanding that the friend can do whatever he wants with it, including using the boat to transport illegal drugs. In such cases, the courts should require a person to prove both lack of knowledge and lack of consent.

Thus, instead of electing either of the rules that have divided the appellate courts, the government attorney should argue, in the case of property interests acquired *before* the time the illegal act occurred, that the claimant could prove either: (1) that he or she had no knowledge of the acts giving rise to the forfeiture at the time those acts were committed, and did not consent to the use of his or her property in the commission of any illegal act; or (2) if the claimant did have knowledge of the criminal acts, that he or she nevertheless took all reasonable steps to ensure that his or her property would not be used, or would cease to be used, in the commission of the illegal act. The test of whether the person consented to the illegal act should be the "all reasonable steps" standard articulated by the Supreme Court dicta in *Calero-Toledo*.

This rule would not make sense, however, in the case of a person who acquires the property *after* the illegal act or use occurred. In the case of before-acquired property, a property owner could logically say, "I learned that my property was being used for an illegal purpose, but I did not consent to that use and tried to stop it." It would not be logical, however, for the owner of after-acquired property to oppose a forfeiture action by saying, "I knew before I bought the property that it had been used illegally in the past, but I did not consent to such use of the property." A person's consent (or lack thereof) to the illegal use of

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[337] *See United States v. Property Titled In The Names of Ponce*, 751 F. Supp. 1436, 1441 (D. Haw. 1990); *See* Cassella, Stefan D., "Forfeiture Reform: A View From The Justice Department," *Notre Dame Law School Journal of Legislation* [Vol. 21, No. 2]: 211.

[338] *See United States v. Property Titled In The Names of Ponce*, 751 F. Supp. 1436, 1441 (D. Haw. 1990); *See* Cassella, Stefan D., "Forfeiture Reform: A View From The Justice Department," *Notre Dame Law School Journal of Legislation* [Vol. 21, No. 2]: 211.

property before he owned it is irrelevant. One who *knowingly* acquires tainted property should not have any "lack of consent" defense; the only proper thing for that person to do would be to not acquire the property at all.[339] For example, in *One Parcel of Real Estate Located at 6640 S.W. 48th St.*, 41 F.3d at 1452-1453, the Eleventh Circuit held that the lack of consent defense set forth in section 881(a)(7) is not available to post-illegal act transferees.[340]

However, in *United States v. One 1973 Rolls Royce*, the Third Circuit, in a split panel decision, held that a post-illegal act transferee who did not consent to the illegal activity would be safe from forfeiture under the innocent owner provisions of 21 U.S.C. § 881(a)(4) even though he knew of the illegal activity at the time he acquired his interest. The Third Circuit noted that to hold otherwise was to ignore established precedent requiring a disjunctive reading of the knowledge and consent clause of the innocent owner provision. Unfortunately, as the Eleventh Circuit noted in *6640 S.W. 48th St.*, the Third Circuit practice of classifying post-illegal act transferees as innocent owners because they had no opportunity to consent creates a sweeping grant of immunity from forfeiture and a gaping loophole in an intentionally comprehensive forfeiture policy.[341]

Consequently, in circuits where innocent owner provisions are generally read disjunctively, government attorneys should urge courts to apply the test set forth by the Eleventh Circuit in *6640 S.W. 48th Street* and impose a different rule for cases involving property acquired by a claimant *after* the illegal activity occurred. Alternatively, or in addition, attorneys should urge the courts to focus upon claimant's "consent" at the time he

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[339] *See United States v. One Parcel of Real Estate Located at 6640 S.W. 48th St.*, 41 F.3d 1448 (11th Cir. 1995) ("If a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest he cannot assert innocent owner defense."); *United States v. Funds in the Amount of $228,390*, No. 94-C-6618, 1996 WL 284943 (N.D. Ill. May 23, 1996) (unpublished) ("if a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense); *United States v. One Parcel of Real Property (190 Colebrook Road)*, 743 F. Supp. 103, 106 (D.R.I. 1990). *Cf. United States v. One 1973 Rolls Royce*, 43 F. 3d 794 (3d Cir. 1994) (a person who knowingly acquires forfeitable property is considered an innocent owner because he could not have consented to the illegal use of the property before he owned it); *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1185, 1187-88 (W.D. Tex. 1990), *aff'd*, 946 F.2d 30 (5th 1991) (with respect to after-acquired property, issue is whether claimant knew, at the time he acquired the property (or within a few days thereafter), of its prior use in a drug transaction or its status as proceeds); *United States v. One Parcel of Real Estate Located at 6640 S.W. 48th St.*, 41 F.3d at 1452 (the extent of claimant's knowledge should be determined at the time he acquired the property, not the time the illegal act occurred).

[340] "If a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense." *United States v. One Parcel of Real Estate Located at 6640 S.W. 48th St.*, 41 F.3d 1448, 1452-1453 (11th Cir. 1995).

[341] *United States v. One Parcel of Real Estate Located at 6640 S.W. 48th St.*, 41 F.3d at 1452.

acquired the property rather than at the time the illegal act was committed. The test should be whether claimant consented to acquiring tainted property as opposed to whether he consented to the illegal use of the property when it was owned by someone else.[342]

(3) Incorporating the Concept of "Willful Blindness" into the Innocent Owner Defense

It is unclear to what extent the term "knowledge" in the statutory innocent owner provisions includes the concept of "willful blindness."[343] In 1988, Congress amended 21 U.S.C. § 881(a)(4), the statute governing the forfeiture of aircraft, vehicles, and vessels used to facilitate drug trafficking, to include a statutory innocent owner defense for the first time. Going beyond the language in 21 U.S.C. § 881(a)(6) and (a)(7), this statute provides that innocent ownership is established only if the claimant proves lack of "knowledge, consent, *or willful blindness* of the owner."[344] Whether the addition of the willful blindness provision was substantively necessary, or whether the concept of willful blindness has been included within the meaning of "knowledge" all along, is of considerable importance in applying the case law to forfeitures under 18 U.S.C. § 981, which requires only that the illegal act be "committed without the knowledge" of the owner or lienholder.[345] If willful blindness is a form of knowledge, then lack of willful blindness is an element of the innocent owner defense under 18 U.S.C. § 981 which claimant must prove.

"Willful blindness" is not defined in any civil forfeiture statute. Courts have expressed the concept of willful blindness in differing ways.

The Eleventh Circuit seems to have adopted an objective due care standard of willful blindness based upon the all reasonable steps test set forth in *Calero-Toledo*. Under this

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[342] The Department of Justice has proposed legislation that would codify *6640 S.W. 48th Street*, applying a disjunctive rule for cases in which a claimant has an interest at the time the illegal use of the property occurs, but requiring that a person who acquires property afterward show that he did everything a reasonable person would do to make sure that he was not acquiring tainted property. Knowledge would be determined at the time the claimant acquired the property, as opposed to the time the illegal act was committed as suggested by the Third Circuit in *1973 Rolls Royce*.

[343] Some courts interpreting 21 U.S.C. § 881(a)(6) and (a)(7) have determined that willful blindness is part of knowledge. *See United States v. One Parcel of Property Located at 755 Forest Road*, 985 F.2d 70 (2d Cir. 1993) (claimant's willful blindness demonstrated knowledge of illegal acts).

[344] 21 U.S.C. § 881(a)(4)(C)(1988) (emphasis added).

[345] *See United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1186-87 (W.D. Tex. 1990) (discussing differences between subsections 881(a)(4) and (a)(6) and legislative intent, but finding it unnecessary to resolve the issue since claimant failed to prove lack of actual knowledge).

standard, a person would be deemed willfully blind if he failed to exercise due care to ensure that the property had not been used in illegal activity.[346] The Seventh Circuit has stated that a person is willfully blind if he is aware of suspicious circumstances and takes affirmative steps to assure he does not acquire full knowledge.[347] The Third Circuit rejected the objective due care standard and adopted a subjective standard whereby a person is willfully blind if he is personally aware of a high probability of illegal use of the property and does not take affirmative steps to investigate.[348] In money laundering cases under section 981(a)(2), the Ninth Circuit has said that willful blindness is the same as knowledge.[349]

It is more difficult for the Government to rebut an innocent owner defense under a subjective standard than it is under an objective standard, because the former requires the Government to adduce circumstantial evidence of a claimant's knowledge of suspicious circumstances regarding the use of his property whereas the objective standard would be satisfied by demonstrating what a reasonable person would have known. However, the Third Circuit's subjective standard is more favorable in some respects than the standards adopted by other circuits. For example, in contrast to the Seventh Circuit's rule, the Third Circuit places the burden on the person aware of the suspicious circumstances to take affirmative steps to investigate; a person who fails to do so is willfully blind. In the Seventh Circuit, a person has no affirmative duty to investigate; he is willfully blind only if he takes affirmative steps to avoid acquiring guilty knowledge. The model innocent owner statute drafted by the Asset Forfeiture Office (now the Asset Forfeiture and Money Laundering Section) in 1994 is consistent with the Third Circuit on this point.

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[346] *See United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884 (11th Cir. 1989); *United States v. All Monies*, 754 F. Supp. 1467, 1478 (D. Haw. 1991) (claimant must prove that "he did not know of the illegal activity, did not willfully blind himself from the illegal activity, and did all that reasonably could be expected to prevent the illegal use" of his property).

[347] *United States v. Giovanetti*, 919 F.2d 1223 (7th Cir. 1990) (person is willfully blind if he is aware of suspicious circumstances and affirmatively avoids acquiring full or exact knowledge). *See also United States v. 1989 Jeep Wagoneer*, 976 F.3d 1172 (8th Cir. 1992) ("Willful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts of omissions show a conscious purpose to avoid knowing the truth. This standard is a way of inferring knowledge, whereas the *Calero-Toledo* standard is more nearly a negligence standard.").

[348] *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 807 (3d Cir. 1994) (court rejects objective standard in favor of subjective standard); *see also United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1186-87 (W.D. Tex. 1990) (lawyer whose fee was paid with drug proceeds was "willfully blind" if he failed to take the basic investigatory steps necessary to determine that his fees were not being satisfied with a major instrumentality of the crime charged against his client).

[349] *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996).

(4) Innocent Owner Defense under 18 U.S.C. § 981

As mentioned, 18 U.S.C. § 981(a)(2) requires that the claimant prove only lack of knowledge; proof of lack of consent is not required. Thus, the definition of knowledge becomes very important. If "knowledge," includes "willful blindness" as suggested in *Gartel Drive* and some of the cases cited above, then in a section 981 forfeiture case, a claimant could not establish innocent ownership merely by asserting that he lacked actual knowledge; he would have to prove that he was not willfully blind.[350]

In those courts where willful blindness is measured by the "due care" standard, as suggested by the Eleventh Circuit in *One 1980 Bertram*, then the *Calero-Toledo* standard may apply to the innocent owner defense under 18 U.S.C. § 981 through the knowledge prong insofar as knowledge includes willful blindness.

However, in circuits which hold that the *Calero-Toledo* all reasonable steps test is part of the consent prong, it may be difficult to argue that the *Calero-Toledo* standard of due care applies to 18 U.S.C. § 981 forfeitures since that statute lacks a consent requirement. The Third and Ninth Circuits have held that claimants are not required to prove that they took all reasonable steps to prevent illegal use of their property when the statutory innocent owner defense does not have a consent element, which section 981(a)(2) does not.[351]

Nevertheless, to the extent that courts interpret willful blindness and the *Calero-Toledo* all reasonable steps test as part of the knowledge prong, government attorneys may impose upon claimants in section 981(a)(2) cases the same requirements imposed upon claimants in other forfeiture cases even if those requirements are analyzed in the other cases under the "willful blindness" or "consent" prongs of other forfeiture statutes.

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[350] *See United States v. One Parcel of Property Located at 755 Forest Road*, 985 F.2d 70 (2d Cir. 1993) (claimant could not show lack of knowledge because she was willfully blind to obvious signs of drug activity); *United States v. $507,270.00 in United States Currency*, 820 F. Supp. 1398 (S.D. Fla. 1993) ("claimant's deliberate ignorance will be equated with knowledge of the illegal activity").

[351] *United States v. Various Computers and Computer Equipment*, 82 F.3d 582 (3d Cir. 1996) (claimant need not show he took "all reasonable steps" if the forfeiture statute at issue does not have a consent prong); *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (plain language of section 981(a)(2) only requires claimants to demonstrate ignorance of illegal transactions). *See also United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990) (applying "due care" standard only to consent prong of statutory innocent owner defense), *cert. denied*, 498 U.S. 1109 (1991); *United States v. $705,270.00 in U.S. Currency*, 820 F. Supp. 1398, 1402 (S.D. Fla. 1993) (because section 981(a)(2) does not contain a consent prong, the "all reasonable steps" test does not apply); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160 n.16 (E.D. Pa. 1993).

If courts prove unwilling, however, to interpret the lack of knowledge requirement in 18 U.S.C. § 981 to include lack of willful blindness and the exercise of due care under *Calero-Toledo*, legislation may be needed to ensure that section 981 comports with the innocent owner statutes in Titles 18 and 21 of the United States Code.[352]

(5) Innocent Owner Defenses in Section 5317 Cases

Section 5317 does not contain an innocent owner defense. Thus, under *Bennis*, a property owner may not contest a forfeiture upon the basis that he is an innocent owner. For example, in *United States v. $83,132.00 in United States Currency*, No. 95-CV-2844, 1996 WL 599725 (E.D.N.Y. Oct. 11, 1996) (unpublished) a traveler failed to file a CMIR for some cash that he was carrying out of the country. The Government seized the money and instituted civil forfeiture proceedings against the currency under 31 U.S.C. § 5317. A third party filed a claim asserting that he was an innocent owner and that the money belonged to him and the traveler was only a courier bringing the money to his mother outside the United States. The Government filed a motion for summary judgment arguing that, under *Bennis*, the third party had no right to contest the forfeiture because section 5317 has no innocent owner defense. The court granted the motion, holding that because section 5317 has no innocent owner defense, a claimant's property could be forfeited even if it were true that he had entrusted his money to a courier and had no reason to suspect that courier would fail to file a CMIR.[353]

(6) Effect of Relation Back Doctrine on Innocent Owner Defense

Until recently, one very important issue was whether the innocent owner defense should apply at all in cases where the property interest in question was not acquired until after the act giving rise to the forfeiture occurred. Under the relation back doctrine, property becomes subject to forfeiture at the moment it is used in the commission of an illegal act for which forfeiture is authorized. Some courts construed this doctrine to mean that title vested in the Government at the moment the illegal act occurred. Thus, they concluded that the owner lost

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[352] Government attorneys are urged to consult with the Asset Forfeiture and Money Laundering Section on cases involving the innocent owner defense to section 981 to ensure consistent application of the statute.

[353] *But see United States v. $69,292.00 in U.S. Currency*, 62 F.3d 1161 (9th Cir. 1995) where the Ninth Circuit held in a that even though section 5317 does not contain an innocent owner provision, the owner who took all reasonable steps to prevent the illegal use may defeat the forfeiture. This decision, which was based upon the dicta in *Calero-Toledo*, predates the Supreme Court's decision in *Bennis*. It is likely that the Ninth Circuit will hold that this precedent is overruled by the *Bennis* decision. *See United States v. $83,132.00 in U.S. Currency*, No. 95-CV-2844, 1996 WL 599725 (E.D.N.Y. Oct. 11, 1996) (unpublished) (innocent owner defense based upon *Calero-Toledo* unavailable based upon *Bennis*).

the power to pass title on to his heirs, donees, or anyone else from the time the illegal act subjecting his property to forfeiture was committed.[354]

The Supreme Court, however, in *United States v. A Parcel of Land Known as 92 Buena Vista Ave.*, 507 U.S. 111 (1993), *aff'g* 937 F.2d 98 (3d Cir. 1991), rejected this interpretation of the relation back doctrine. A six-Justice majority (consisting of a plurality and concurring opinions) held that the vesting of title in the Government under the relation back doctrine was not self-executing, and that such vesting did not occur until the entry of the judgment of forfeiture.[355] Based on this holding, the majority rejected the Government's argument that the innocent owner defense could only be raised by parties who acquired their ownership interest *prior* to the commission of the act giving rise to the forfeiture.[356] It held instead that the innocent owner defense could be asserted by any party with an ownership interest in the property regardless of whether the interest was acquired before or after the commission of the act giving rise to the forfeiture or regardless of whether the party stood as a bona fide purchaser for value of the ownership interest.

In *92 Buena Vista*, the plurality also rejected the argument of the dissent that since the wrongdoer's title was "defective" from the time of the commission of the illegal act under the relation back doctrine, such title was "voidable." Under the common law of "voidable title" as applied in the area of trusts and secured transactions, one who acquired property from a holder of voidable title (other than a good faith purchaser for value) obtained nothing beyond

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[354] *See, e.g., In re One 1985 Nissan, 300 ZX*, 889 F.2d 1317 (4th Cir. 1989) (*en banc*) (heirs of deceased drug dealer cannot inherit title to his forfeitable property).

[355] Both the four-Justice plurality opinion and the two-Justice concurring opinion agreed on this point. The two opinions disagreed on the relationship between 21 U.S.C. § 881(a)(6), which created the applicable innocent owner defense to the forfeiture action in question, and 21 U.S.C. § 881(h), which codified the relation back doctrine for section 881 forfeitures. The plurality held that section 881(h) did not even come into play until such time as property became forfeitable under section 881(a)(6). Since the innocent owner defense effectively made the property non-forfeitable under section 881(a)(6), the possible application of section 881(h) really did not have to be determined. The concurring opinion disagreed with this analysis, but went on to say that the relation back doctrine was best seen as a "retroactive vesting of title" that takes effect only upon the entry of the judicial order of forfeiture. *United States v. A Parcel of Land Known as 92 Buena Vista Ave.*, 507 U.S. 111 (1993).

The concurring opinion also said that the plurality wrongly assumed that the relevant time for determining lack of knowledge on the part of the alleged innocent owner was the time of the illegal act—as opposed to the time the property interest was acquired. The concurring opinion said this issue was not before the Court at this time. *United States v. A Parcel of Land Known as 92 Buena Vista Ave.*, 507 U.S. 111 (1993).

[356] Despite this argument, it seems appropriate that an innocent owner claim would be honored, regardless of whether the interest was acquired before or after the illegal act, if the claimant would qualify as a bona fide purchaser for value in a criminal forfeiture case. This logic applies to secured creditors as well as other bona fide purchasers for value.

what the transferor held.[357] Consequently, the dissent argued, the claim of the donee in this case should not prevail, even if the innocent owner defense could be raised by one acquiring his interest in forfeited property after the commission of the illegal act. The donee's rights should be no greater than that of the original owner, the wrongdoer, according to the dissent. The plurality replied that because the relation back doctrine was not self-executing, it did not create in the Government at the time of the violation the necessary secured or beneficial interest in the forfeitable property that would have to exist for the common law rule of voidable title to apply in its favor.[358]

As a result of the Supreme Court's holding in *92 Buena Vista*, it is now clear that the relation back doctrine will not limit the potential applicability of the innocent owner defense, at least as to any party who is considered to be an "owner" of the property subject to forfeiture. It can be presumed, however, that the doctrine can still be used to defeat the claims of parties who had not acquired any specific ownership or secured interest in the property subject to forfeiture prior to the time of the seizure, but merely had a potential claim against the property as an asset of the wrongdoer, like an ordinary judgment or general creditor would have (or a contingent claim against the property, as an heir would have prior to the death of the wrongdoer). It is important to note that, unlike a claimant asserting a bona fide purchaser defense in a criminal forfeiture proceeding, an innocent owner claimant in a civil forfeiture case need not be a bona fide purchaser for value.

d. Unreasonable Delay Defense

An unreasonable delay between the time of seizure of the subject property and the institution of forfeiture proceedings may serve as a valid defense to a proposed forfeiture on the ground that the delay has deprived the claimant of his due process right to a hearing "at a meaningful time."[359]

e. Common Carrier Defense

As discussed earlier in this manual,[360] conveyances that are used to transport controlled substances or to facilitate illegal drug transactions are forfeitable under 21 U.S.C.

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[357] *United States v. A Parcel of Land Known as 92 Buena Vista Ave.*, 507 U.S. 111 (1993).

[358] *Id.*

[359] *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 564 (1983). A fuller discussion of this issue appears in part I.C.2 of this chapter, *supra*.

[360] *See* discussion of the forfeiture of conveyances in chapter 1, part IV.E, *supra*.

§ 881(a)(4). However, conveyances used in the transaction of business as common carriers cannot be forfeited unless the owner or other person in charge consented or was privy to the underlying violation of the drug laws.[361]

When the common carrier defense is at issue, the Government is required, as it typically is in forfeiture actions, to make an initial showing of probable cause for forfeiture: that is, reasonable cause to believe that the subject conveyance was involved in illegal activity.[362] The burden then shifts to the claimant to prove the common carrier status of the conveyance by a preponderance of the evidence.[363] If such status is established,[364] it is up to the Government to show that the owner or person in charge was a consenting party or privy to the violation that gave rise to the forfeiture action.[365]

f. Stolen Conveyance Defense

Section 881(a)(4) of Title 21 also contains an exception for stolen conveyances.[366] Specifically, it exempts conveyances from forfeiture if the owner can establish that the

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[361] 21 U.S.C. § 881(a)(4)(A). *See* 8 U.S.C. § 1324(b)(1)(A) (common carrier exception to forfeiture of conveyances used to transport undocumented aliens). The distinction drawn by the forfeiture statute between common carriers and other conveyances has been upheld against constitutional challenge. As stated in *United States v. One 1957 Oldsmobile Automobile*, 256 F.2d 931, 933 (5th Cir. 1958):

> The opportunity of the owner of a common carrier to detect or prevent carriage by one of its passengers (who must be carried without discrimination) of a small quantity of narcotics is obviously slight as compared with the opportunity of the owner of an automobile who reserves full right of inviting to ride whom he wishes.

[362] 19 U.S.C. § 1615; *United States v. One (1) Liberian Refrigerator Vessel*, 447 F. Supp. 1053, 1066 (M.D. Fla. 1977), *aff'd*, 617 F.2d 136 (5th Cir. 1980). *But see Transportes Aeros Mercantiles Panamericanos, S.A. v. Boyatt*, 562 F. Supp. 707, 711 (S.D. Fla. 1983) (holding that the Government may not seize a common carrier for forfeiture without both probable cause to believe that it was used illegally *and* probable cause to believe that the owner or operator knew of the illegal use).

[363] *United States v. One (1) Liberian Refrigerator Vessel*, 447 F. Supp. 1053, 1064 (M.D. Fla. 1977). The conveyance's status as a common carrier may be proven by the nature of the trade in which it is engaged, the reputation of the owners or operators in the trade, and evidence that they have held themselves out to transport goods or people generally and indifferently. *Id.* at 1063. *See also* 21 U.S.C. § 885(a)(1).

[364] If common carrier status is not established, the claimants could assert the *Calero-Toledo* defense of "exceptional innocence." *See* discussion in part V.C.4.c, of this chapter, *supra*.

[365] To meet this burden, the Government is not required to show that the owner or operator participated intimately in the underlying criminal activity; proof of knowledge of the activity and acquiescence in its continued operation is sufficient. *United States v. One (1) Liberian Refrigerator Vessel*, 447 F. Supp. 1053, 1066 (M.D. Fla. 1977).

[366] 21 U.S.C. § 881(a)(4)(B).

underlying proscribed use was committed by another person while the conveyance was illegally in the possession of someone other than the owner.[367] The burden of proving the stolen conveyance defense is on the owner/claimant,[368] who must establish that the possession by another person was criminally illegal, not merely unauthorized or beyond the scope of a previous agreement.[369]

g. Excessive Fines Claims (Eighth Amendment Violations)

A claimant may argue that the civil forfeiture of his property constitutes an excessive fine.[370]

5. Non-defenses to Forfeiture

a. Innocence of Owner

As stated above, the innocence of the property's owner is not considered to be a defense to forfeiture,[371] unless Congress has specifically recognized it as such in the pertinent forfeiture statute.[372] In absence of a statutory innocent owner defense, an innocent owner's relief from the harshness of forfeiture must normally be sought through the filing of a petition for remission or mitigation.[373]

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[367] *Id. See also* 8 U.S.C. § 1324(b)(1)(B) (stolen conveyance exception to forfeiture of conveyances used to transport undocumented aliens).

[368] *United States v. Andrade*, 181 F.2d 42, 46 (9th Cir. 1950); 21 U.S.C. § 885(a)(1).

[369] *United States v. "Monkey,"* 725 F.2d 1007, 1011 (5th Cir. 1984).

[370] *See* discussion of excessive fines claims in chapter 12 of this manual.

[371] *See United States v. On Leong Chinese Merchants Assn. Bldg.*, 918 F.2d 1289 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991); *United States v. Andrade*, 181 F.2d 42, 46 (9th Cir. 1950); *DeVito v. United States*, 520 F. Supp. 127, 129 (E.D. Pa. 1981). *See also United States v. One 1980 Chevrolet Corvette*, 564 F. Supp. 347, 349 (D.N.J. 1983).

[372] *E.g.*, 21 U.S.C. § 881(a)(4)(C), (a)(6), (a)(7). *See also Bennis v. Michigan*, ___ U.S. ___, 116 S. Ct. 994 (1996).

[373] *See* discussion of petitions for remission or mitigation in chapter 9 of this manual.

b. Acquittal on Underlying Criminal Charges

The acquittal of the claimant or the dismissal of criminal charges premised on the same events as the civil forfeiture proceeding does not serve as a defense to the civil forfeiture.[374] The holding that neither collateral estoppel nor double jeopardy bars a civil forfeiture case following acquittal on related criminal charges is premised on two theories. First, civil forfeiture is remedial in that it is brought against the tainted property rather than the acquitted criminal defendant.[375] Second, the respective burdens of proof differ between criminal and civil forfeiture, with criminal forfeiture bearing the higher burden. Thus, the acquittal of a criminal defendant does not mean that the same evidence presented civilly would be insufficient to support forfeiture.[376]

Pertaining to the latter theory, many of the cases that have considered the collateral estoppel issue have compared the civil preponderance of the evidence burden of proof against the criminal beyond a reasonable doubt standard.[377] However, recent cases considering the burden of proof in criminal drug forfeiture cases hold that a lower preponderance standard

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[374] *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); *United States v. One 1977 Chevrolet Pickup*, 503 F. Supp. 1027, 1030 (D. Colo. 1980); *United States v. One 1961 Cadillac Hardtop Automobile*, 207 F. Supp. 693, 697 (E.D. Tenn. 1962).

[375] *United States v. $2,500 in United States Currency*, 689 F.2d 10, 12-16 (2d Cir. 1982); *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988); *United States v. Ursery*, 518 U.S. 267 (1996).

[376] An acquittal on criminal charges does not prove defendant is innocent; it merely proves the existence of reasonable doubt. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984).

[377] *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972); *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990); *United States v. Fifty Thousand Dollars ($50,000) U.S. Currency*, 757 F.2d 103 (6th Cir. 1985); *United States v. Dunn*, 802 F.2d 646 (2d Cir. 1986); *United States v. United States Currency in the Amount of $228,536.00*, 895 F.2d 908, 916-17 (2d Cir.), *cert. denied*, 495 U.S. 958 (1990) (*in dicta*). Generally, these cases involved civil forfeitures based upon the same evidence presented in earlier criminal cases that resulted in acquittal of the defendant. Only one case actually involved a criminal acquittal of the property against which civil forfeiture subsequently was sought. *United States v. Dunn*, 802 F.2d at 647 (holding *res judicata* and collateral estoppel inapplicable to a civil forfeiture case where the criminal case jury failed to forfeit the same property).

applies in criminal forfeiture cases,[378] in part under the theory that forfeiture is not an element of the criminal offense requiring proof beyond a reasonable doubt, but rather is punishment and as such should be likened to sentencing hearings, which are governed by a preponderance standard.[379] Accordingly, under this theory, the preponderance theory could be extended to any criminal forfeiture statute that does not explicitly set forth a different burden of proof.[380]

Due to this change in interpretation of the burden of proof as to criminal forfeitures, it is unclear whether the prior body of cases holding that a criminal acquittal does not bar a subsequent civil forfeiture will still apply with equal force when the same property is acquitted criminally under a preponderance standard. In any event, an argument can be advanced that a civil forfeiture is not barred by the criminal acquittal of the same property on

[378] 21 U.S.C. § 853(d); *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992) *(en banc)* (holding that the Government's burden of proof is by a preponderance as to drug proceeds under 21 U.S.C. § 853(a)(1), without reaching the question of whether the preponderance standard also applies to forfeitures based upon facilitation or source of influence theories under 21 U.S.C. § 853(a)(2)-(3)); *United States v. Ben Hur*, 20 F.3d 313 (7th Cir. 1994) (Government must establish, by a preponderance of the evidence, that the defendant, as a matter of state law, held an ownership interest in the property at the time the offense was committed). *See also United States v. Tanner*, 61 F.3d 231 (4th Cir. 1995), *cert denied,* 516 U.S. 1119 (1996); *United States v. Herrero,* 893 F.2d 1512, 1541-42 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576-77 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987).

[379] *Libretti v. United States*, 516 U.S. 29 (1995) (criminal forfeiture is part of a criminal sentence); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (criminal forfeiture is part of sentence).

[380] Preponderance standard applies to money laundering forfeitures brought under 18 U.S.C. § 982. *United States v. Myers*, 21 F.3d 826, 829 (8th Cir. 1994). Prior to the Supreme Court decision in *Libretti v. United States*, 516 U.S. 29 (1995), which held that criminal forfeiture is part of the sentence, many courts held that a reasonable doubt standard applies in RICO forfeitures. *See, e.g., United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994); *United States v. Cauble*, 706 F.2d 1322, 1347-8 (5th Cir. 1983). It is doubtful whether the "beyond a reasonable doubt" standard can apply in a RICO forfeiture cases following *Libretti*.

the grounds that the preponderance standard applicable in the criminal case is still higher than the probable cause showing required of the Government in civil forfeiture cases.[381]

In a civil forfeiture case, the Government's showing of probable cause moves the forfeiture proceeding into a second phase where the claimant may put on evidence in support of an affirmative defense. In this phase, the standard of proof is preponderance of the evidence—the same standard that applies to criminal forfeiture proceedings. A civil claimant who was acquitted in the criminal case may argue that at this stage of the civil litigation, the doctrine of collateral estoppel should apply to any issue that was previously litigated in the criminal forfeiture proceeding because both the second phase of the civil forfeiture case and the criminal forfeiture proceeding are governed by the same preponderance standard.

The response to this argument is two-fold. First, the doctrine of collateral estoppel only applies if both the parties and the issues involved in the two cases are identical. In civil and criminal forfeiture cases, this is rarely the situation. In a criminal forfeiture, where the action is *in personam*, the finder of fact may decline to impose forfeiture because it finds that the property in question belongs to someone other than the defendant. The fact finder may acquit the defendant because it finds that someone else committed the crime giving rise to the forfeiture. In either case, the result in the criminal forfeiture should not have any effect on a civil forfeiture *in rem* where the issues are whether: (1) the crime giving rise to the forfeiture was committed by someone (not necessarily the claimant or defendant); and (2) the property was involved in the crime (regardless of who the owner of the property might be).

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[381] The Government's burden of proof in civil forfeiture cases is probable cause, not a preponderance standard. 19 U.S.C. § 1615; *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990); *United States v. United States Currency in the Amount of $228,536.00*, 895 F.2d 908, 916 (2d. Cir 1990). In *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 n.7 (2d Cir. 1986), the Second Circuit found that "probable cause" is equal to "*prima facie* proof" in a civil forfeiture action, whereas a "preponderance" standard of proof means "that the fact to be proved is more likely so than not so," a standard that the Government is not required to meet in civil forfeiture cases. Thus, the Government's preponderance burden in criminal forfeiture is higher and thus distinguishable from its lower probable cause burden in civil forfeiture. This distinction between the Government's criminal forfeiture burden, even at the lower preponderance level, and its civil forfeiture burden, should be sufficient to defeat collateral estoppel and *res judicata* defenses raised when the Government attempts civil forfeiture following a criminal acquittal either of the property or the defendant.

It is the civil claimant who must demonstrate proof by a preponderance of the evidence to defeat civil forfeiture of the property once the Government has demonstrated probable cause. *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990). However, government attorneys should be aware that despite this clear distinction between the Government and claimant's civil burdens of proof, some courts have commented erroneously that the Government's burden of proof in civil forfeiture cases is by a preponderance of the evidence. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 235 (1972); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986).

Second, even if the *standard* of proof with respect to a given issue is the same in both a criminal and civil proceeding, the *allocation of the burden* is different. In a criminal case, the Government has the burden of proof on all issues involving the criminal defendant, including the forfeiture of his property. In the civil case, once the Government demonstrates probable cause, the burden shifts to the claimant. Thus, a finding in favor of the defendant in a criminal case based on the Government's failure to establish probable cause does not necessarily mean that the defendant who later becomes the claimant in a civil case, could have satisfied his or her burden of proof on an affirmative defense.

For these reasons, collateral estoppel will not bar most civil forfeiture actions, even if the finder of fact in a parallel criminal case declines to impose forfeiture.

c. Illegal Seizure of Subject Property

The fact that the subject property was illegally seized is not fatal to forfeiture if the Government's case can be sustained by evidence that is untainted by the illegal seizure or by other unconstitutional conduct.[382]

d. Delay of Seizure

As a general rule, a delay between the time when the underlying illegal activity occurred and the time when the subject property is seized[383] does not undermine the subsequent

[382] *United States v. $7,850.00 in U.S. Currency*, 7 F.3d 1355, 1357 (8th Cir. 1993) (monies may have been illegally seized does not immunize them from forfeiture—the Government must show with untainted evidence that probable cause to forfeit exists); *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency*, 955 F.2d 712, 715 n.5 (D.C. Cir. 1992) ("the fact that the defendant property had been seized after an illegal search does not 'immunize' it from forfeiture, any more than a defendant illegally arrested is immunized from prosecution"); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1303 (5th Cir. 1983); *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 351-52 (9th Cir. 1974) (per curiam). Normally, the only detriment suffered by the Government is loss of evidence suppressed as a consequence of the illegal search. *See United States v. $191,910*, 16 F.3d 1051, 1063 (9th Cir. 1994) (even though an illegal seizure does not immunize the *res* from forfeiture, the *res* is still suppressible as evidence).

[383] As noted earlier, however, an unreasonable delay between the time of seizure and the institution of forfeiture proceedings is a valid defense. *See* discussion of promptness after seizure in part I.C.2 of this chapter, *supra*.

forfeiture, so long as formal forfeiture proceedings are instituted within the five-year statute of limitations period.[384]

e. Quantity or Intended Use of Illegal Drugs

The forfeiture of a conveyance under 21 U.S.C. § 881(a)(4)—because of its use to transport controlled substances or to facilitate drug possession or trafficking—does not depend on the quantity of drugs involved.[385] Likewise, the fact that the contraband that was possessed or transported was intended for personal use, rather than commercial trafficking, does not provide a defense to the Government's forfeiture of the transporting or facilitating conveyance.[386]

D. Government's Rebuttal

As explained earlier, after the Government establishes probable cause, the burden of proof in a civil forfeiture action based on customs procedures shifts to the claimant. If the claimant sustains its burden, the Government must successfully rebut or refute the evidence presented by the claimant by convincing the fact-finder that such evidence no longer "preponderates" in the claimant's favor. This may be accomplished through the introduction of evidence, testimony, and cross-examination as permitted under the Federal Rules of

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[384] 19 U.S.C. § 1621. *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) ("we hold that courts may not dismiss a forfeiture action filed within the five-year statute of limitations for noncompliance with the internal timing requirement of §§ 1602-1605"); *United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982); *O'Reilly v. United States*, 486 F.2d 208, 210 (8th Cir.), *cert. denied*, 414 U.S. 1043 (1973); *Sanders v. United States*, 201 F.2d 158, 159 (5th Cir. 1953). *But see United States v. Pappas*, 613 F.2d 324, 330 (1st Cir. 1980) (requiring that a warrantless seizure under 21 U.S.C. § 881(b)(4) be contemporaneous with the events giving rise to probable cause).

[385] *United States v. One 1980 Red Ferrari*, 875 F.2d 186 (8th Cir. 1989); *United States v. One Gates Learjet Serial No. 28004*, 861 F.2d 868 (5th Cir. 1988); *United States v. One 1986 Mercedes Benz*, 660 F. Supp. 410, 414 (S.D.N.Y. 1987), *aff'd*, 846 F.2d 2 (2d Cir. 1988); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977); *United States v. One 1977 Chevrolet Pickup*, 503 F. Supp. 1027, 1030 (D. Colo. 1980); *United States v. One 1971 Porsche Coupe Automobile*, 364 F. Supp. 745, 749 (E.D. Pa. 1973) (stating that the statute's broad language clearly reveals a congressional intent to authorize forfeiture where any contraband has been physically present in the vehicle).

The same rule also applies to the forfeiture of conveyances used to transport contraband drugs under 49 U.S.C. App. § 782 (now 49 U.S.C. § 80303). *See United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978); *United States v. One 1957 Oldsmobile Automobile*, 256 F.2d 931, 933 (5th Cir. 1958) (ruling that the possession of a small quantity of marijuana by a passenger is sufficient for forfeiture of the vehicle under 49 U.S.C. § 782).

[386] *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 11-12 (1st Cir. 1977); *United States v. One 1973 Dodge Van*, 416 F. Supp. 43, 46-47 (E.D. Mich. 1976).

Evidence, but not through the use of inadmissible hearsay, which is only permitted in the probable cause phase of the proceeding.[387]

VI. Judgment

A. Judgment for the Government

1. Order of Forfeiture

The order of forfeiture should simply state that the subject property is forfeited to the plaintiff United States and is to be disposed of in accordance with law. As a general rule, it should not include recommendations or requirements as to specific disposition, such as sale, official use, or equitable sharing with participating state and local law enforcement agencies.[388] However, in order to facilitate the procurement of title insurance by the U.S. Marshals Service, forfeiture orders involving real property should specifically describe the means by which notice of the proposed forfeiture was provided to owners of record (or the efforts undertaken to provide such notice). Real property forfeiture orders should also make explicit provision for the payment of liens against the property, to the extent of the proceeds of sale, after the deduction of government expenses relating to seizure, maintenance, custody, and disposal.

When a judicial forfeiture action began as an administrative proceeding in which a claim and a cost bond were filed,[389] the judgment should also include those costs that may be deducted from the bond.[390] In cases that did not originate at the administrative level,

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[387] *United States v. Parcel of Real Property Known as 6109 Grubb Road,* 886 F.2d 618, 621-22 (3d Cir. 1989); *United States v. Forfeiture, Stop Six Center Located at 3340 Stallcup, Fort Worth, Texas*, 794 F. Supp. 626 (N.D. Tex. 1992); *United States v. All Right, Title, and Interest in Property and Premises Known as 710 Main St. Peeskill N.Y.*, 744 F. Supp. 510 (S.D.N.Y. 1990).

[388] *See Attorney General's Guidelines On Seized and Forfeited Property* [*Asset Forfeiture Policy Manual* (1996), Chap. 8, at p. 8 — 1].

[389] *See* 19 U.S.C. § 1608. A discussion of the procedure and effect of filing a claim and cost bond in an administrative forfeiture proceeding appears in chapter 3, part II.E, of this manual. *See* Memorandum, entitled "Disposition of Cost Bonds," Directive 92-4, issued by the Office of the Deputy Attorney General on April 7, 1992 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. III, at p. 2 — 13]; and Memorandum entitled, "Disposition of Cost Bonds," Directive 94-3, issued by the Office of the Deputy Attorney General on April 1, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. III, at p. 2 — 13].

[390] 21 C.F.R. § 1316.76(b). *See* 28 U.S.C. §§ 1920, 1921. Any amount remaining after a deduction of allowable costs from the bond should be returned to the claimant.

however, it is unclear whether costs are allowable against an unsuccessful claimant. The wording of the statute pertaining to costs in forfeiture actions seems to authorize its application in any forfeiture action, but the statutory history suggests that costs may be limited to criminal *in personam* proceedings.[391] At least one court, without specifically addressing the issue, has applied the statute in an *in rem* civil forfeiture action.[392]

2. Judgments Involving Real Property

In proceedings in which the forfeited *res* is real property, government attorneys should remember to withdraw the notice of *lis pendens* filed at the inception of the action and to file in its place a copy of the order of forfeiture to the United States.

B. Judgment for the Claimant

Section 2465 of Title 28 provides that the subject property must "forthwith" be returned to a successful claimant in a forfeiture action. Likewise, in applicable cases, the claimant's cost bond should be returned. If the government attorney is considering an appeal of the judgment, he or she should immediately move for a stay pending appeal.[393] Until the enactment of 28 U.S.C. § 1355(c) on October 28, 1992,[394] and the Supreme Court's decision in *Republic National Bank v. United States*, 506 U.S. 80 (1992),[395] the release of the property or its removal from the district court's jurisdiction by physical transfer or disposition of the proceeds of sale, in the absence of such a stay, arguably had the effect of destroying *in rem* jurisdiction and rendering an appeal of the judgment moot. Section 1355(c) was amended specifically to provide that removal of the property by a prevailing party does not deprive a court of jurisdiction to hear an appeal. The amended statute further provides that, upon

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[391] 28 U.S.C. § 1918(a) provides: "Costs shall be included in any judgment, order, or decree rendered *against any person* for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for." (Emphasis added.) But the predecessor to this statute, 28 U.S.C. § 822 (1940), provided in pertinent part: "When judgment is rendered *against the defendant in a prosecution* for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs. ..." (Emphasis added.) The Historical and Revision Notes to the current statute state only that "changes were made in phraseology."

[392] *United States v. One 1949 G.M.C. Truck*, 104 F. Supp. 34, 38-39 (E.D. Va. 1950) (holding that the costs assessable against an unsuccessful claimant include only those enumerated in 28 U.S.C. §§ 1920, 1921 and do not include storage costs incurred by the Government prior to the U.S. Marshals Service's process).

[393] *See* Fed. R. App. P. 8(a).

[394] 28 U.S.C. § 1355(c), *as amended by* the Money Laundering Enforcement Improvements Act of 1991, Pub. L. 102-550, § 1521, 106 Stat. 4062, 102d Cong, 2d Sess. (Oct. 28, 1992).

[395] *See* discussion of this case in part I.D.4 of this chapter, *supra*.

motion of the appealing party, the district court or the court of appeals "shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond."

C. Certificate of Reasonable Cause

Whether the Government wins, loses, or settles the forfeiture action, the government attorney should *always* apply to the court for a certificate of reasonable cause for seizure pursuant to 28 U.S.C. § 2465. Such a certificate serves the dual purpose of preventing a successful claimant from obtaining costs from the Government and immunizing the person who made the seizure and the government attorney from liability to suit or judgment based on the forfeiture proceeding.[396]

[396] *See United States v. One Thousand Six Hundred Thirty Dollars ($1,630.00) in United States Currency,* 922 F.2d 740 (11th Cir. 1991). *But see United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995) (post-judgment order such as issuance of certificate of reasonable cause is appealable). A certificate of reasonable cause is sought in all cases, even those in which the Government wins, because a certificate of reasonable cause is a finding that the Government's actions *at the time of seizure* were based upon reasonable cause. In contrast, a judgment of forfeiture in favor of the Government finds only that *at the time the complaint was filed* the Government was able to establish probable cause.

Criminally Forfeitable
Property

Chapter 5

Criminally Forfeitable Property

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Chapter 5

Criminally Forfeitable Property

Criminal forfeitures are *in personam* actions, part of the sentence imposed upon conviction for certain criminal offenses in which property is wrongly used or acquired. Therefore, criminal forfeiture may only be sought as part of a criminal prosecution, and may not be ordered unless and until the defendant is convicted of the crime(s) for which forfeiture is to be imposed.[1]

This chapter is a general discussion of the types of property that can be criminally forfeited to the United States under the major forfeiture statutes. It is not intended to be exhaustive, but simply to highlight issues that are commonly raised in this area. Some issues that are common to the Racketeer Influenced and Corrupt Organizations (RICO), drug, money laundering, and other forfeiture statutes are discussed most thoroughly in part V of this chapter. Therefore, we recommend that government attorneys review part V in its entirety and *not only* the section relating to a particular forfeiture provision.

I. Requirement of Statutory Authority

Property is forfeitable to the United States only if forfeiture is specifically authorized by a federal statute. Government attorneys should, therefore, carefully review the criminal forfeiture provisions of the various statutes before attempting to forfeit property through a criminal prosecution.

The most commonly pursued criminal forfeitures currently authorized by federal law were enacted by Congress to enhance the effectiveness of law enforcement efforts under the

[1] *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (because section 1957 conviction was reversed on appeal, section 982 forfeiture had to be vacated).

RICO statute,[2] the Comprehensive Drug Abuse Prevention and Control Act of 1970,[3] and the Money Laundering Control Act of 1986.[4] The provisions of these statutes as they pertain to forfeiture procedures are almost identical. This chapter focuses on the criminal forfeiture provisions of those laws. It is hoped that the following discussion will also be helpful to government attorneys in proceedings brought under other criminal forfeiture statutes.[5]

II. Relation Back Doctrine and Third-party Transfers

When evaluating potential forfeitability, government attorneys should consider the effect of the relation back doctrine, under which all right, title, and interest in the subject property are deemed to vest in the United States at the time of the commission of the act giving rise to forfeiture.[6] Any question about the applicability of this doctrine to criminal forfeitures[7] was erased by the enactment of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 12, 1984), which specifically codified the principle of relation back and incorporated it into the criminal forfeiture provisions of RICO and the federal drug laws.[8] As Congress explained, "absent application of the principle, a defendant could attempt to avoid

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[2] 18 U.S.C. §§ 1961-1968.

[3] 21 U.S.C. §§ 801-971.

[4] The forfeiture provisions are in 18 U.S.C. §§ 981 and 982, since extended to cover FIRREA and other offenses. Substantive provisions are now found in 18 U.S.C. §§ 1956, 1957, 1960, and 31 U.S.C. § 5324.

[5] For instance, Department of Justice agencies enforce statutes that contain criminal forfeiture provisions involving copyright violations (17 U.S.C. § 506(b) and 18 U.S.C. § 2318(d)), and espionage (18 U.S.C. §§ 793(h), 794(d)). *See also* 18 U.S.C. § 3666 (bribe money) and 18 U.S.C. § 3611 (as interpreted in *United States v. Seifuddin*, 820 F.2d 1074 (9th Cir. 1987)) (firearms and ammunition) as well as 18 U.S.C. §§ 1467 (obscenity), 2253 (child exploitation), and 7 U.S.C. § 2024 (food stamp fraud), which are discussed in parts XII and XIII of this chapter, *infra*.

[6] *See United States v. Stowell*, 133 U.S. 1, 16-17 (1890).

[7] *Compare United States v. McManigal*, 708 F.2d 276, 289-90 (7th Cir. 1983), *vacated and remanded*, 464 U.S. 979, *reaff'd in pertinent part*, 723 F.2d 580 (7th Cir. 1983) *with United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1011 (1986) *and United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

[8] 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c) (which is incorporated by reference into 18 U.S.C. § 982(b)(1), making the principle applicable to the general criminal forfeiture statute as well).

criminal forfeiture by transferring his property to another person prior to conviction."[9] The relation back doctrine vitiates transfers of forfeitable property even when used to pay legitimate attorneys fees.[10]

It should be noted, however, that subsequent transfers of criminally forfeitable property are not necessarily vitiated by the relation back doctrine. A third-party transferee may maintain his interest in the subject property if he can establish, at an ancillary hearing,[11] that "he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture. ..."[12]

III. Effect of State Law

Both 18 U.S.C. § 1963(a) and 21 U.S.C. § 853(a) require forfeiture of the property falling within their coverage "irrespective of any provision of [s]tate law." This language makes it clear that defendants cannot prevent federal forfeiture of their assets simply by asserting the idiosyncrasies and protections offered by state corporate, business, or domestic relations laws. On the other hand, while federal law controls the meaning of terms within the federal forfeiture statutes,[13] state law is to be consulted to determine which parties have

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[9] S. Rep. No. 225, 98th Cong., 1st Sess. 200 (1983). The Senate Report explains that application of the relation back doctrine must be tempered by a recognition of the rights of innocent third parties. Thus, the provisions "may not result in the forfeiture of property acquired by an innocent *bona fide* purchaser," who is entitled to relief through the ancillary hearing process set forth in 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(n). *Id.* at 200-01.

[10] Any prosecutor contemplating forfeiture of attorneys' fees must obtain approval from the Assistant Attorney General, Criminal Division, through the Asset Forfeiture and Money Laundering Section, before instituting forfeiture proceedings. *See United States Attorneys' Manual* § 9-111.000 *et seq.* and the *Asset Forfeiture Policy Manual* (1996), Chap. 9, Sec. I.D, at p. 9 — 2.

[11] The ancillary hearing process and procedure are established in 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(n). *See* discussion of standing to file petitions in an ancillary hearing in chapter 6, part VIII.D, of this manual.

[12] 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c). *See* S. Rep. No. 225, 98th Cong., 1st Sess. 200 at 200-01 (1983). *See also* 18 U.S.C. § 982(b)(1).

[13] *See, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of Foreign Branches)*, 48 F.3d 551 (D.C. Cir. 1995).

recognizable property interests that are forfeitable.[14] Similarly, state law should be consulted in determining whether or not a party has standing to file a petition in an ancillary hearing.[15] On the other hand, state law homestead exemptions are inapplicable.[16]

Section 982 of Title 18 lacks similar language concerning the limits of state law; however, it is unclear what the effect of this omission means. There is no indication of any particular congressional intent on this issue.

IV. General Types of Forfeitable Property

Section 1963(b) of Title 18 and Section 853(b) of Title 21 set forth the comprehensive scope of the term "property" as used in those criminal forfeiture statutes. According to these subsections, the term encompasses all types of real property (including items that are growing on, affixed to, and found on land) and all types of tangible and intangible personal property (including rights, privileges, interests, claims, and securities).

Section 982(a)(1) of Title 18 does not use similar language but speaks generally of the forfeitability of all real and personal property involved in, or traceable to, the offenses listed in the subsection. Other provisions of 18 U.S.C. § 982 use the undefined terms "proceeds,"

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[14] *United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (under California law, defendant who was carrying claimants' property to Mexico was a bailee and not the owner of the property); *United States v. Ben-Hur*, 20 F.3d 313, 317 (7th Cir. 1994) (state law applies to determination of what interest in property defendant holds); *see, e.g., United States v. One Lear Jet, Model 35A, Serial Number 277*, 38 F.3d 398, 402 (9th Cir. 1994) (in civil forfeiture case, state law governs determination of lienable interest in jet); *United States v. Smith*, 966 F.2d 1045, 1054 (6th Cir. 1992) (state law governs interests of tenants by the entirety); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (to determine the extent of a defendant's interest in forfeited property, federal courts turn to state law).

[15] *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (court looks to state law to see what interest the claimant has in the property and to the federal statute to see if that interest is subject to forfeiture); *United States v. Henry*, 850 F. Supp. 681 (M.D. Tenn. 1994), *aff'd mem.*, 64 F.3d 664 (6th Cir. 1995) (per curiam) (Table) (defendant's spouse had standing to contest forfeiture of marital residence in which she had a legal interest under state law), *cert. denied sub nom. Jo-Ann Henry v. United States*, ___ U.S.___, 116 S. Ct. 1020 (1996). *See United States v. One 1987 Cadillac Deville*, 774 F. Supp. 221, 223 (D. Del. 1991) (holding that a claimant in a civil forfeiture proceeding must establish that he is an owner or lienholder within the meaning of state law in order for him to have standing). The same principle logically extends to ancillary hearings in criminal forfeiture cases. *See also United States v. Certain Real Property Located at 2525 LeRoy Lane*, 910 F.2d 343 (6th Cir. 1990) (proper for court to refer to state law in determining nature of property in terms claimed by third party in forfeiture proceeding), *cert. denied*, 499 U.S. 947 (1991).

[16] *United States v. Curtis*, 965 F.2d 610 (8th Cir. 1992); *United States v. One Parcel of Property Located at 1606 Butterfield Rd.*, 786 F. Supp. 1497 (N.D. Iowa 1991); *United States v. Martenson*, 780 F. Supp. 492 (N.D. Ill. 1991); *United States v. One Single Family Residence Located at 212 Airport Rd. South*, 771 F. Supp. 1214 (S.D. Fla. 1991) (federal forfeiture law preempts state homestead laws).

"gross receipts," "gross proceeds," and "gross profits."[17] In any criminal forfeiture, the Government may only forfeit property in which the defendant has an interest.[18]

It is important to distinguish the concepts: traceable property, money judgments, and substitute assets. Most forfeiture statutes authorize forfeiture of property that is involved in or that is proceeds or profits from the underlying offense as well as property traceable thereto.[19] To forfeit traceable property, however, the Government must directly trace that property to other property that was involved in the offense giving rise to the forfeiture.[20]

Once the Government has proved in a criminal forfeiture trial that a certain amount of property is forfeitable as proceeds illegally garnered by the defendant, it is entitled to a money judgment for that amount, *without tracing those proceeds* to specific assets owned by the defendant at the time of the verdict.[21] As stated by the Eleventh Circuit:

> Since the forfeiture is *in personam*, it follows the defendant as a part of the penalty and thus it does not require that the [G]overnment trace it, even though the forfeiture is not due until after conviction. Money is a fungible item. It matters not that the [G]overnment received the identical money which the defendants received, as long as the *amount* that was received in violation of the racketeering statute is known.[22]

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[17] 18 U.S.C. § 982(a)(2)-(6). Section 982(a)(2) incorporates the definition of "property" found in 21 U.S.C. § 853(b). The Department of Justice continues to recommend that Congress make uniform the terms describing forfeitable property.

[18] *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (noting, in dicta, that defendant could have challenged forfeiture on the ground that property was held by a corporation, not by the defendant, and that unless corporate form could be ignored, defendant's only forfeitable interest was his stock in the corporation); *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (if corporation used by defendant to commit offense is not a defendant, only defendant's interest in the corporation may be forfeited, not the corporation itself or its assets); *United States v. Jimerson*, 5 F.3d 1453 (11th Cir. 1993) (the Government may not use the ancillary proceeding to forfeit the interests of third parties); *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995) (if the Government forfeits third party's property in criminal case without conducting factual inquiry into ownership of the property, and court orders forfeiture of property without ascertaining factual basis for defendant's guilty plea, Government may be liable to third party for EAJA fees in the ancillary proceeding). For further discussion of ancillary hearings, *see* chapter 6.

[19] *E.g.*, 18 U.S.C. §§ 793(h)(1), 982(a)(1)-(6), 1467(a)(2), 1963(a)(3), 2253(a)(2); and 21 U.S.C. § 853(a)(1).

[20] *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996).

[21] *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995); *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1011 (1986); *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

[22] *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985). *Accord United States v. Navarro-Ordas*, 770 F.2d 959, 970 (11th Cir. 1985).

The fact that a defendant has dissipated or transferred his profits or proceeds before conviction will not prevent the Government from reaching and forfeiting the full amount of his ill-gotten gains, because presumably it can collect this money judgment against any of the assets the defendant still owns.[23]

A similar remedy to the dissipation or transfer of otherwise forfeitable assets is provided by the statutory provisions allowing forfeiture of substitute assets.[24] But there is a crucial difference between the concepts of money judgments and substitute assets. While a money judgment allows the Government to proceed, in a collection action, against any property the defendant owns, it does not give the Government the right to *seize* any property. Where specific property is forfeited as substitute assets; however, the Government may seize the property as if it were traceable to the offense.[25]

Bear in mind that the Government may seize substitute assets of a defendant only. Therefore, while title to criminally forfeitable assets transfers to the Government at the time the crime is committed pursuant to the relation back doctrine—even if such assets are transferred to a third party—the Government may not seize substitute assets from a third party if the third party dissipates those assets prior to the issuance of the forfeiture order.[26]

V. 18 U.S.C. § 1963 Property (RICO)

A. Predicate Violation and Conviction

The forfeiture of property under 18 U.S.C. § 1963 is dependent upon the conviction of the defendant for a violation of the substantive RICO statute, 18 U.S.C. § 1962, which

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[23] Under civil forfeiture statutes, such a money judgment against the wrongdoer cannot be obtained because a civil action is brought against the particular property involved in or derived from the underlying criminal activity. *See, e.g.*, 21 U.S.C. § 881(a)(6) (authorizing the civil forfeiture of proceeds traceable to an illegal drug exchange).

[24] *See, e.g.*, 18 U.S.C. § 1963(m) and 21 U.S.C. § 853(p).

[25] *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (affirming concept of personal money judgment in money laundering prosecution but declining to allow the Government to seize specific items of property except under section 853(p)).

[26] *In re Moffit, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996) (fungibility theory did not apply to third parties under 21 U.S.C. § 853; the Government can only reach proceeds or property traceable to third parties at the time that the forfeiture order is issued; common law conversion action may be used to recover from third parties), *cert. denied*, ___ U.S. ___, 117 S. Ct. 788 (1997).

includes conspiracies to violate RICO.[27] The following discussion highlights the most significant aspects of RICO forfeiture law and policies.

The offenses described in the RICO statute are all predicated on the commission of two or more specified predicate offenses constituting a pattern of racketeering activity[28] or on the collection of an unlawful debt (the term "unlawful debt" is defined in 18 U.S.C. § 1961(6)). Subsection (a) of 18 U.S.C. § 1962 prohibits the use of funds derived from a pattern of racketeering activity to acquire or maintain an interest in an enterprise engaged in, or the activities of which affect, interstate commerce. Subsection (b) prohibits the acquisition or maintenance of an interest in an enterprise through a pattern of racketeering activity. Subsection (c) forbids the use of an enterprise to pursue a pattern of racketeering activity. Subsection (d) expressly makes it a crime to conspire to violate the provisions of any of the prior subsections.

Once a person has been convicted of any of these RICO offenses, the person is subject to imprisonment, a fine,[29] and mandatory forfeiture to the United States of the property specified in paragraphs (1), (2), and (3) of 18 U.S.C. § 1963(a).

B. Section 1963(a)(1) Property (Illegally Acquired Interest)

Section 1963(a)(1) of Title 18 authorizes the forfeiture of "any interest" acquired or maintained in violation of the substantive RICO statute. The "interest" forfeitable under this provision includes an interest in any enterprise, legitimate or illegitimate, as well as interests in property other than that constituting the RICO enterprise itself. According to the Supreme

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[27] For a detailed discussion of the RICO statute, *see Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors* [3d rev. ed., September 1990]: 103-126. This publication is available from the Organized Crime and Racketeering Section. (The 4th revised edition is expected to be published soon.)

[28] Predicate offenses are listed in 18 U.S.C. § 1961(1). 18 U.S.C. § 1961(5) sets forth statutory requirements for the existence of a "pattern of racketeering activity." *But see H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). The Supreme Court held that in order for there to be a "pattern of racketeering activity" it had to be established that there had either been a "continuity of racketeering activity, or its threat." *Id.* at 241. "Continuity" could be demonstrated either by the existence of a closed period of repeated criminal conduct, or by past criminal conduct which, by its nature, projected into the future with a threat of repetition. *Id.* The Court rejected lower court opinions that required proof of the existence of multiple or separate criminal schemes, but it also held in effect that the mere commission of unrelated RICO predicate offenses was by itself insufficient to establish a RICO violation.

[29] 18 U.S.C. § 1963(a) authorizes the imposition of a fine. It goes on to provide that, in lieu of such a fine, "a defendant who derives profits or other proceeds from such an offense may be fined not more than twice the gross profits or other proceeds." The Criminal Fine Enforcement Act, 18 U.S.C. § 3571 *et seq.*, sets fines for individuals at $250,000 for felonies and $500,000 for organizations, with alternative fines of up to double the amount of pecuniary gains or losses.

Court, the term encompasses any form of real or personal property, including profits or proceeds, that is obtained through or derived from the commission of a RICO offense.[30]

Case law supports the interpretation that 18 U.S.C. § 1963(a) authorizes the forfeiture of all proceeds obtained, directly or indirectly, by the RICO defendant from racketeering activity without the deduction of operating costs from the amount subject to forfeiture.[31] Forfeitable proceeds also include all proceeds obtained by co-conspirators in furtherance of the racketeering conspiracy to the extent these amounts are reasonably foreseeable by the defendant.[32]

It has also been held that in cases involving racketeering proceeds, joint and several liability may be imposed in a forfeiture order upon RICO defendants.[33] In so holding, the Eleventh Circuit reasoned that "if the [G]overnment can prove the amount of the proceeds and identify a definite group of people receiving the proceeds, it defeats the purpose of the provision to hold that the proceeds cannot be forfeited because the [G]overnment cannot prove exactly which defendant received how much of the pot."[34] The First Circuit has refined this analysis imposing on RICO co-conspirators forfeiture up to the amounts of proceeds obtained by their codefendants provided such amount is reasonably foreseeable to the co-conspirator.[35]

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[30] *Russello v. United States*, 464 U.S. 16, 21-22 (1983).

[31] *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995), upholding *United States v. Saccoccia*, 823 F. Supp. 994 (D.R.I. 1993) (proceeds include all money laundered by RICO defendants without subtraction for costs even though defendants only held the money for a short period and only retained 5 to 15 percent in profit); *see United States v. Lizza Industries, Inc.*, 775 F.2d 492 (2d Cir. 1985) (district court properly refused to deduct overhead expenses or taxes, but properly allowed deduction of direct costs of performing contracts), *cert. denied*, 475 U.S. 1082 (1986). *See also United States v. Ofchinick*, 883 F.2d 1172, 1182 (3d Cir. 1989) (district court placed the burden on the defendant to establish the existence of direct costs); *but see United States v. Masters*, 924 F.2d 1362 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991); *United States v. Elliott*, 727 F. Supp. 1126, 1128-30 (N.D. Ill. 1989) (which authorize the forfeiture of net proceeds only). *See also* note 51, *infra*, and accompanying text.

[32] *United States v. Hurley*, 63 F.3d at 14-17; *but see United States v. Masters*, 924 F.2d at 1370.

[33] *United States v. Hurley*, 63 F.3d at 14-17; *United States v. DeFries*, 909 F. Supp. 13 (D.D.C. 1995); *United States v. Caporale*, 806 F.2d 1487, 1506 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987). *Accord United States v. Masters*, 924 F.2d at 1370.

[34] *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986), *cert denied*, 483 U.S. 1021 (1987).

[35] *United States v. Hurley*, 63 F.3d at 14-17.

C. Section 1963(a)(2) Property (Interest in Enterprise)

Section 1963(a)(2) of Title 18 authorizes the forfeiture of any interest in, security of, or claim against a RICO enterprise and any property or contractual right affording a source of influence over a RICO enterprise.

1. Enterprise

The "enterprise" to which reference is made in this provision and in the substantive RICO statute is statutorily defined to include "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[36] The Supreme Court has held that this definition encompasses both legitimate enterprises and criminal organizations or associations.[37]

2. Forfeitable "Interest"

a. In a Legal Enterprise

In contrast to subsections (a)(1) and (a)(3) of 18 U.S.C. § 1963, subsection (a)(2) is directed at the forfeiture of the defendant's sources of power beyond money and capital. It is designed to destroy the economic base through which the convicted racketeer will continue to constitute a threat to legitimate business, as well as to separate him from the RICO enterprise itself.[38] Thus, a subsection (a)(2) forfeiture does not focus on the profits and proceeds that result from the illegal activity, but rather on the defendant's interests in and relating to the enterprise.

Under subsection (a)(2)(A), *all* of a RICO defendant's interests *in* an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether

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[36] 18 U.S.C. § 1961(4).

[37] *United States v. Turkette*, 452 U.S. 576, 587-91 (1981) (holding that even though the primary purpose of RICO is to address the infiltration of legitimate businesses by organized crime: this fact does not require the negative inference that it does not also reach the activities of enterprises organized and existing for criminal purposes).

[38] *See United States v. Rubin*, 559 F.2d 975, 991-92 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U.S. 810 (1978); *United States v. BCCI Holdings (Luxembourg) S.A.*, 795 F. Supp. 477 (D.D.C. 1992).

some portion of the enterprise is untainted by the racketeering activity.[39] One district court has interpreted subsection (a)(2)(A) broadly to permit the forfeiture of all of the assets of a defendant financial institution, including the assets of a separate corporation that was the *alter ego* of the defendant, where the defendant was part of the enterprise and such forfeiture was necessary to separate the defendant from the enterprise.[40]

It is generally agreed that the interest forfeitable under 18 U.S.C. § 1963(a)(2)(A) includes any and every interest held by the defendant in the enterprise and that it does not have to be "guilty" property.[41] Forfeiture under this paragraph "deprives the defendant of all assets that allow him to maintain an interest in a RICO enterprise, regardless of whether those assets are themselves 'tainted' by use in connection with the racketeering activity."[42]

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[39] *See United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993) (interest forfeitable in entirety unless limited by Eighth Amendment prohibition of cruel and unusual punishment); *United States v. Angiulo*, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990); *United States v. Porcelli*, 865 F.2d 1352, 1364-65 (2d Cir.) (RICO enterprise, in violation of section 1962(c), is forfeitable in its entirety, unless limited by the Eighth Amendment where the enterprise's business is substantially legitimate), *cert. denied*, 493 U.S. 810 (1989); *United States v. Busher*, 817 F.2d 1409, 1415-16 (9th Cir. 1987) (all interests forfeitable, unless forfeiture "grossly disproportionate to the offense committed" in violation of the Eighth Amendment); *United States v. Anderson*, 782 F.2d 908, 918 (11th Cir. 1986); *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983) (all of defendant's interest in Cauble Enterprises, the RICO enterprise, subject to forfeiture), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Hess*, 691 F.2d 188, 190-91 (4th Cir. 1982) (same); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979) (where enterprise is association-in-fact, forfeiture issues are which corporations were in fact part of the enterprise, and what was defendant's interest—now forfeitable—in those corporations), *cert. denied*, 445 U.S. 927 (1980). *See also United States v. Feldman*, 853 F.2d 648, 662 (9th Cir. 1988) (where forfeiture of defendant's interest in enterprise sought, issues of guilt and forfeiture likely to converge, as forfeiture of entire interest follows automatically on finding that enterprise conducted through pattern of racketeering), *cert. denied*, 489 U.S. 1030 (1989).

[40] *United States v. BCCI Holdings (Luxembourg) S.A.*, 795 F. Supp. 477 (D.D.C. 1992).

[41] Civil forfeitures, on the other hand, can only be brought against "guilty" property that is tainted by the underlying criminal conduct.

[42] *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983) (forfeiture of defendant's entire partnership interest), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Hess*, 691 F.2d 188, 190-91 (4th Cir. 1982) (same) (forfeiture of all ownership rights in association). *See United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983) (noting that defendant's full interest in RICO enterprise is forfeitable and that therefore any mistake by the jury in forfeiting only part of his ownership rights in engineering firm inured to his benefit). *Cf. United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (holding that where the RICO defendant "makes a *prima facie* showing that the forfeiture may be excessive, the district court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment"); *United States v. Huber*, 603 F.2d at 397 (indicating that defendant's entire interest is forfeitable under the statute, but that the district court may have the discretion to avoid potentially "cruel and unusual" forfeitures that would disproportionately reach untainted property). *See also United States v. Pryba*, 900 F.2d 748, 756-57 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990); *United States v. Angiulo*, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990); *United States v. Porcelli*, 865 F.2d 1352, 1362 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989); *United States v. Horak*, 833 F.2d 1235, 1250-51 (7th Cir. 1987).

b. In an Illegal Enterprise

If the enterprise involved in the RICO prosecution is a criminal association in fact, rather than a traditional legal entity, it may be difficult to identify any "interest" held by the defendant that can be forfeited to the Government. As stated by the Supreme Court, "forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets. ..."[43] Some courts have held, however, that an interest in a criminal enterprise may include property "contributed" to the association by the defendant to further its operations and its success.[44] As stated by the district court in *Thevis*:

> Like an investment in the stock of a corporation or a capital interest in a partnership, a person's informal contribution of property to an association is an interest in that association subject to forfeiture under 18 U.S.C. § 1963(a)(2), since the contributed property has been put at the risk of the association's success.[45]

3. Property Affording a Source of Influence

Property or contractual rights that afford a source of influence over a RICO enterprise are also forfeitable under 18 U.S.C. § 1963(a)(2)(D). Unlike the preceding portions of subsection (a)(2), this provision does not require that the property or rights it encompasses be in the enterprise itself.[46] Whether within or outside the enterprise, however, they must provide a continuing means of influence, rather than simply a one-time or discarded source.[47] Among the varied applications of this statutory provision are the forfeiture of a defendant's

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[43] *Russello v. United States*, 464 U.S. 16, 24 (1983).

[44] *See, e.g., United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *United States v. Thevis*, 474 F. Supp. 134, 144 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

[45] *United States v. Thevis*, 474 F. Supp. 134, 143 (N.D. Ga. 1979).

[46] *Id.* at 144. This interpretation is based on the specific language of the statute, which was clarified further by the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 12, 1984). Forfeiture may be required on an interest held outside the RICO enterprise as a proceed of the enterprise or an interest that gives the defendant a source of influence over the enterprise. Such interests are forfeitable only to the extent they were purchased with tainted proceeds or to the extent they provide a source of influence over the enterprise. The courts have limited such forfeitures using a "but for" test, as well as the "proportionality" test. *See United States v. Ofchinick*, 883 F.2d 1172, 1183 (3d Cir. 1989); *United States v. Porcelli*, 865 F.2d at 1363-65; *United States v. Horak*, 833 F.2d at 1243; *United States v. Angiulo*, 897 F.2d at 1212. *See also United States v. McKeithen*, 822 F.2d 310, 314-15 (2d Cir. 1987) (Continuing Criminal Enterprise forfeiture).

[47] *United States v. Thevis*, 474 F. Supp. at 144 n.16. *See also United States v. McKeithen*, 822 F.2d at 314-15.

elected office in a union[48] and the forfeiture of a house that was used primarily to stash and count money for an illegal RICO enterprise.[49]

D. Section 1963(a)(3) Property (RICO Proceeds)

Section 1963(a)(3) of Title 18 authorizes the forfeiture of property constituting, or derived from, proceeds the defendant obtained through the conduct prohibited by the RICO statute.[50]

Subsection (a)(3) was added to Section 1963 by the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 12, 1984). Between the introduction of that legislation[51] and its eventual enactment, the Supreme Court interpreted the existing RICO forfeiture law as encompassing all illegally obtained profits and proceeds.[52] The subsection, therefore, does not noticeably extend the reach of RICO forfeitures, but it does bolster the position that the Government is required to show only what sums or property the defendant has received through his criminal conduct, not how much he has actually "profited" after deduction of his overhead expenses.[53]

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[48] *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977) (holding that a contractual right under the subsection includes "the right under an organization's charter to serve out a specified term in an elective or appointive management position of substantial influence").

[49] *United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1995).

[50] Besides establishing forfeitability, proof of unlawfully obtained proceeds can be important because, in lieu of an otherwise authorized fine, a defendant convicted of a RICO offense may be fined not more than twice the amount of the proceeds derived from his illegal conduct. The Criminal Fine Enforcement Act, 18 U.S.C. §§ 3571 *et seq.*, sets maximum fines for individuals at $250,000 for felonies and $500,000 for organizations, with alternative fines of up to double the amount of pecuniary gains or losses.

[51] S. 1762, 98th Cong., 1st Sess. (1983) (introduced on Sept. 14, 1983).

[52] *Russello v. United States*, 464 U.S. 16, 21-22 (1983).

[53] According to the Senate report on 18 U.S.C. § 1963(a)(3), "the term 'proceeds' has been used in lieu of 'profits' in order to alleviate the unreasonable burden on the [G]overnment of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." S. Rep. No. 225, *supra* note 10, at 199, 98th Cong., 1st Sess. 200 (1983). The First Circuit has held that "proceeds" forfeitable under section 1963(a)(3) means the entire amount realized from racketeering activity, not just net profits. *United States v. Hurley*, 63 F.3d 1, 14 (1st Cir. 1995). *But see United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir.) ("the proceeds to which the statute refers are net, not gross, revenues—profits, not sales, for only the former are gains"), *cert. denied*, 500 U.S. 919 (1991).

E. Substitute Assets

As part of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, signed by the President on October 27, 1986, Congress empowered the Government to forfeit substitute assets from a RICO defendant when property found to be subject to forfeiture is unavailable at the time of his conviction.[54] Specifically, 18 U.S.C. § 1963(m) requires the court to order the forfeiture of other assets belonging to the defendant (up to the value of those that are unavailable) when, as a result of any act or omission of the defendant, the property described in subsection (a) of the statute cannot be located, is in the hands of a third party, is beyond the court's jurisdiction, has been substantially diminished in value, or has been commingled with other property that cannot be easily divided. This substitute asset provision may be applied retroactively without violating the *ex post facto* clause of the Constitution as it simply provides an alternative method for collecting a forfeiture judgment.[55]

F. Approval of RICO Indictments and Temporary Restraining Orders (T.R.O.s)

All RICO indictments, including the criminal forfeiture allegations, require the approval of the Organized Crime and Racketeering Section in the Criminal Division. The Organized Crime and Racketeering Section must also approve all attempts to obtain any restraining orders pursuant to the RICO statute.[56] The following requirements must be satisfied:

(1) As part of the approval process for RICO prosecutions, the prosecutor must submit any proposed forfeiture T.R.O. for review and approval by the Organized Crime and Racketeering Section. The prosecutor must show that less-intrusive remedies (such as bonds) are not likely to preserve the assets for forfeiture in the event of a conviction.

(2) In seeking approval of a T.R.O., the prosecutor must articulate any anticipated impact that forfeiture and the T.R.O. would have on innocent third parties, balanced against the Government's need to preserve the assets.

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[54] The only pertinent legislative history of the substitute assets provision appears in the Senate report on the Comprehensive Crime Control Act of 1984, which had originally included a virtually identical amendment. According to that report, "where property found to be subject to forfeiture is no longer available at the time of conviction, the court is authorized to order the defendant to forfeit substitute assets of equivalent value." S. Rep. No. 225, 98th Cong., 1st Sess. 200, *supra* note 10, at 201 (1983).

[55] *United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991).

[56] *See* Bluesheet affecting *United States Attorneys' Manual* § 9-110.414, "Temporary Restraining Orders Under 18 U.S.C. § 1963(d)," dated June 30, 1989.

(3) In deciding whether forfeiture (and, hence, a T.R.O.) is appropriate, the Section will consider the nature and severity of the offense. The Government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

(4) When a RICO T.R.O. is being sought, the prosecutor is required, at the earliest appropriate time, to state publicly that the Government's request for a T.R.O., and eventual forfeiture, is made in full recognition of the rights of third parties—that is, in requesting the T.R.O., the Government will not seek to disrupt the normal, legitimate business activities of the defendant, will not seek through use of the relation back doctrine to take from third parties assets legitimately transferred to them, will not seek to vitiate legitimate business transactions occurring between the defendant and third parties, and will, in all other respects, assist the court in ensuring that the rights of third parties are protected, through proceedings under 18 U.S.C. § 1963(1) and otherwise.

VI. 21 U.S.C. § 853 Property (Drug Felonies)

A. Predicate Violation and Conviction

Prior to the enactment of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 12, 1984), signed into law on October 12, 1984, the only criminal forfeitures allowed under federal drug laws were based upon violations of the Continuing Criminal Enterprise statute,[57] which covers the organization or management of groups of five or more persons involved in a continuing series of federal felony drug offenses. The 1984 legislation significantly expanded the scope of the criminal forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act.[58] Through the addition of 21 U.S.C. § 853, Congress has authorized criminal forfeitures for all felony drug offenses, including, but no longer limited to, violations of the Continuing Criminal Enterprise statute.

[57] 21 U.S.C. § 848.

[58] 21 U.S.C. §§ 801-970. The 1984 legislation also added a significant new substantive offense to the federal drug laws by prohibiting the use of drug-generated income to acquire an interest in or establish an enterprise (legal entity or association-in-fact) that affects interstate or foreign commerce. 21 U.S.C. § 854.

B. Section 853(a)(1) Property (Proceeds)

Paragraph (1) of 21 U.S.C. § 853(a) allows the Government to forfeit any real or personal property constituting, or derived from, proceeds obtained by the defendant through the underlying drug violation.[59] Section 853(d) of Title 21 creates a statutory rebuttable presumption that property is subject to forfeiture as drug proceeds if the Government shows by a preponderance of the evidence that: (1) the property was acquired during the period of the felony violation or within a reasonable time thereafter; and (2) there was no likely source for such property other than the felony violation. [60]

The language of the RICO statute on forfeitable proceeds[61] is essentially identical to that in 21 U.S.C. § 853(a)(1)[62] and, therefore, the interpretations and applications of the two provisions should be analogous.[63] The legislative history of both provisions makes it clear

[59] 21 U.S.C. § 853(a)(1). Proof of the extent of a defendant's proceeds can also be important in determining the amount of any fine imposed upon conviction for a drug felony. Section 853(a) of Title 21 allows the court, in lieu of an otherwise authorized fine, to impose a fine of not more than twice the proceeds derived by the defendant from his illegal activities. The Criminal Fine Enforcement Act, 18 U.S.C. §§ 3571 *et seq.*, sets maximum fines for individuals at $250,000 for felonies and $500,000 for organizations, with alternative fines of up to double the amount of the pecuniary gains or losses.

[60] *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir. 1994); *United States v. Elgersma*, 971 F.2d 690, 694 (11th Cir. 1992).

[61] 18 U.S.C. § 1963(a)(3).

[62] "To the greatest extent possible, the provisions of the Title 21 criminal forfeiture statute...parallel those of amended RICO criminal forfeiture provisions. ..." S. Rep. No. 225, 98th Cong., 1st Sess. 200 at 210 (1983).

[63] For instance, using the same reasoning employed under 18 U.S.C. § 1963(a)(1), courts may find that the Government can obtain a money judgment against the defendant for the amount of the cash proceeds he illegally obtained from his drug offense, without having to trace the proceeds to specific property owned by the defendant when convicted. *See United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995); *United States v. Ginsburg*, 773 F.2d 798, 801, 803 (7th Cir. 1985); *United States v. Conner*, 752 F.2d 566, 573, 577 n.2 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985). Likewise, the justification for imposing joint and several liability on RICO co-conspirators would seem to be equally applicable to drug co-conspirators who share the rewards of their trafficking efforts. *See United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995); *United States v. Caporale*, 806 F.2d 1487, 1506 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); *United States v. Benevento*, 663 F. Supp. 1115, 1118-19 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 129 (2d Cir. 1988) (per curiam).

that the term "proceeds" was consciously chosen by Congress in order to obviate any need for the Government to prove the "net profits" realized by the criminal defendant.[64]

C. Section 853(a)(2) Property (Facilitating Property)

Paragraph (2) of section 853(a) authorizes the Government to forfeit any of the defendant's property that was used (or intended for use), in any manner or part,[65] to commit or facilitate the commission of the underlying felony drug offense. Property is considered to be facilitating if it makes the commission of the felony offense easier or makes it freer from hindrance.[66] The property forfeitable under this paragraph includes all the assets civilly forfeitable under 21 U.S.C. § 881(a) (except assets forfeitable under section 881 for misdemeanor offenses and "traceable proceeds," which, as discussed previously, can be forfeited under section 853(a)(1)).[67]

It should be noted, however, that this paragraph is in many respects broader in its coverage than the corresponding civil statute. Section 881(a) is limited to specific types or categories of property, while section 853(a)(2) encompasses *any* property used to commit or facilitate a felony drug law violation.[68] Thus, for instance, some assets of businesses that are used to facilitate drug felonies, other than the real property itself, may not be civilly forfeited, but would fall within the purview of section 853(a)(2).[69]

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[64] S. Rep. No. 225, 98th Cong., 1st Sess. 200 at 210 (1983). *See United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996) holding that gross proceeds of illegal drug sales are forfeitable without deduction for costs as the appropriate measure is the harm not the net profits. *See also United States v. Milicia*, 769 F. Supp. 877, 886-90 (E.D. Pa. 1991), holding that "gross proceeds" of illegal drug sales by pharmacy were forfeitable, and that no deduction could be made for allocable salaries, taxes, or other business expenses. However, the court held that the "cost of goods sold" was not part of "gross proceeds," at least where that portion of the monies received was used to replace inventory, otherwise there would be a double recovery. *See* discussion in notes 29 and 50, *supra*, regarding division of opinion on the deductibility of certain overhead costs in RICO cases.

[65] It has been held that, subject to Eighth Amendment concerns, this language authorizes the forfeiture of property "even when only a portion of it is used for prohibited purposes." *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987).

[66] *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992) (tract of land on which marijuana was grown as well as surrounding tracts which concealed the cultivation from view were forfeitable.)

[67] It should be noted, however, that certain provisions of 21 U.S.C. § 881(a) permit the forfeiture of property for misdemeanor violations of the drug cases, while the criminal forfeiture provisions are limited to felony violations of the drug laws.

[68] S. Rep. No. 225, 98th Cong., 1st Sess. 200 at 211 (1983).

[69] 21 U.S.C. § 881(a)(6) authorizes the forfeiture of a business that constituted the proceeds of a drug violation, but not a business that simply facilitated such a violation. 21 U.S.C. § 881(a)(7) authorizes the forfeiture of facilitating real property only.

D. Section 853(a)(3) Property (Continuing Criminal Enterprise Property)

Unlike paragraphs (1) and (2) of section 853(a), which are triggered by the commission of any federal felony drug offense, paragraph (3) is operative only when the defendant is charged with and convicted of a violation of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848. In general terms, the Continuing Criminal Enterprise statute applies to any person who commits a federal drug felony as part of a continuing series of drug offenses if: (1) the series of offenses was undertaken by the defendant in concert with five or more other people whom he managed or supervised; and (2) he obtained substantial income or resources from the continuing illegal activity.[70]

A defendant who is convicted under the Continuing Criminal Enterprise statute is subject to forfeiture of the property described in paragraphs (1) and (2) of section 853(a) and also to forfeiture of "any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise."

The language in paragraph (3) of section 853(a) is basically the same as that in 18 U.S.C. § 1963(a)(2) and, therefore, judicial interpretations of the scope of the two provisions can be usefully compared and often interchanged.[71] For instance, the cases interpreting the RICO provision as allowing forfeiture of property "contributed" to an illegal association[72] are particularly compelling in relation to section 853(a)(3), which always

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[70] For a discussion of the elements of a Continuing Criminal Enterprise violation, *see Garrett v. United States*, 471 U.S. 773 (1985); *United States v. Church*, 955 F.2d 688, 695 (11th Cir. 1992); *United States v. Kramer*, 955 F.2d 479, 483-85 (7th Cir. 1992); *United States v. Jones*, 801 F.2d 304 (8th Cir. 1986).

[71] It should also be noted, however, that although these provisions of the drug laws and the RICO statute are analogous in interpretation and application, they are not of comparable importance to the forfeiture schemes of which they are a part. The primary purpose of the RICO statute is to eliminate the infiltration of legitimate business by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981). Thus, the divestiture of a criminal defendant's interest in and influence over such legal enterprises is perhaps the most important function of the RICO forfeiture statute. On the other hand, because of the comprehensive range of the first two paragraphs of section 853(a), paragraph (3) does not significantly expand the scope or the purpose of the criminal forfeiture provisions of the federal drug laws. The purpose of these provisions is to deprive defendants of the instrumentalities of their crimes and the money they derive from their illegal activities in order to deter and prevent them and the criminal community generally from continuing their illegal pursuits. Paragraphs (1) and (2) authorize the forfeiture of all of a drug felon's illegally obtained proceeds and all of the property that was used to commit or facilitate his criminal conduct. Property constituting an interest in or affording a source of control over a continuing criminal enterprise is thus generally forfeitable under one of the first two paragraphs, even absent the authorization provided by paragraph (3). The RICO statute is broader than the Continuing Criminal Enterprise statute in that it allows forfeiture of the enterprise itself while a Continuing Criminal Enterprise forfeiture does not.

[72] *See, e.g., United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *United States v. Thevis*, 474 F. Supp. 134, 144 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir. 1980), *cert. denied*, 456 U.S. 1008 (1982).

involves a criminal entity. Absent such an interpretation, the authorization for forfeiture of an interest in a continuing enterprise would be essentially meaningless, because "an association of that kind rarely has identifiable assets. ..."[73] The Second Circuit requires that a proportionality instruction be given to the jury when the Government relies on a source of influence theory of forfeiture.[74]

E. Substitute Assets

With an amendment identical to that made to the RICO forfeiture statute, Congress also added a substitute asset forfeiture provision to 21 U.S.C. § 853 as part of the Anti-Drug Abuse Act of 1986, Stat. 99-570, signed by the President on Oct. 27, 1986.[75] Basically, subsection (p) of 21 U.S.C. § 853 requires the court to order the forfeiture of other assets of equivalent value belonging to the drug defendant when property found to be forfeitable under subsection (a) is not available at the time of conviction due to any act or omission by the defendant.[76]

Although the court, not a jury, determines whether assets will be substituted for forfeiture, it is recommended that language be routinely placed in the indictment seeking the substitution of assets and certainly should be included any time it is reasonably anticipated that substitute forfeiture may have to be sought.

A listing of any known assets of the defendant that are expected to be substituted should be included within this substitution charge, as well as the statutory language that sets forth the various instances of the defendant's conduct that give rise to such substitution. Such a substitution charge is included in the indictment primarily to notify third parties of the Government's intent to forfeit assets that otherwise would not necessarily appear to a third party to be forfeitable, as well as to establish the foundation for restraint of the property, either through the entry of a pretrial restraining order or, if real property, the filing of a *lis*

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[73] *Russello v. United States*, 464 U.S. 16, 24 (1983).

[74] In *United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987), the court of appeals held that the United States must prove a connection between the property it seeks to forfeit and the illegal enterprise. The jury is to decide what portion of the defendant's property provided him a source of influence over the illegal enterprise.

[75] Identical substitute asset provisions also were added to the obscenity statute, as well as the sexual exploitation and abuse of children statute: 18 U.S.C. §§ 1467(n), 2253(o), respectively.

[76] Property is considered to have been rendered unavailable for forfeiture when it cannot be located, is in the hands of a third party, is beyond the court's jurisdiction, has been substantially diminished in value, or has been commingled with other property that cannot be divided without difficulty. 21 U.S.C. § 853(p).

pendens.[77] When the forfeiture is ultimately presented to the jury for its special verdict, however, no substitute asset issues should be submitted to the jury. The language of the asset substitution statute makes clear that it is the court that determines whether substitution is appropriate.[78] Furthermore, substitution cannot even be reached until the jury has first returned a special forfeiture verdict finding that certain assets of the defendant were used or acquired illegally, thus making those assets forfeitable.

It is only after this threshold forfeiture stage has been reached and the Government determines that the forfeited assets are no longer available, due to the defendant's action or inaction, that the government attorney may then apply to the court to forfeit substitute assets of the defendant to satisfy the forfeiture judgment. Generally, the Government should file a motion to forfeit substitute assets that is accompanied by an affidavit setting forth facts that show that the forfeited asset is no longer available, that its unavailability is due to the defendant's action or inaction in one of the categories prescribed by the substitution statute, that the defendant has an interest in the asset to be substituted, and the extent to which the value of the substituted asset compares with that of the originally forfeited asset (and any value of any substitute asset previously forfeited). Such an affidavit can be sworn to by the government attorney or case agent. If post-conviction depositions have been taken in order to locate the forfeited assets or to identify the defendant's other assets that could be substituted instead, all of the foregoing affidavit information may well be contained in such depositions.[79] If so, the government attorney could rely entirely upon the sworn deposition by presenting relevant excerpts therefrom rather than filing a separate affidavit as described above.

Following the court's forfeiture of substitute assets, the ancillary hearing process, including notice to any known third parties, is then followed as to each newly substituted asset in order to resolve any third-party rights to the assets and to obtain a final order of forfeiture. It is the final forfeiture order that enables the Government to dispose of the substituted asset.[80] This process of collecting on the forfeiture judgment by applying the

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[77] Pretrial restraint of assets is discussed in chapter 6, part II, of this manual.

[78] *See United States v. Thompson*, 837 F. Supp. 585 (S.D.N.Y. 1993).

[79] Following the entry of a forfeiture order, the Government may apply to the court to take the deposition of witnesses in order to facilitate the identification and location of forfeited property and to require the witness to produce relevant documents. 21 U.S.C. § 853(m); 18 U.S.C. §§ 982(b)(1)(A)-(B), 1467(k), 1963(k), 2253(l).

[80] *See generally* 21 U.S.C. § 853(n); 18 U.S.C. §§ 982(b), 1467(l), 1963(l), 2253(m).

defendant's legitimate assets up to the value of the forfeited asset can continue for years after the original forfeiture verdict.[81]

VII. 18 U.S.C. § 982(a)(1) Property (Currency Transaction and Money Laundering Violations)

Section 982(a)(1) of Title 18 is the criminal forfeiture statute for violations of 18 U.S.C. §§ 1956, 1957, and 1960, and 31 U.S.C. §§ 5313, 5316, and 5324.[82]

Until November 18, 1988, there were no criminal forfeiture provisions applicable to violations of the currency transaction reporting (CTR) requirements under 31 U.S.C. § 5313 and 31 C.F.R. § 103.22. Until November 29, 1990, there were no criminal forfeiture provisions applicable to violations of the currency and monetary instrument reporting (CMIR) requirements under 31 U.S.C. § 5316 and 31 C.F.R. § 103.23. Thus, until November 1988, the only possible forfeiture authority applicable to such violations was civil *in rem* forfeiture under either former 18 U.S.C. § 981(a)(1)(C) (applicable to CTR violations committed between October 27, 1986, and November 18, 1988), or 31 U.S.C. § 5317(c) (applicable to CMIR violations).

From October 27, 1986 to November 18, 1988, it was possible to bring a criminal forfeiture action for violations of the criminal money laundering statutes, 18 U.S.C. §§ 1956 or 1957, but the scope of forfeiture was limited to "any property, real or personal, which represents the *gross receipts* the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts."[83] The legislative history indicated that the term "gross receipts" meant only the fees or commissions earned by the money

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[81] *United States v. Martenson*, 780 F. Supp. 492, 494 (N.D. Ill. 1991) (assets substituted for forfeiture four years after the original forfeiture order).

[82] Section 981 is the civil forfeiture counterpart for all of these violations except 18 U.S.C. § 1960 and 31 U.S.C. §§ 5316 and 5324(b). 31 U.S.C. § 5317(c), discussed in chapter 1, part VI.A, of this manual, is the civil forfeiture counterpart for the Title 31 violations. Only criminal forfeiture is available for violations of 18 U.S.C. § 1960, a statute that became effective Oct. 28, 1992, and which makes it unlawful to conduct, supervise, direct, or own an "illegal money transmitting business." Such a business is defined as one that transfers funds for the public but that operates without a required state license, where failure to have such a license is a state criminal offense. For a detailed discussion of currency transaction and money laundering violations forfeiture, *see* chapter 1, part V.A, of this manual.

[83] Anti-Drug Abuse Act of 1986, Pub. L. 99-570, Title I, § 1366(a), 100 Stat. 3707-39 (Oct. 27, 1986) (codified as 18 U.S.C. § 982(a)) (emphasis added).

launderer and, specifically, did not include the corpus of the money laundered.[84] Moreover, there were no provisions for forfeiture of "substitute assets" if such "gross receipts" were unavailable for forfeiture.

Effective November 18, 1988, Congress substantially amended the criminal forfeiture provisions of 18 U.S.C. § 982(a).[85] It authorized criminal forfeiture for both CTR violations under 31 U.S.C. §§ 5313(a) and 5324[86] and money laundering violations under 18 U.S.C. §§ 1956 and 1957. Moreover, Congress substantially broadened the scope of such forfeitures by authorizing forfeiture of "any property, real or personal, involved in such offense, or any property traceable to such property."[87] Finally, Congress authorized the forfeiture of substitute assets equal in value to property otherwise subject to forfeiture where, as a result of any act or omission of the defendant, any of the circumstances enumerated in 21 U.S.C. § 853(p) existed.[88] However, the utility of this substitute assets provision was severely undermined by the restriction that it could not be used against a defendant who "acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense."[89] This substitution limitation was chiefly designed to protect individuals commonly known as "smurfs," who were paid merely to transfer other people's money and who thereby often handled large sums of money, which were subject to forfeiture but in which the smurfer had no individual interest. Thus, section 982(b)(2) originally was intended to protect the smurf from the disproportionate impact of having his own assets substituted for the laundered funds. However, section 982(b)(2) was drafted very broadly that it also protected the most sophisticated and culpable money launderers, who likewise handle the laundered funds but do not retain them during the course of the laundering offenses.

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[84] S. Rep. No. 433, 99th Cong., 2d Sess. 23 (1986). *But see United States v. Sokolow*, 91 F.3d 396 (3d Cir. 1996) (holding that notwithstanding the legislative history, the term "gross receipts" includes the corpus of the money laundered where the defendant committing the money laundering offense also committed the predicate (SUA) crime—*i.e.*, where the defendant launders his own proceeds), *cert. denied*, ___ U.S. ___, 117 S. Ct. 960 (1997).

[85] Section 6463 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4374 (Nov. 18, 1988).

[86] However, the amended statute barred forfeiture in the case of a violation of 31 U.S.C. § 5313(a), which was committed by a domestic financial institution examined by a federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission, or a partner, director, or employee thereof.

[87] 18 U.S.C. § 982(a)(1).

[88] *See* 18 U.S.C. § 982(b) (incorporating by reference 21 U.S.C. § 853(p)).

[89] *See* Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VI, §§ 6463(c) and 6464, 102 Stat. 4374-75 (Nov. 18, 1988).

Effective November 29, 1990, Congress again amended section 982 to add CMIR violations under 31 U.S.C. § 5316 and 31 C.F.R. § 103.23 to the CTR and money laundering violations already covered. Moreover, Congress acted to liberalize the limitations on recovery of substitute assets by amending the statute to read that:

> The substitution of assets...shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense *unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.*[90]

This amendment substantially increased the utility of the substitute assets provision in cases involving continuing, large-scale money laundering offenses, in accordance with its intended purpose.

Finally, on October 28, 1992, Congress amended section 982(a)(1) to include violations under 18 U.S.C. § 1960, a newly-enacted statute relating to illegal money transmitting businesses. On the same date, Congress added a provision to 31 U.S.C. § 5324 regarding structuring in CMIR cases. Criminal forfeiture for this violation is, of course, covered by the pre-existing reference to section 5324 in section 982(a)(1).

Department policy requires that when any indictment is sought for a violation of 18 U.S.C. § 1956 or 1957, the Asset Forfeiture and Money Laundering Section be notified.[91] Such notification is to be accomplished by sending a copy of the indictment to the Asset Forfeiture and Money Laundering Section as soon as possible after the return of the indictment. (A similar policy applies to money laundering civil forfeiture complaints.) Formal approval from the Criminal Division, through the Asset Forfeiture and Money Laundering Section, is also required for the prosecution of any financial institution for any money laundering or Title 31 violation. This approval requirement extends to naming a

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[90] 18 U.S.C. § 982(b)(2), as amended by Crime Control Act of 1990, Pub. L. 101-647, Title XIV, § 1403, 104 Stat. 4835 (Nov. 29, 1990) (emphasis added). *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (money launderer is liable to forfeit substitute assets equal to the entire amount laundered, even though he held the money only temporarily and only retained a fraction for his fee); *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994) (gold dealer who retained only $10,000 profit on sale of gold for $742,555 in drug proceeds required to forfeit $742,555 in substitute assets because intermediary exception not applicable).

[91] *See* Bluesheet affecting *United States Attorneys' Manual* § 9-105.000, dated Oct. 1, 1992, entitled "Money Laundering Prosecutions and Forfeitures," 18 U.S.C. §§ 1956-57, 981-82 at 5.

financial institution as an unindicted co-conspirator.[92] In addition, there must be prior consultation with the Asset Forfeiture and Money Laundering Section before forfeiture of an entire business may be sought on a facilitation theory.[93] In general, the Asset Forfeiture and Money Laundering Section is responsible for giving advice on the following issues: the legal theory and evidence supporting money laundering allegations, the propriety and nature or scope of the forfeiture, and any procedural issues relating to the forfeiture.

VIII. 18 U.S.C. § 982(a)(2), (3) and (4) Property (FIRREA and Other Fraud Violations)[94]

Section 982(a)(2) of Title 18 is the criminal forfeiture counterpart for violations described in 18 U.S.C. § 981(a)(1)(C), including both FIRREA violations[95] and violations added by the statute establishing the Department of the Treasury Forfeiture Fund.[96] Section 982(a)(3) and (4) of Title 18 are the criminal forfeiture counterparts for violations described in 18 U.S.C. § 981(a)(1)(D) and (E).[97] However, 18 U.S.C. § 982(a)(2) is broader than its civil counterpart in that it covers conspiracies to commit the predicate violations. Sections 982(a)(3) and (4) do not apply to conspiracy violations.

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[92] 18 U.S.C. §§ 1956-57 and 981-82 at 4. A copy of the proposed indictment and prosecution memorandum should be sent as soon as possible before the anticipated filing of the indictment to the Asset Forfeiture and Money Laundering Section, preferably by overnight carrier. Prosecutors are also encouraged to seek guidance from the Asset Forfeiture and Money Laundering Section prior to the opening of an investigation and well before a final indictment and prosecution memorandum are submitted for review. This approval requirement is inapplicable to cases where the financial institution involved is a "non-bank financial institution," like a check cashing service or a "casa de cambio," which is a stand-alone business and not part of a larger institution.

[93] 18 U.S.C. §§ 1956-57 and 981-82 at 4 and 6. *See* the extensive discussion of facilitation forfeiture under the money laundering and currency transaction reporting statutes in chapter 1, part V.A.3, of this manual, particularly as it applies to the forfeiture of entire businesses.

[94] *See generally* the discussion of civil FIRREA forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), (D), and (E) in chapter 1, part V.C, of this manual.

[95] The FIRREA provision was effective August 9, 1989. The criminal provision inadvertently leaves out violations of 18 U.S.C. § 1032 (concealment of assets from FDIC or other financial institution regulatory bodies when they are the receiver or conservator of a financial institution) from the list of predicate offenses for forfeiture under this subsection. In the event of an 18 U.S.C. § 1032 violation; however, forfeiture may be sought under 18 U.S.C. § 982(a)(3) if applicable.

[96] H.R. 5488, 102d Cong., 2d Sess. (1992), Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. 102-393, 106 Stat. 1729 (Oct. 6, 1992).

[97] This provision was effective Nov. 29, 1990.

There is a distinction in the language used describing forfeitable property under 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(2), even though they are intended to be parallel civil and criminal provisions. The civil forfeiture provision provides for the forfeiture of property that "constitutes or is derived from proceeds traceable to" the underlying violations.[98] The criminal forfeiture provision provides for the forfeiture of property "constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of" the underlying violation.[99] There is no such discrepancy with respect to 18 U.S.C. §§ 981(a)(1)(D) and 982(a)(3). Does the failure to explicitly provide for the forfeiture of "traceable proceeds" mean that "traceable proceeds" are not covered in section 982(a)(2)? The answer is that they probably are covered under section 982(a)(2) as property "derived" from illegal proceeds. Moreover, there is no indication in the legislative history that the difference in language was intended to have any particular consequence.

Section 982(a)(2) provides for forfeiture of proceeds or property derived therefrom but not to facilitating property. However, it may be possible to obtain the forfeiture of facilitating property or property interests under 18 U.S.C. § 1963 if a RICO count, including a forfeiture charge, has been included in the indictment (after prior approval as described in part V.F of this chapter, *supra*) and a conviction has been obtained on that count. Violations of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), and 1344 (bank fraud) are predicate offenses for a RICO violation. In addition, it may be possible to obtain a facilitation forfeiture under 18 U.S.C. § 982(a)(1) if a money laundering violation can be established. All the predicate offenses for FIRREA forfeiture are predicate offenses for money laundering forfeiture, except 18 U.S.C. §§ 1001 (false statements) and 1031 (major procurement fraud). There also may be a 31 U.S.C. § 5313(a), 5316, or 5324 violation if there was noncompliance with the CTR or CMIR reporting requirements.

Subsections 982(a)(3) and (4) make "gross receipts" of the underlying fraud offense forfeitable. There is no explanation in either the statute or the legislative history as to the difference between "gross receipts" and "proceeds." Possibly, Congress saw "gross receipts" as a broader term, implying that "proceeds" related only to net profits, but such an interpretation is pure speculation. Similar confusion exists as to what Congress intended to make forfeitable under subsection (a)(4) that was not already forfeitable under subsection (a)(3). Both provisions make forfeitable the "gross receipts" of the same offenses. Subsection (a)(4) applies, however, only where the offense is "committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses. ..." It is not clear what violation of the

[98] 18 U.S.C. § 981(a)(1)(C).

[99] 18 U.S.C. § 982(a)(2).

statutes listed in section 982(a)(3) would not satisfy this definition, nor is it apparent what is gained by showing that the definition is satisfied. It may be that Congress intended subsection (a)(4) to permit the forfeiture of the "gross receipts" of the entire scheme, and not just the property received as a result of the offense(s) of conviction, but this also is pure speculation.

The substitute assets provision is the same for subsection (a)(2) forfeitures as it is for money laundering forfeitures under subsection (a)(1).[100] Due to an apparent legislative oversight, however, the statute is silent with respect to forfeiture of substitute assets or any other procedures under subsections (a)(3)-(5). Thus, it is unclear whether some or all of the provisions of 21 U.S.C. § 853, including the substitute assets provision, apply to forfeitures under these statutes.

There is a special ten year statute of limitations for FIRREA prosecutions.[101] In enacting this statute, Congress explicitly stated that this extension applied to offenses that were already not time barred as of its effective date, August 9, 1989.[102] The courts of appeals have held that the retroactive application of the ten-year statute of limitations does not violate the *ex post facto* clause of the Constitution.[103]

IX. 18 U.S.C. § 982(a)(5) Property (Federal Carjacking Violations)

On October 25, 1992, Congress added 18 U.S.C. § 982(a)(5) to make forfeitable the "gross proceeds" of certain federal auto-theft cases including the newly enacted "carjacking" statute. Subsection (a)(5) is virtually identical to its civil counterpart, 18 U.S.C. § 981(a)(1)(F).

There is no legislative history on subsection (a)(5) and no indication in the statute as to the distinction Congress intended to make between "proceeds," "gross receipts," and "gross

[100] 18 U.S.C. § 982(b)(1)(B) (incorporating the provisions of section 853 for the purposes of section 982(a)(2) forfeitures, but making no reference to that section for the purposes of subsections (a)(3), (4), or (5)).

[101] 18 U.S.C. § 3293.

[102] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, Title IX, § 961(l)(3), 103 Stat. 501 (Aug. 9, 1989).

[103] *United States v. Brechtel*, 997F. 2d 1108 (5th Cir. 1992), *cert. denied*, 510 U.S. 1013 (1993); *United States v. Taliaferro*, 979 F.2d 1399 (10th Cir. 1992); *United States v. Knipp*, 963 F.2d 839 (6th Cir. 1992); *United States v. Madia*, 955 F.2d 538, 539-40 (8th Cir. 1992).

proceeds."[104] Moreover, as was true for the 1990 amendments adding subsections (a)(3) and (4), Congress made no reference to the procedural provisions of 21 U.S.C. § 853, leaving it unclear which provisions of that statute, if any, apply to forfeiture under these latter subsections of 18 U.S.C. § 982.

Because no procedures are incorporated into section 982 for forfeitures under section 982(a)(3), (4), and (5), these provisions have been rarely used.

X. Criminal Forfeiture for Federal Health Care Offenses

On August 21, 1996, the President signed the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (Aug. 21, 1996), which provides for criminal forfeiture under 18 U.S.C. § 982(a)(6) for violations of a federal health care offense. A "federal health care offense" is defined as follows in 18 U.S.C. § 24:

> (a) As used in this Title, the term "[F]ederal health care offense" means a violation of, or a criminal conspiracy to violate—
>
> (1) [s]ection 669, 1035, 1347, or 1518 of this Title;
>
> (2) [s]ection 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 of this Title, if the violation or conspiracy relates to a health care benefit program.[105]

Section 982(a)(6) states that the court, in sentencing a person convicted of a federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

Section 982(b) was also amended to incorporate criminal forfeiture procedures applicable to section 982(a)(6). As amended, section 982(b)(1)(A) now provides that forfeitures pursuant to section 982(a)(1) *or* (a)(6) are governed by 21 U.S.C. § 853(c), (e)-(p).

Several things are noteworthy about the new forfeiture provision. First, Congress has incorporated the same criminal forfeiture procedures for health care fraud offenses as are

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[104] *See* 18 U.S.C. § 982(a)(2), (3), and (4).

[105] 18 U.S.C. § 24 defines a "benefit program" as follows:

> (b) As used in this title, the term "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

incorporated for money laundering. This is good, but in amending section 982(b)(1) to cross-reference the new paragraph (a)(6), Congress neglected to correct the oversight dating back to 1990 in which it failed to incorporate procedures for paragraphs (a)(3)-(5). Thus, there are now criminal forfeiture provisions for paragraphs (a)(1), (2), and (6), but not for the remainder of the statute.

Second, paragraph (a)(6) provides for the forfeiture of "gross proceeds." In this instance, as in paragraph (a)(5) (relating to carjacking and other offenses), Congress had made it clear that the defendant is not entitled to any deduction from the amount to be forfeited for the cost of committing the fraud. The use of the term "gross proceeds" in paragraphs (a)(5) and (6) only perpetuates the confusion regarding the use of "proceeds" in other forfeiture statutes including section 982(a)(2) and 21 U.S.C. § 853(a). Unfortunately, once Congress started using "gross proceeds" in criminal forfeiture statutes, courts began to assume that when it used "proceeds" alone it meant "net proceeds."[106]

Finally, section 982(a)(6) obviously provides only for criminal forfeiture. This is a serious problem. It means that proceeds of health care offenses can be forfeited only if the defendant (often a health care provider) pleads guilty or is convicted at trial of a criminal offense. If criminal prosecution is not possible for any reason (*e.g.*, the perpetrator is a fugitive or deceased) or the Government determines that in the interest of justice no criminal conviction is necessary, it will not be possible to recover the proceeds of the offense through civil forfeiture. Nor will any forfeiture be possible if the proceeds are acquired by a corporation unless the corporate entity is also convicted.[107]

However, there may be a way around the absence of a civil forfeiture provision for federal health care offenses. In another provision of the health care bill, Congress amended 18 U.S.C. § 1956(c)(7) to make all federal health care offenses predicates for money laundering.[108] Thus, if the proceeds of the health care offense are laundered, they may be

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[106] *See United States v. McCarroll*, No. 95-CR-48, 1996 WL 355371 (N.D. Ill. June 25, 1996) (unpublished) (heroin dealer given credit for cost of heroin sold because "proceeds" means "net profits"); *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (defendant in fraudulent securities deal permitted to deduct the amount invested in the scheme from the amount subject to forfeiture).

[107] *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (noting, *in dicta*, that defendant could have challenged forfeiture on the ground that property was held by a corporation, not by the defendant, and that unless corporate form could be ignored, defendant's only forfeitable interest was his stock in the corporation); *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (if corporation used by defendant to commit offense is not a defendant, only defendant's interest in the corporation may be forfeited, not the corporation itself or its assets).

[108] *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 2018 (Aug. 21, 1996), adding new subparagraph (F) to section 1956(c)(7).

forfeited civilly or criminally (along with any property facilitating the laundering offense) under sections 981(a)(1)(A) and 982(a)(1).

With respect to civil forfeiture under the money laundering statute, we note that Congress has also enacted a new statute, 18 U.S.C. § 3486, authorizing the issuance of civil investigative demands "in any investigation relating to any act or activity involving a [f]ederal health care offense." The plain language of this provision would seem to authorize the issuance of a civil investigative demand in an investigation directed toward the civil forfeiture of the proceeds of a federal health care offense under 18 U.S.C. § 981(a)(1)(A).

XI. Criminal Forfeiture for Immigration Offenses

The immigration law signed by the President on September 30, 1996, and effective the same date, includes criminal forfeiture among its increased penalties for some immigration related offenses. Specifically, it adds a number of Title 18 passport and visa fraud offenses as predicates for criminal (but not civil) forfeitures under a new paragraph in 18 U.S.C. § 982, which unfortunately is also designated paragraph (a)(6).[109] It is clear from the text of the provision that Congress intended to add criminal forfeiture as a penalty for violations of certain Title 8 immigration law violations also, but failed to do so because of ineffective drafting.

The new paragraph (a)(6) provides that anyone convicted of certain offenses relating to passport and visa fraud shall forfeit three categories of property: (1) conveyances used to commit the offense; (2) proceeds of the offense; and (3) any other property—real or property—used to facilitate the offense. The passport and visa violations for which forfeiture may be imposed are the following:

(1) 18 U.S.C. § 1425 (procurement of citizenship or naturalization unlawfully);

(2) 18 U.S.C. § 1426 (reproduction of naturalization or citizenship papers);

(3) 18 U.S.C. § 1427 (sale of naturalization or citizenship papers);

(4) 18 U.S.C. § 1541 (issuance of passports or visas without authority);

[109] It is likely that this provision will be redesignated as paragraph (a)(7) sometime in the future, but for now it will be known as "the second (a)(6)."

(5) 18 U.S.C. § 1542 (false statement in application and use of passport);

(6) 18 U.S.C. § 1543 (forgery or false use of passport);

(7) 18 U.S.C. § 1544 (misuse of passport);

(8) 18 U.S.C. § 1546 (fraud and misuse of visas, permits, and other documents);

(9) 18 U.S.C. § 1028 (fraud and related activity in connection with identification documents "if committed in connection with passport or visa issuance or use"); and

(10) conspiracy to violate any of these predicate offenses.

In each of the subparagraphs describing the categories of property subject to forfeiture, Congress included references to property involved in violations of Title 8 immigration offenses. Apparently, the intent was to provide criminal forfeiture sanctions for these offenses as well. But there are two reasons why the provisions are ineffective in that regard.

First, in each subparagraph Congress included a reference to an unspecified "subsection (a)" in the description of the property subject to forfeiture. Thus, section 982(a)(6)(A)(i) provides for the forfeiture of conveyances used to facilitate a violation of the unidentified "subsection (a)"; subparagraph (A)(ii)(I) provides for the forfeiture of proceeds of such violations; and subparagraph (A)(ii)(II) provides for the forfeiture of all property used to facilitate such violations. These references appear to have been intended to be to the primary alien smuggling statute, subsection 274(a) of the Immigration and Nationality Act, 8 U.S.C. § 1324(a), for which only civil forfeiture of facilitating conveyances is presently available under 8 U.S.C. § 1324(b). However, Congress included no reference to subsection 274(a) anywhere in the new (the second) section 982(a)(6). Consequently, the apparent attempt to provide for criminal forfeiture of proceeds and facilitating property for 8 U.S.C. § 1324(a) alien smuggling violations was totally ineffective.

Second, within two of the subparagraphs, Congress included references to subsections 274A(a)(1) and 274A(a)(2) of the Immigration and Nationality Act (8 U.S.C. § 1324a(a)(1) and 1324a(a)(2)), which relate to the employment of illegal aliens. While these statutes are properly cited, the criminal forfeiture provision still will not apply to them because the Title 8 provisions are not listed in the key first paragraph of the new section 982(a)(6), which lists the violations for which criminal forfeiture is to be imposed. Instead, the employment offenses appear only in subparagraphs (A)(ii)(I) and (II) that describe the property that is forfeitable under section 982(a)(6).

In other words, section 982(a)(6) essentially states: A person convicted of a passport or visa offense shall forfeit all proceeds and property used to facilitate that offense *and all proceeds and property used to facilitate a violation of 8 U.S.C. § 1324a(a)(1) and 1324a(a)(2).* Or conversely, criminal forfeiture is available as a remedy for certain Title 8 violations if *and only if* the defendant is convicted of a passport or visa offense.

This is unique among criminal forfeiture statutes. No other statute provides that a defendant who is convicted of one offense must forfeit property involved in an entirely separate offense. Nor does any other statute predicate forfeiture for one offense on conviction for an entirely separate offense. Yet, the statute clearly provides that proceeds of and property used to facilitate violations of section 1324(a) are subject to criminal forfeiture, if and only if, the defendant is convicted of one of the Title 18 passport and visa fraud offenses listed in the provision's first paragraph. Unfortunately, courts may find that it makes no sense to say that a person convicted of one of the passport or visa violations must forfeit property involved in another offense with which the defendant may or may not have ever been charged.[110] Hence, despite Congress' evident intent to the contrary, the statute may not provide any authority to forfeit any property involved in Title 8 violations.

Despite the failure to expand forfeiture authority for Title 8 offenses, the statute's criminal forfeiture authority for passport and visa offenses will be a useful tool. The procedures for criminal forfeiture are incorporated from 21 U.S.C. § 853.[111] Moreover, as is true for food stamp and health care fraud, there may be ways of working around the inadequacies in the new statute.

First, both civil and criminal forfeiture remain available under 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(2)(B) for violations of 18 U.S.C. § 1028 independently of whether they are committed in connection with passport or visa issuance, but forfeitures under those statutes are limited to proceeds only.

Second, in other legislation enacted in 1996 in the anti-terrorism bill, Congress made alien smuggling, other Title 8 offenses, and some of the passport and visa offenses,

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[110] Subparagraphs (A)(ii)(I) and (II) also list all of the passport and visa violations that appear in the opening paragraph. Thus, section 982(a)(6) provides that if a person is convicted of any one passport of visa violation, he must forfeit proceeds and property used to facilitate any other passport or visa violation, regardless of whether he was charged or convicted of such other violations.

[111] Instead of amending section 982(b)(1)(A) to incorporate the section 853 procedures for purposes of forfeiture in immigration cases, Congress added a subparagraph (B) to section 982(a)(6) that incorporates the procedures. This is duplicative and confusing, but it works.

predicates for RICO.[112] Thus, civil and criminal forfeiture of the laundered proceeds of these offenses, and any property facilitating the laundering of such proceeds, is available in money laundering cases. Furthermore, if a RICO indictment is approved and returned based upon these predicate offenses, criminal forfeiture may be sought pursuant to 18 U.S.C. § 1963.

XII. 18 U.S.C. §§ 1467 and 2253 Property (Obscenity and Child Exploitation Violations)

Section 1467 of Title 18, first effective November 18, 1988, provides for the forfeiture of specified assets in a criminal case after a conviction of an offense involving obscene material pursuant to one of the statutory provisions set forth in Chapter 71 of Part 1 of Title 18.[113] These violations include 18 U.S.C. §§ 1460 (possession); 1461 (mailing); 1462 (importation); 1463 (mailing indecent matter on wrappers or envelopes); 1464 (broadcasting obscene language); 1465 (transportation for distribution); 1466 (engaging in business of selling or transferring); and 1468 (distribution by cable or subscription television). There is no counterpart civil forfeiture statute.

The property subject to forfeiture under this statute includes a convicted person's interest in:

(1) any obscene material produced, transported, mailed, shipped, or received in violation of any of those listed statutes[114];

(2) property constituting or traceable to gross profits or other proceeds obtained by such a violation[115]; and

[112] *See* 18 U.S.C. § 1961(1)(B) and (F), amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1274 (Apr. 24, 1996). The new RICO predicates are as follows: 8 U.S.C. §§ 1324, 1327, 1328; and 18 U.S.C. §§ 1028, 1542-1544, 1546.

[113] The leading case on what constitutes "obscenity" is *Miller v. California*, 413 U.S. 15 (1973). The basic requirements are: (1) that the average person, applying contemporary community standards, would find that an item, taken as a whole, appeals to the prurient interest; (2) that the item depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable statute; and (3) that the item, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

[114] 18 U.S.C. § 1467(a)(1).

[115] 18 U.S.C. § 1467(a)(2).

(3) property used or intended to be used to commit or to promote the commission of the offense, in the discretion of the court, taking into consideration the nature, scope, and proportionality of use of the property in the commission of the offense.[116]

There is proceeds and facilitation forfeiture, but this statute is unique in making facilitation forfeiture discretionary with the court and in codifying a proportionality rule.

The procedural and other collateral forfeiture provisions are the same in this statute as in other major criminal forfeiture statutes. There is a relation back[117] and a substitute assets forfeiture provision.[118] Unlike other criminal forfeiture statutes, this statute makes clear that the burden of proof on the forfeitability of property is beyond a reasonable doubt.[119]

Due to the fact that the statute applies to expressive material that may be entitled to First Amendment protection, it is the policy of the Department of Justice not to seize property until there has been an order of forfeiture, though pretrial seizures of limited material for evidentiary purposes is permitted.[120] Department policy permits the seeking of restraining orders, or the requesting of performance bonds, in appropriate fact situations to insure that property is not depleted prior to conviction.[121] Permission to make these requests must be obtained in writing from both the Child Exploitation and Obscenity Section and the Asset Forfeiture and Money Laundering Section. It should be noted that the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court order barring the use of any restraining orders and pretrial seizure provisions, finding that the relevant statutory provisions in section 1467 were not facially unconstitutional.[122]

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[116] 18 U.S.C. § 1467(a)(3).

[117] 18 U.S.C. § 1467(b).

[118] 18 U.S.C. § 1467(n).

[119] 18 U.S.C. § 1467(e). *See* lengthy discussion of the burden of proof issue in chapter 6, part VI.B, of this manual.

[120] *See* Memorandum, entitled "Pretrial Seizure of Presumptively Protected First Amendment Materials," issued by the Office of the Deputy Attorney General, Criminal Division, on April 12, 1989 [*United States Attorneys' Manual*, Vol. II, at p. 6 — 13].

[121] *Id.*

[122] *American Library Ass'n v. Barr*, 956 F.2d 1178, 1194-98 (D.C. Cir. 1992). The court also rejected a claim that the facilitation forfeiture provisions of the statute were unconstitutional. *Id.* at 1187-94.

Another concern arises because of case law peculiar to obscenity prosecutions. The ultimate question of obscenity is a legal conclusion that is predicated upon certain factual findings.[123] As a practical matter, before sexually explicit materials can be determined to be obscene, a factual finding that the works offend "contemporary community standards," one of these predicate factual findings, would be required. This requirement could lead to a claim by a third-party petitioner in an ancillary hearing under section 1467(l)(6)(B) that at the time he acquired an interest in the property forfeited there had been no such findings; hence, the petitioner's interest is automatically exempt under section 1467(l)(6)(B) because the petitioner was reasonably without cause to believe the property was subject to forfeiture at that time. Courts have rejected similar claims—*e.g.*, that one cannot knowingly mail obscene material or knowingly launder proceeds from the sale of obscene materials without the benefit of an adjudication of obscenity at the time the mailing or laundering occurred.[124]

The child exploitation criminal forfeiture statute is 18 U.S.C. § 2253. This statute applies to violations of 18 U.S.C. §§ 2251 (exploitation of children by having them engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct); 2251A (selling or buying children so they may be used in visual depictions of sexually explicit conduct); and 2252 (shipping, receiving, or distributing visual depictions of sexually explicit conduct involving children). Forfeiture extends to the visual depiction itself, any property used or intended to be used to commit or promote the commission of any of the underlying violations, and any property constituting or traceable to gross profits or other proceeds obtained from any of those violations. There are provisions for protecting third-party rights as in other criminal forfeiture statutes.[125] The relation back doctrine[126] and substitute assets provisions apply.[127] Procedural provisions and property custody and disposition provisions are the same as for other criminal forfeiture statutes, except that it is clear that the burden of proof on forfeitability is beyond a reasonable doubt.[128] Pretrial seizures require a search warrant.[129]

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[123] *See Miller v. California*, 413 U.S. 15, 24 (1973).

[124] *Hamling v. United States*, 418 U.S. 87, 120 (1974); *United States v. Krasner*, 841 F. Supp. 649 (M.D. Pa. 1993).

[125] 18 U.S.C. § 2253(m).

[126] 18 U.S.C. § 2253(b).

[127] 18 U.S.C. § 2253(o).

[128] 18 U.S.C. § 2253(e). *See* discussion of burden of proof issue, chapter 6, part VI.B, of this manual.

[129] 18 U.S.C. § 2253(d) authorizes seizures pretrial with a search warrant.

Unlike the predicate violations for forfeiture under 18 U.S.C. § 1467, there is no requirement that depictions of sexually explicit activity involving children be "obscene." Nevertheless, the same challenge to the constitutionality of the pre-conviction seizure and pretrial restraint provisions was made to this statute as was made to the parallel provisions in 18 U.S.C. § 1467. The U.S. Court of Appeals for the District of Columbia Circuit also rejected this challenge for the same reasons.[130]

Advice from the Child Exploitation and Obscenity Section should be sought before there is a prosecution for a violation of any of the predicate offenses for 18 U.S.C. §§ 1467 and 2253. Advice on issues relating to the legal theory and evidence supporting the prosecution itself should be sought from the Child Exploitation and Obscenity Section. Advice on issues relating to the propriety and nature or scope of any forfeiture allegations, and to any procedural issues relating to the forfeiture aspects of the case, should be sought from the Asset Forfeiture and Money Laundering Section.

As an alternative or in addition to using section 1467 or 2253, it may be possible in some fact situations to charge a money laundering violation and seek forfeiture pursuant to 18 U.S.C. § 982(a)(1). However, government attorneys should be alert to a special issue that may arise in money laundering prosecutions with obscenity predicates. Property must be found to offend contemporary community standards within a given district in order for it to be constitutionally classifiable as obscene. Such a determination applies only to the particular district. Thus, without a prior judicial determination on this subject, a money launderer might raise a lack of knowledge defense by contending that he could not have had knowledge that he was handling the proceeds of unlawful activity.[131] Because of issues like this, the Asset Forfeiture and Money Laundering Section will, as a matter of standard procedure, review all proposed money laundering prosecutions and forfeitures that are predicated on the laundering of the proceeds from violations of the obscenity and child exploitation statutes. The Child Exploitation and Obscenity Section is responsible for forwarding the indictment and related documents in such situations to the two components for their review.

It is also possible to seek forfeiture in obscenity cases if there has been a RICO conviction predicated on obscenity statute violations. Section 1961(1) of Title 18 lists as

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[130] *American Library Ass'n v. Barr*, 956 F.2d 1178, 1194-98 (D.C. Cir. 1992), *rev'g* 713 F. Supp. 469 (D.D.C. 1989).

[131] This defense will fail so long as it can be established that the defendant knew the defendant was handling the proceeds of some type of felonious federal, state, or foreign unlawful activity for purposes of section 1956 or any criminal activity for purposes of section 1957. It is not necessary to establish that the defendant knew which type of unlawful activity was involved in the predicate offense. 18 U.S.C. § 1956(c)(1).

predicate offenses for RICO all the predicate offenses for 18 U.S.C. §§ 1467 and 2253 forfeitures, except sections 1466 (engaging in business of selling or transferring) and 1468 (distribution by cable or subscription television). The Supreme Court has upheld the constitutionality of using a state RICO statute similar to the federal RICO statute.[132]

Several courts, including the Supreme Court, have upheld the constitutionality of using RICO forfeiture for obscenity predicate act violations.[133] The Fourth Circuit held that once there was a conviction based on a finding of obscenity as to certain specific materials, it was constitutional then to order the forfeiture of three bookstores and nine video rental shops where such material had been sold, even though they also contained constitutionally protected material, on the theory that this property was property which was acquired and maintained in violation of 18 U.S.C. § 1962 and afforded the defendants a source of influence over the unlawful enterprise.[134]

Similarly, the Supreme Court, in *Alexander v. United States*, 509 U.S. 544 (1993), upheld an Eighth Circuit ruling that the forfeiture of a chain of book and video stores after a conviction based on the finding that four magazines and three video tapes sold there were obscene, was constitutional and did not constitute a "prior restraint" as to the other materials sold at those stores. The Court said that the term "prior restraint" describes orders forbidding certain communications that are issued before the communications occur. However, an order of forfeiture after a conviction imposed no legal impediment to a defendant's ability to engage in any expressive activity; it simply prevented him from financing those activities with assets related to previous racketeering violations.

The Court, however, remanded the case to the Court of Appeals for a determination of whether the forfeiture was excessive within the meaning of the excessive fines clause of the Eighth Amendment. It held that this determination should be made "in the light of the extensive criminal activities which [the defendant] apparently conducted through this racketeering enterprise over a substantial period of time."[135] It rejected the defendant's contention that the determination should be based on the specific conduct underlying the

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[132] *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989).

[133] *Alexander v. United States*, 509 U.S. 1217 (1993); *United States v. Pryba*, 900 F.2d 748, 753-56 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990).

[134] *United States v. Pryba*, 900 F.2d at 756-57. The court in *Pryba* rejected any concern about a possible Eighth Amendment proportionality issue because it construed the leading Supreme Court case on the subject of the applicability of the cruel and unusual punishment clause of the Eighth Amendment, to be limited to situations involving sentences of death or life without possibility of parole. This holding is no longer valid in light of the Supreme Court's decision in *Alexander*, as discussed below.

[135] *Alexander v. United States*, 509 U.S. at 545.

RICO predicate offense—the finding that four magazines and three video tapes were obscene—because the defendant was really found guilty of creating and managing what the trial court had described as "an enormous racketeering enterprise."[136]

The Fifth Circuit declined to make an express ruling on the constitutionality of the use of RICO forfeiture procedures pending a ruling on this issue by the Supreme Court in the *Alexander* case, but it upheld the constitutionality of an *ex parte* restraining order that prohibited the defendants from selling, transferring, or otherwise encumbering any assets owned by or owed to them, and which directed that all funds from the sales of four adult bookstores be seized and held by the Government pending the outcome of the case.[137] The court held that since this order did not impede the defendants from conducting their business in any way, it could not be viewed as a prior restraint on free speech in violation of the First Amendment. The court, however, indicated that it did not approve of a provision requiring defendants not to use the properties to violate any laws, as that could be applied in such a way as to constitute a prior restraint.[138]

On the other hand, the Ninth Circuit has held that the pretrial "seizure" provisions of the RICO forfeiture statute (*i.e.*, 18 U.S.C. § 1963(d)) were unconstitutional insofar as they authorize seizures based on mere probable cause to believe the materials to be seized are obscene, and that the post-trial forfeiture provisions needed to be tailored to exempt from forfeiture the interests or assets of a RICO/obscenity case defendant that were invested in legitimate expressive activity being conducted by parts of an enterprise uninvolved or only marginally involved in racketeering activity.[139] However, this holding has been vacated by the Supreme Court with the direction to reconsider the case in light of *Alexander v. United States.*

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[136] *Id.*

[137] *United States v. Jenkins*, 974 F.2d 32, 35-36 (5th Cir. 1992).

[138] *Id.* at 35. The panel found that, on balance, this "obey the law" provision of the restraining order was "outweighed" by other provisions permitting the continued conduct of the business and the dissemination of presumptively protected materials.

[139] *Adult Video Ass'n v. Barr*, 960 F.2d 781, 788-92 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video*, 509 U.S. 917 (1993). Section 1963(d) of Title 18 does not authorize the pretrial seizure of allegedly obscene materials, only the restraint on their transfer and then only after a special showing has been made. (The court had no objection to the pretrial restraint provisions. *Id.* at 792.) The *Pryba* court, as well as the Eighth Circuit opinion in *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991), *rev'd on other grounds*, 509 U.S. 544 (1993), rejected this claim for that very reason. *See also* rejection of a similar claim against the constitutionality of pretrial restraint subsections in 18 U.S.C. §§ 1467, 2253 in *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196-98 (D.C. Cir. 1992).

Thus, while a RICO violation is more difficult to establish, once established, the forfeiture provisions of RICO may be more effective in that they are broader than the forfeiture provisions of Section 1467. Furthermore, all the RICO forfeiture provisions are mandatory, unlike the facilitation forfeiture provision of section 1467 whose application is discretionary.

The Organized Crime and Racketeering Section, the Child Exploitation and Obscenity Section, and the Asset Forfeiture and Money Laundering Section will review all forfeiture allegations in a proposed RICO indictment involving obscenity predicate act violations.

XIII. Criminal Forfeiture for Food Stamp Offenses

On August 22, 1996, the President signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, which included new criminal forfeiture penalties for food stamp fraud. The Act, which went into effect October 1, 1996, amends section 15 of the Food Stamp Act of 1977 by adding a new subsection (h) to 7 U.S.C. § 2024.

Under the Food Stamp Act, the unlawful possession of Food Stamp Coupons, Authorization to Participate cards, or Electronic Benefit Transfer cards in excess of $100 is a felony. The amendment in section 2024(h) makes the proceeds of such offenses, and all property, real or personal, used to commit or to facilitate the commission of the offense, subject to forfeiture.

The provision, however, is seriously flawed. First, it is a criminal forfeiture provision that contains no cross-reference whatsoever to any criminal forfeiture procedures, such as those normally incorporated from 21 U.S.C. § 853 as is the case for forfeitures under section 982(a)(3), (4), and (5). Second, if the statute is not flawed it is at least very peculiar. It provides for criminal forfeiture only; there is no provision for civil or administrative forfeiture, but it contains a *civil* innocent owner defense.[140]

This innocent owner defense could be construed as follows: (1) Congress did not understand that criminal forfeiture is limited to the property of the defendant and did not realize that providing relief for innocent convicted defendants makes no sense; or (2) Congress has subtly expanded the concept of criminal forfeiture to authorize for the first time the forfeiture of property of third parties in criminal cases. It is unlikely that Congress

[140] *See* section 2024(h)(3).

would substantially expand the scope of criminal forfeitures without some discussion in the legislative history. It appears that Congress simply made a mistake.

Since 1992, food stamp fraud has been listed as "specified unlawful activity" for money laundering. Thus, the laundered proceeds of food stamp fraud (and any property facilitating the laundering offense) may still be forfeited, civilly or criminally, in money laundering cases.

Criminal Forfeiture Proceedings

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Chapter 6

Criminal Forfeiture Proceedings

I. Pre-indictment Preparation

A. Venue and Jurisdiction

Criminal prosecutions that seek forfeiture are properly brought in the district in which the predicate offense was committed.[1] The jurisdiction for criminal forfeiture stems from the district court's *in personam* jurisdiction over the defendant.[2] Custody and control of the specific property involved in the offense are not some prerequisites to jurisdiction.[3] Therefore, orders relating to criminal forfeiture proceedings may target property of the defendant that is located outside the territorial jurisdiction of the United States.[4]

B. Types of Property Subject to Criminal Forfeiture

In order for property to be criminally forfeited, a federal statute must authorize forfeiture. More than two hundred federal statutes provide for forfeiture as a penalty; however, relatively few provide for criminal forfeiture. The most frequently invoked criminal forfeiture statutes are discussed in chapter 5. Most criminal forfeiture statutes use

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[1] *See* Fed. R. Crim. P. 18.

[2] *See* 18 U.S.C. § 3231.

[3] *See* 21 U.S.C. § 853(l) (expressly granting authority to federal district courts to enter appropriate orders in criminal forfeiture proceedings regardless of location of property involved).

[4] *See, e.g., United States v. Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (ordering defendants to repatriate funds from foreign bank account); *United States v. Lopez*, 688 F. Supp. 92, 94 (E.D.N.Y. 1988) (ordering defendants to sign release form transferring foreign bank account to United States); *see also United States v. Ghidoni*, 732 F.2d 814, 819 (11th Cir.) (district court order requiring defendant to execute release form for foreign bank account records did not violate Fifth Amendment privilege against self-incrimination), *cert. denied*, 469 U.S. 932 (1984).

procedures for forfeiture set forth in the drug forfeiture statute, 21 U.S.C. § 853,[5] or procedures that are almost identical to those set forth in section 853. Accordingly, this chapter focuses on criminal forfeiture under section 853.[6]

C. What is Forfeitable?

Property that the Government seeks to forfeit criminally must have been involved in a federal criminal offense of which the defendant was convicted. Moreover, because criminal forfeiture is *in personam*, only property in which the defendant has an interest is subject to forfeiture under section 853.[7]

This is not to say, however, that the Government can indict and forfeit only property titled in the defendant's name.[8] For example, the Government can forfeit property held in the name of a third party if it can establish that the defendant is the true owner.[9] To prove that a third party is only a nominal owner, the Government will need to present evidence of the defendant's control over the property, such as his use of property, his receipt of rents, and his payment of repairs and maintenance.

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[5] *See, e.g.*, 18 U.S.C. § 1963 (procedures for RICO forfeiture); 18 U.S.C. §§ 1467, 2253 (procedures for obscenity and child pornography offenses).

[6] Although sections 853, 1963, 1467 and 2253 are very similar, government attorneys should be aware that some major differences exist among these statutes. For example, although criminal seizure warrants are available for property subject to forfeiture under 21 U.S.C. § 853(f), no similar provision exists under section 1963. Government attorneys undertaking forfeitures under statutes that do not simply incorporate all subsections of section 853 should closely examine the provisions of those statutes to ensure that they are similar to those of section 853 prior to relying on the material set forth herein.

[7] *See United States v. Lester*, 85 F.3d 1409, 1410 n.1 (9th Cir. 1996) (noting in dicta that defendant could have challenged forfeiture on ground that property was held by corporation, not by defendant, and that unless corporate form could be ignored, defendant's only forfeitable interest was his stock in corporation); *United States v. Riley*, 78 F.3d 367, 370-71 (8th Cir. 1996) (if corporation used by defendant to commit offense is not defendant, only defendant's interest in corporation may be forfeited, not corporation itself or its assets); *United States v. Jimerson*, 5 F.3d 1453, 1454 (11th Cir. 1993) (Government may not use ancillary proceeding to forfeit interests of third parties).

[8] *See generally* Cassella, Stefan D., "Third Party Rights in Criminal Forfeiture Cases," *Criminal Law Bulletin* [Winter 1996]: 1 (more fully discussing criminal forfeiture of defendant's property titled in third party's name).

[9] *E.g.*, *United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996) (race car titled in driver's name actually owned by defendant and, thus, properly subject to criminal forfeiture); *accord United States v. Messino*, 917 F. Supp. 1318 (N.D. Ill. 1996) (property titled in name of defendant's girlfriend subject to forfeiture); *United States v. Messino*, 917 F. Supp. 1312 (N.D. Ill. 1996) (property titled in name of defendant's father subject to forfeiture); *United States v. Messino*, 917 F. Supp. 1307 (N.D. Ill. 1996) (property titled in name of defendant's son subject to forfeiture).

The Government can also indict and forfeit a defendant's property subject to a third-party lien. For example, if the defendant owns an automobile subject to a financing lien, the Government can indict and forfeit the entire vehicle because the defendant's interest in the vehicle is indivisible. The financier will be able to preserve its interest by filing a claim in the ancillary hearing process following the defendant's conviction. Similarly, the Government can forfeit an entire parcel of real estate in which the defendant's spouse has a tenancy by the entireties or a community property interest because the defendant's interest in such a parcel is indivisible. The spouse can then file a claim in the ancillary hearing proceeding to challenge the forfeiture.[10]

In contrast, where the defendant holds a severable interest in forfeitable property, such as when he holds the property as a cotenant, the Government may indict and forfeit only the defendant's property. For example, if the defendant and his business partner each own half of the shares of a corporation, the Government can indict and forfeit only the defendant's shares of the corporation.

Usually, government attorneys should determine what property actually belongs to the defendant at the time of indictment, instead of simply forfeiting "whatever interest the defendant may have" and sorting it out later. This is because the Government may be liable for attorneys' fees under the Equal Access to Justice Act in the ancillary hearing proceeding if it recklessly forfeits a third party's property without conducting an appropriate factual investigation into the property's ownership beforehand.[11] To avoid this possibility, government attorneys should maintain thorough documentation of the factual investigation undertaken to determine the ownership of assets listed in the indictment. In addition, in plea agreements, government attorneys should require the defendant to represent, and the district court in the Rule 11 colloquy to find that the defendant has an interest in the specific property interest which is being forfeited, even though such a finding is not required by law.[12]

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[10] *See, e.g., United States v. Henry*, 850 F. Supp. 681, 685 (M.D. Tenn. 1994) (spouse with community property interest must challenge forfeiture in ancillary hearing), *aff'd mem.*, 64 F.3d 664 (6th Cir. 1995) (Table), *cert. denied sub nom. Jo-Ann Henry v. United States*, 516 U.S. 1147 (1996); *United States v. Hilliard*, 818 F. Supp. 309, 315 (D. Colo. 1993) (forfeiture count not subject to dismissal on ground that subject property jointly owned by innocent spouse). *Cf. United States v. Lester*, 85 F.3d 1409, 1413 (9th Cir. 1996) (undivided one-half community property interest of defendant's spouse exempt from forfeiture).

[11] *See United States v. Bachner*, 877 F. Supp. 625, 627 (S.D. Fla. 1995) (section 853(n) proceedings are civil in nature so EAJA applies); *see, e.g., United States v. Douglas*, 55 F.3d 584, 588-89 (11th Cir. 1995) (affirming district court's award of EAJA fees based on fact that the Government "apparently made no investigation into factual background prior to seeking forfeiture").

[12] *See Libretti v. United States*, 516 U.S. 29, 36 (1995) (because criminal forfeiture is element of sentencing and not underlying offense, factual basis requirement of Fed. R. Crim. P. 11(f) does not apply).

D. Effect of State Law

Section 853(a) requires forfeiture of property falling within its scope "irrespective of any provision of [s]tate law." This means that defendants cannot prevent federal forfeiture of their assets by asserting idiosyncracies and protections offered by state corporate, business, or domestic relations laws.[13] For example, state law homestead exemptions are inapplicable in the forfeiture context.[14]

On the other hand, state law defines the defendant's interests in property vis a vis third parties.[15]

E. Pre-indictment Planning

Prior to seeking an indictment that will include a forfeiture count, the Government must determine the extent of the defendant's interest in property subject to forfeiture, as well as his other legitimate property interests (particularly in jurisdictions that permit pretrial restraint of substitute assets). This determination will rely on intensive investigation through such methods such as: evaluation of the value and condition of the defendant's property; title searches on real property, conveyances, or other property with public title records; estimates of the defendant's equity in specific assets; identification of the existence, amount, and validity of liens and mortgages; identification of other potential third-party interests and their addresses for notification at the commencement of the ancillary hearing proceeding; and the date those interests were acquired (for purposes of anticipating the outcome of the ancillary hearing).

In complex forfeiture cases, the pre-indictment investigation will likely entail the unraveling of complicated financial maneuvering and schemes. Routine investigative methods, such as conducting surveillance, reviewing state corporation records, or enlisting the cooperation of a defendant's colleagues, acquaintances, or employees, can sometimes prove useful in this regard. Beyond these routine measures, however, the Government should also make use of more comprehensive resources for financial information available under federal law.

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[13] *See, e.g., United States v. Stazola*, 893 F.2d 34, 38 (3d Cir. 1990) (federal forfeiture law supersedes Pennsylvania law prohibiting eviction in less than 30 days).

[14] *See United States v. Curtis*, 965 F.2d 610, 616 (8th Cir. 1992) (federal forfeiture law preempts state homestead laws); *accord United States v. One Parcel of Property Located at 1606 Butterfield Rd.*, 786 F. Supp. 1497, 1504 (N.D. Iowa 1991); *United States v. Martenson*, 780 F. Supp. 492, 495 (N.D. Ill. 1991); *United States v. One Single Family Residence Located at 212 Airport Rd. S.*, 771 F. Supp. 1214, 1216 (S.D. Fla. 1991).

[15] Ancillary proceedings are discussed in part VIII of this chapter, *infra*.

Perhaps the most important of these sources are search warrants and Grand Jury subpoenas, which can yield vital documentation of the defendant's financial and business transactions. If the defendant is aware that he is the subject of an investigation, the Government should serve subpoenas *duces tecum* on the defendant and his accountants, employees, and corporate officers as necessary to ferret out his assets. In addition, the Government may serve subpoenas *ad testificandum* on these same individuals to determine the location of the defendant's assets, the extent of his ownership interest, and the existence of third-party owners, as well as to determine whether the defendant has employed third-party nominee owners to conceal his ownership of assets. The Government can also serve subpoenas *duces tecum*, along with a court order of nondisclosure, on the financial institutions with which the defendant does business because such subpoenas are exempt from disclosure under the Right to Financial Privacy Act.[16]

Other valuable sources include tax information obtained from the Internal Revenue Service through *ex parte* orders under 26 U.S.C. § 6103 and data procured outside the Grand Jury process from private financial institutions under exceptions to the Right to Financial Privacy Act.[17] With the increasing use of offshore and foreign banks for money laundering, INTERPOL is a useful source of information and can assist in certain aspects of foreign banking investigations. Many state and local real property, tax, and public business records are available on LEXIS. Another invaluable source of information is the Financial Crimes Enforcement Network (FinCEN) in Tysons Corner, Virginia, which maintains for federal law enforcement agencies, a wide variety of intelligence databases, federal agency criminal databases, and commercial system databases. Finally, the Office of International Affairs of the Criminal Division can request information from foreign sources pursuant to mutual legal assistance treaties (also known as MLATs) and letters rogatory.

II. Restraint of Assets

Under 21 U.S.C. § 853(e), the Government may obtain either pre- or post-indictment restraining orders to secure property subject to criminal forfeiture. Jurisdiction to enter a restraining order lies only in the district in which the criminal investigation or prosecution is being conducted.[18] However, the restraining order applies to all forfeitable assets within its

[16] *See* 12 U.S.C. §§ 3413(i), 3420.

[17] *Id.*

[18] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386.

scope, regardless of their location.[19] The authority to issue a restraining order lies solely with district court judges and cannot be delegated to a magistrate judge.[20] Procedures on issuance of restraining orders are contingent on whether restraint is pre-indictment or post-indictment.

A. Pre-indictment Restraining Orders

Prior to indictment, the Government may file a motion with the district court for a ten-day, *ex parte* temporary restraining order.[21] In order to obtain this temporary restraining order, the Government must establish probable cause that: (1) the property will be subject to forfeiture upon conviction; and (2) provision of notice to the target that the Government is seeking the temporary restraining order will jeopardize the availability of the property for forfeiture.[22]

The Government's motion for a ten-day, *ex parte* temporary restraining order will generally consist of a motion that summarizes the pertinent facts, sets forth the requirements for obtaining a temporary restraining order under section 853(e)(2), and explains how the facts fulfill these requirements. The motion should be accompanied by a law enforcement agent's affidavit setting forth in greater detail facts establishing the forfeitability of the property, as well as facts supporting the conclusion that provision of notice to the target will jeopardize the property's availability for forfeiture.

By operation of law, the temporary restraining order "shall expire not more than ten days after the date on which it is entered."[23] The court may, however, extend the *ex parte* temporary restraining order upon either a showing of "good cause" by the Government or the consent of the target whose assets are subject to restraint.[24]

Although the target is not entitled to a notice or hearing when the Government applies for a temporary restraining order under section 853(e)(2), a hearing "shall be held" upon

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[19] *See* 21 U.S.C. § 853(l).

[20] *See* 28 U.S.C. § 636.

[21] *See* 21 U.S.C. § 853(e)(2).

[22] *Id.*

[23] *Id.*

[24] *Id.* According to section 853(e)(2), the court has the discretion to order that the *ex parte* temporary restraining order expire less than ten days after its issuance. Although district courts generally grant *ex parte* temporary restraining orders for the full ten days permitted by statute, government attorneys should be aware that the court may order that the temporary restraining order be effective for less than that amount of time.

request "at the earliest possible time and prior to the expiration" of the temporary restraining order.[25] The Federal Rules of Evidence are inapplicable to this hearing.[26]

The statute does not specify upon whose "request" an adversarial hearing must be held. Accordingly, government attorneys may want to include in the draft order granting the Government's motion for an *ex parte* temporary restraining order a provision scheduling a hearing on the last date on which the temporary restraining order is in effect. This measure discourages the target from requesting a hearing at an earlier date, thereby providing the Government with more time to prepare for the hearing.

The Government bears the burden of proof at the hearing. In order to prevail, the Government must establish a substantial probability that: (1) the Government will prevail on the issue of forfeiture at trial; (2) failure to restrain the property will result in its destruction, removal, or unavailability for forfeiture; and (3) the need to preserve the availability of the property outweighs the hardship of its restraint on the target.[27]

If the Government carries its burden of proof, the court will convert the temporary restraining order into a pre-indictment restraining order. This order will be effective for "not more than 90 days" unless either the court extends it upon a showing of good cause or an indictment or information is filed prior to its expiration.[28] The Federal Rules of Civil Procedure apply to any litigation that may result from the entry of a pre-indictment restraining order.[29]

The Government may obtain the 90-day restraining order available under section 853(e)(1)(B) without first obtaining the ten-day temporary restraining order under section 853(e)(2). Under section 853(e)(1)(B), however, the Government must give advance notice of the application for the restraining order to any persons with an interest in the property to

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[25] *See* 21 U.S.C. § 853(e)(2).

[26] *See* 21 U.S.C. § 853(e)(3).

[27] 21 U.S.C. § 853(e)(1)(B)(i) and (ii). Because hearsay is admissible at this hearing under section 853(e)(3), the Government may generally meet its burden of proof on the first two requirements under section 853(e)(1)(B) by having a law enforcement agent adopt the contents of the affidavit that was submitted with the Government's motion for the ten-day *ex parte* temporary restraining order under section 853(e)(2). Additional evidence regarding the third requirement may then be submitted through oral testimony.

[28] 21 U.S.C. § 853(e)(1).

[29] *See United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986) (Fed. R. Civ. P. 65 applies to all restraining orders unless Congress provides otherwise), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987).

be restrained, as well as provide an opportunity for a hearing. Accordingly, in most cases, government attorneys will find it necessary at the pre-indictment stage to first obtain the ten-day *ex parte* temporary restraining order in order to prevent the target from alienating, removing, or concealing the property upon receipt of notice.

B. Post-indictment Restraining Orders

Upon the return of an indictment or criminal information that includes a forfeiture charge, the Government may file a motion for a restraining order against the assets subject to forfeiture.[30] The Government files its application for a post-indictment restraining order *ex parte* in the district where the criminal case is pending. The motion should establish that: (1) the indictment or information charges the defendant with an offense for which forfeiture may be ordered; and (2) the property sought to be restrained would, in the event of conviction, be subject to forfeiture.[31] Most courts require compliance with Fed. R. Civ. P. 65.[32]

The indictment should be returned under seal until the court has issued the restraining order and law enforcement agents have served it so that the defendant does not prematurely learn of the Government's intent to forfeit his assets. At the time of the defendant's arrest, law enforcement agents should serve the restraining order upon the defendant, the defendant's counsel, and any other persons or entities with an interest in or control over the restrained assets, such as any banks at which restrained accounts are located. If the defendant is being summoned instead of arrested, service should occur as soon as possible after the restraining order is issued. The agents should record the date and time of service, as well as the names of the persons served, for proof of notice in any subsequent contempt proceedings in the event the restraining order is not obeyed.

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[30] *See* 21 U.S.C. § 853(e)(1)(A).

[31] *Id.*

[32] *See United States v. Monsanto*, 836 F.2d 74, 83 (2d Cir. 1987) (requirements of Fed. R. Civ. P. 65 are applicable to issuance of post-indictment restraining order), *rev'd on other grounds*, 491 U.S. 600 (1989); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.) (merits of pretrial order restraining forfeitable assets are governed by civil standards for temporary restraining orders and preliminary injunctions), *cert. denied sub nom. Milburn v. United States*, 474 U.S. 994 (1985); *accord United States v. Riley*, 78 F.3d 367 n.2 (8th Cir. 1996) (civil appellate rules govern appeal from order imposing pretrial restraint); *United States v. Monsanto*, 924 F.2d 1186, 1196 (2d Cir.) ("*Monsanto IV*"), *cert. denied*, 502 U.S. 943 (1991); *United States v. Stazola*, 893 F.2d 34, 37 (3d Cir. 1990); *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985).

Government attorneys should strongly consider seeking post-indictment restraining orders where the Government has not been able to locate all of the defendant's forfeitable assets. For example, if a defendant generated $50,000 in drug proceeds, but the Government, at the time of indictment, has located only $10,000, then an order restraining the entire $50,000 puts the defendant on notice that should he dissipate any portion of that $50,000, regardless where it is located, he may be subject to contempt of court. Government attorneys should note that such a restraining order does not seek to restrain the defendant's substitute assets, but rather seeks to restrain the actual property he generated as a result of his criminal activity, regardless of its location.

Section 853(e) itself does not set forth any hearing requirements incidental to the issuance of a post-indictment restraining order, and no circuit requires that an adversarial hearing be held prior to the issuance of a such an order.[33] The courts are divided, however, regarding whether due process requires an adversarial hearing following the issuance of a post-indictment restraining order under section 853(e)(1)(A).

The Supreme Court was presented with this issue in *United States v. Monsanto*, 491 U.S. 600 (1989), but declined to decide it. The Court did hold, however, that assets may be restrained pretrial based on a finding of probable cause that the assets are forfeitable. The Court reasoned that because probable cause is a sufficient standard for the issuance of search and seizure warrants and the detention of defendants pending trial, it is equally sufficient for the less intrusive act of restraining assets pending trial.[34]

Following the lead of *Monsanto*, the Tenth and Eleventh Circuits have held that the probable cause finding regarding the forfeitability of the assets inherent in the return of the indictment or information is a sufficient basis for the issuance of a restraining order, and accordingly no hearing is required.[35] The legislative history of section 853(e)(1)(A) supports

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[33] *See Monsanto IV*, 924 F.2d 1186, 1196 (2d Cir. 1991); *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir.) (same), *cert. denied sub nom. Caraballo-Lujan v. United States*, 493 U.S. 876 (1989).

[34] *See United States v. Monsanto*, 491 U.S. 600, 615-16 (1989); *accord United States v. Bouler*, 799 F. Supp. 581, 583 (W.D.N.C. 1992) (probable cause established by indictment is sufficient basis for entry of pre-conviction restraining order); *see also United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995).

[35] *See United States v. Bissell*, 866 F.2d 1343, 1352-54 (11th Cir. 1989) (same); *United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986); *In re Protective Order*, 790 F. Supp 1140 (S.D. Fla. 1992); *United States v. Draine*, 637 F. Supp. 482, 485 (S.D. Ala. 1986). *But see United States v. Nichols*, 841 F.2d 1485, 1491 n.4 (10th Cir. 1988) (leaving open question whether hearing required if defendant raises Sixth Amendment issue).

this view, although it does not exclude the possibility of a hearing where, for example, the defendant alleges that the wrong property was restrained.[36]

On the other end of the spectrum, two district courts have required that a post-restraint hearing be conducted before a restraining order is converted into a preliminary injunction.[37] These courts have limited the issue at the hearing to the forfeitability of the property, not the validity of indictment.[38]

The Second, Fifth, Seventh, and Ninth Circuits have adopted somewhat of a middle ground by requiring post-restraint hearings only in cases where the defendant needs the restrained property to retain counsel in his criminal prosecution.[39] The Seventh Circuit, and at least one district court, have required the same type of due process hearing where the Government has used civil forfeiture procedures to "arrest" the defendant's only assets available to retain counsel.[40] These courts have taken this position in an effort to balance the

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[36] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3385 ("While the court may consider factors bearing on the reasonableness of the order sought, it is not to 'look behind' the indictment or require the [G]overnment to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order.").

[37] *See United States v. Sellers*, 848 F. Supp. 73, 76 (E.D. La. 1994); *United States v. O'Brien*, 836 F. Supp. 438, 441 (S.D. Ohio 1993).

[38] *See United States v. Sellers*, 848 F. Supp. 73, 76 (E.D. La. 1994) (Government must comply with Rule 65 requirements at hearing; court does not question validity of indictment, but determines whether and to what extent to issue restraining order); *United States v. O'Brien*, 836 F. Supp. 438, 441 (S.D. Ohio 1993) (court not to inquire into probable cause for indictment, but the Government must establish substantial likelihood of success on both merits of criminal case and forfeiture).

[39] *See, e.g., Monsanto IV,* 924 F.2d 1186, 1195; *United States v. Roth*, 912 F.2d 1131, 1133-34 (9th Cir. 1990) (Government must establish substantial likelihood of success on merits together with balancing of hardships on parties and proof of public interest in granting restraining order) (following *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985)); *United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988), *cert. denied sub nom. Estevez v. United States*, 492 U.S. 908 (1989); *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986)

[40] *See United States v. Michelle's Lounge*, 39 F.3d 684, 700-01 (7th Cir. 1994); *United States v. All Funds*, 767 F. Supp. 36, 42 (E.D.N.Y. 1991); *see also United States v. $876,915.00 U.S. Currency*, 874 F.2d 104, 107 (2d Cir. 1989) (in case expressly intended not to be precedential, court allowed use of forfeitable funds to pay attorney's fees because of defendant's lengthy incarceration pending *Monsanto* decision by the Supreme Court).

government's interest in securing a full and complete forfeiture against the defendant's qualified right to counsel.[41]

Government attorneys may avoid the necessity of a hearing by voluntarily releasing some assets to the defendant.[42] Government attorneys considering this type of "settlement," however, should be aware that the Assistant Attorney General of the Criminal Division must approve the release of any restrained assets to pay for defense counsel's fees. Fundamental to that approval are reasonable grounds to believe that the assets sought to be released are not subject to forfeiture.[43]

Logic dictates that, because knowledge of the extent and availability of the defendant's assets lies peculiarly with the defendant, the defendant should bear the burden of proof on the issue whether he has any unrestrained assets available to pay attorney's fees and living expenses.[44] Government attorneys should request that the court order the defendant to submit a signed, sworn affidavit declaring either that: (1) the defendant has no unrestrained assets; or (2) although the defendant has unrestrained assets, they are insufficient to pay his attorney's fees.[45] If the defendant admits that he has unrestrained assets, his sworn statement should contain a full account of those assets, including their identity, location, and total value, as well as the value of the defendant's equity interest in them. Because of the relative ease with which a defendant can fabricate his financial status, law enforcement agents should independently verify the details of any statement the defendant submits.

Another method of avoiding a full-blown adversarial hearing is to limit the scope of the restraining order to less than all of the assets subject to forfeiture in the indictment. For

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[41] *See United States v. Caplin & Drysdale*, 491 U.S. 617, 624-28 (1989) (defendant does not have constitutional right to use forfeitable assets to retain counsel of choice); *United States v. Monsanto*, 491 U.S. 600, 614 (1989) (same).

[42] *See, e.g., United States v. Moya-Gomez*, 860 F.2d 706, 730 (7th Cir. 1988) ("If the [G]overnment elects not to disclose sufficient information to justify its retention of all of the assets subject to the freeze order, then the court must order the release of funds in an amount necessary to pay reasonable attorneys' fees for counsel of sufficient skill and experience to handle the particular case.").

[43] *See United States Attorneys' Manual* § 9-111.700. Note that in the circuits that permit the pretrial restraint of substitute assets, the Government is required by Department of Justice policy to release from restraint such substitutes assets as the defendant may require for living expenses and attorney's fees. *See Asset Forfeiture Policy Manual* (1996), Chap. 9, Sec. I.D, at p. 9 — 2.

[44] *But see All Funds*, 767 F. Supp. at 42 (requiring the Government to prove by preponderance of evidence that defendant had other unrestrained assets with which to pay counsel).

[45] *See, e.g., Michelle's Lounge*, 39 F.3d at 688 (claimant/defendant filed affidavit claiming his counsel had not been paid in months and he had no assets with which to pay him).

example, the Government may wish to limit the restraining order to the defendant's personal property, thereby excluding real property, which is more difficult to conceal or dissipate. Such a limitation of the scope of the restraining order does not prevent the Government from seeking a forfeiture judgment against all of the assets listed in the indictment.[46] Of course, the absence of a restraining order allows the defendant freely to alienate his interest in the property unless some other device, such as the notices of *lis pendens* discussed below, are available to secure the property.

Government attorneys may file a *lis pendens* against any real property named in the indictment without having to conduct an adversarial hearing.[47] No bright line rule exists to determine how soon after restraint the hearing must take place.[48] The general rule is that it must occur within a "meaningful time."[49]

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[46] *See Monsanto IV*, 924 F.2d 1186, 1195 (2d Cir. 1991) ("The hearing which we require to justify *continuation* of a restraint is not being forced upon the [G]overnment. If the [G]overnment determines in any case that an adversary hearing in advance of a criminal trial is inadvisable, it always has the option of forgoing the restraint and obtaining forfeiture after conviction.") (emphasis in original).

[47] *See United States v. Register*, No. 93-305-CR-T-17(A) (M.D. Fla. Sept. 22, 1995) (unpublished) (no pre- or post-filing hearing required because *lis pendens* is not taking). Government attorneys should determine what practice is permissible in their district before filing a *lis pendens*.

[48] *Compare United States v. Michelle's Lounge*, 39 F.3d 684, 700 (7th Cir. 1994) (hearing in civil forfeiture case should occur shortly after indictment returned to be timely) *with United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989) (same) (merger of post-restraint hearing with trial permissible if balance of factors enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972), indicate such delay is reasonable) *and United States v. Perholtz*, 842 F.2d 343, 367 (D.C. Cir.) (defendant not entitled to hearing separate from criminal trial in which forfeitability of assets would be determined), *cert. denied*, 488 U.S. 821 (1988).

[49] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *United States v. Moya-Gomez*, 860 F.2d 706, 762 (7th Cir. 1988); *cf. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 569-70 (1983) (finding no due process violation despite 18-month delay between seizure and institution of civil forfeiture proceedings where claimant/defendant failed to assert right to due process).

Although the precise scope of the hearing varies from circuit to circuit, the general consensus is that the scope should be limited to the forfeitability of the assets at issue.[50] This conclusion is supported by the legislative history of the statute, which directs that:

> While the court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the [G]overnment to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order.[51]

At the hearing, the Government may meet its burden in a number of ways. For example, because the Federal Rules of Evidence do not apply at this hearing,[52] the government attorney may proffer evidence of probable cause. Such a proffer is consistent with the common practice in detention hearings, and is supported by the legislative history of section 853(e).[53] Another method is to rely upon prior independent findings that the assets are subject to forfeiture, including the Grand Jury's return of the indictment and, if applicable, the district court's issuance of a pre-indictment restraining order under section 853(e)(1)(B). Any relevant discoverable documents, such as bank records and invoices, may also be tendered to the court. The Government may also present the summary testimony of a law enforcement agent in the same manner as at a suppression hearing or preliminary hearing.[54]

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[50] *See, e.g., United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (neither third party nor defendant has statutory right to use restraining order hearing to look behind Grand Jury indictment to challenge criminal case on the merits, but court may make exceptions to avoid due process violations); *United States v. Michelle's Lounge*, 39 F.3d 684, 698-701 (7th Cir. 1994) (scope of hearing limited to existence of probable cause to forfeit restrained assets; assets released only if defendant "rebuts the [G]overnment's showing of probable cause and the [G]overnment cannot or chooses not to bring forth additional evidence"); *United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988) (court should limit inquiry to forfeiture issues). *But see United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) (district court may issue restraining order only if Government demonstrates that defendant is likely guilty and property subject to forfeiture); *Monsanto IV*, 924 F.2d 1186, 1197 (2d Cir. 1991) (court required to review probable cause for both commission of offense and forfeiture of restrained property).

[51] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3385.

[52] *See* section 853(e)(3).

[53] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3387-88.

[54] *See United States v. Roth*, 912 F.2d 1131, 1134 (9th Cir. 1990) (testimony of an Internal Revenue Service agent at probable cause hearing on preliminary injunction). No cases have addressed the question as to whether the Government must produce Jencks material at a post-restraint due process hearing. Government attorneys should argue that production of Jencks material is not required because a post-restraint hearing does not fall within the scope of Fed. R. Crim. P. 26.2. *See* Fed. R. Crim. P. 26.2(g).

After the Government has made its showing, the defendant may present evidence in rebuttal.[55]

C. Performance Bond

As an alternative to issuing a restraining order, the court may require the defendant to execute a satisfactory performance bond in order to preserve the availability of the property for forfeiture.[56] If the bond is obtained through a surety company, it must be one of the government-approved surety companies listed in the Federal Register.[57]

Obtaining a surety bond as a method of assuring the availability of a defendant's property for forfeiture, however, is usually not a practical solution. A surety bond may not be feasible in high value forfeitures because the bonding company likely will require 100 percent collateral. The defendant may also object to the loss of 10 percent of the value of the asset, which is the usual fee associated with the bond.

D. Repatriation of Foreign Assets

A district court may "take any...action to preserve the availability of [forfeitable] property"[58] and has jurisdiction to enter orders under section 853 "without regard to the location of any property which may be subject to forfeiture."[59] Accordingly, the court has the

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[55] *See, e.g., United States v. Michelle's Lounge*, 39 F.3d 684, 700 (7th Cir. 1994) (defendant can rebut Government's probable cause showing by establishing that he is innocent owner, that confidential informant on which Government relied is unreliable, or that property is not tainted); *United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989) (same) (requiring defendant to establish "that the government wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity, but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial"). *Cf.* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3387-88 (declaring inapplicability of Federal Rules of Evidence to section 853(e) restraining order hearings because disclosure of witnesses and informants in racketeering and drug trafficking cases has great potential for intimidation of and danger to witnesses). It is worth noting that the suggestion in *Michelle's Lounge* that the defendant should be able to rebut the Government's probable cause showing in the indictment by establishing that he is an innocent owner runs afoul of the statutory directive that a party may not challenge the validity of the indictment in seeking relief from a restraining order.

[56] *See* section 853(e)(1).

[57] *E.g.*, 59 Fed. Reg. 34138 (1994) (codified at 31 C.F.R. § 9304).

[58] *See* section 853(e)(1).

[59] *See* section 853(l).

authority to compel the defendant to repatriate to the United States any foreign-held assets that are subject to forfeiture.[60]

A repatriation order is most effective against fungible assets, such as funds in bank accounts. With regard to real estate and personal property such as conveyances, the Government may seek a court-ordered sale of the property, followed by repatriation of the proceeds of the sale.

The repatriation order should describe the property as specifically as possible, including any applicable account numbers, and specify a deadline for compliance by the defendant. If the identity of foreign accounts is unknown, the repatriation order should include a general requirement that the defendant repatriate all foreign assets up to the dollar amount of the charged forfeiture.

Repatriation of assets serves to protect the Government's interest in preserving property subject to forfeiture. Thus, the act of repatriation is generally not considered compelled testimony within the scope of the Fifth Amendment.[61] However, if the defendant asserts a privilege against self-incrimination to avoid repatriation, the Government may agree not to use the act of repatriation as evidence in its case in chief, and may grant the defendant formal use immunity regarding the act of production.[62] Such a grant will generally have little adverse consequence for the Government because it only prevents the Government from using the act of production, and the inevitable authentication of documents and repatriated assets, against the defendant at trial.

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[60] *See, e.g., United States v. Sellers*, 848 F. Supp. 73, 76 (E.D. La. 1994) (restraining order requiring defendant to repatriate foreign bank accounts); *United States v. Lopez*, 688 F. Supp. 92, 94 (E.D.N.Y. 1988) (ordering defendant to execute release form to permit foreign bank to repatriate account funds to United States pursuant to 21 U.S.C. § 853(f) seizure warrant). In circuits that prohibit pretrial restraint of substitute assets, the repatriation order should be drafted so that it requires the defendant to repatriate only directly forfeitable assets.

[61] *See United States v. Ghidoni*, 732 F.2d 814, 819 (11th Cir.) (district court order requiring defendant to execute release form for foreign bank account records did not violate Fifth Amendment privilege against self-incrimination), *cert. denied*, 469 U.S. 932 (1984); *United States v. Sellers*, 848 F. Supp. 73, 77 (E.D. La. 1994) (forced repatriation does not violate defendant's Fifth Amendment rights because Government's repatriation application is "tool of preservation and not discovery").

[62] *See United States v. Doe*, 465 U.S. 605, 616 (1984) (act of producing business records cannot be compelled without formal grant of use immunity).

If the defendant refuses to comply with a repatriation order, the normal sanctions of contempt apply.[63] Typically, the court will hold the defendant in civil contempt and impose a daily or weekly fine until the defendant complies with the order,[64] but the court may alternatively order the defendant incarcerated until compliance.[65]

E. Substitute Assets

Most circuits that have considered the issue, including the Third, Fifth, Eighth, and Ninth Circuits, have held that pretrial restraint of substitute assets[66] is not permissible.[67] This bar on pretrial restraint of substitute assets logically extends to pretrial seizure of such assets as well.[68] In these circuits, the Government may seek the restraint of substitute assets pursuant to the All Writs Act, 28 U.S.C. § 1651, following the jury's return of a special verdict of forfeiture.

Each of the cases holding that pretrial restraint of substitute assets is impermissible focused on the plain language of section 853(e). That subsection provides for the availability of pretrial restraint "of property described in subsection (a)," which in turn provides for the forfeiture of proceeds, facilitating property, and other "directly forfeitable" assets. Because subsection (e) does not refer to subsection (p), the substitute assets provision, the circuits listed above reasoned that Congress did not intend to subject substitute assets to pretrial restraint.

Nevertheless, government attorneys in these circuits may still file a *lis pendens* in the county land records where real property is located to preserve its availability for forfeiture as a substitute asset. This is because a *lis pendens* is a part of state law, which exists separate and apart from the statutory forfeiture scheme. Because the cases discussed above turn on

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[63] *See* discussion of penalty for violation in part II.H of this chapter, *infra*.

[64] *See, e.g., United States v. Lopez*, 688 F. Supp. 92, 94-95 (E.D.N.Y. 1988) (holding defendants in contempt for failure to comply with repatriation order and setting fine of $2,500 per week until defendants complied).

[65] *See* 18 U.S.C. § 401.

[66] *See* 21 U.S.C. § 853(p).

[67] *See United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *In Re Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993). *But see United States v. Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (permitting restraint of facilitating property in money laundering case; facilitating property distinguished from substitute assets).

[68] *See United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993) (dicta); *cf. United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis. 1994) (if substitute assets can be restrained they can also be seized).

the interpretation of section 853, their holding does not affect the utility or availability of a *lis pendens* to notify third parties that real property is subject to forfeiture as a substitute asset.

On the other hand, the Fourth Circuit and perhaps the Second Circuit, in addition to district courts in the Sixth, Seventh, and Eleventh Circuits, have held that section 853(e) permits pretrial restraint of substitute assets.[69]

The Government may also consider obtaining a restraining order against substitute assets under the fraud injunction statute, 18 U.S.C. § 1345, in appropriate cases.[70] Government attorneys should be aware, however, that whether in fact this statute permits restraint of substitute assets is subject to debate.

F. Fugitives

The fugitive disentitlement doctrine provides that a fugitive defendant waives the right to appeal his conviction.[71] The rationale for this doctrine is that a defendant who is not willing to suffer the penalties of his crime should not be afforded "an opportunity to improve his or her position by challenging the validity of the conviction."[72]

A number of courts have extended this doctrine by holding that a fugitive defendant may not challenge the issuance of a section 853(e) restraining order.[73]

After the recent Supreme Court decision in *United States v. Degen*, ___ U.S. ___,

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[69] *See In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990), *cert. denied sub nom. McKinney v. United States*, 500 U.S. 952 (1991); *United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988); *United States v. Schmitz*, 153 F.R.D. 136, 140 (E.D. Wis. 1994); *United States v. O'Brien*, 836 F. Supp. 438, 441 (S.D. Ohio 1993); *United States v. Swank Corp.*, 797 F. Supp. 497, 501-02 (E.D. Va. 1992); *United States v. Skiles*, 715 F. Supp. 1567, 1568 (N.D. Ga. 1989); *see also United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997) (holding that reference to "subsection (a)" property in section 853(c) applies to substitute assets, and stating, *in dicta*, that same would apply to pretrial restraint under section 853(e)).

[70] *See* discussion of civil fraud injunction statute in part IV of this chapter, *infra*.

[71] *See Molinaro v. New Jersey*, 396 U.S. 365, 365-66 (1970); *accord Smith v. United States*, 94 U.S. 97 (1876).

[72] *In Re Martin*, 1 F.3d 1351, 1356 (3d Cir. 1993)

[73] *See id.* at 1356-57; *United States v. Eagleson*, 874 F. Supp. 27, 30 (D. Mass. 1994) (following *Martin*). *But see United States v. Veliotis*, 586 F. Supp. 1512, 1516 (S.D.N.Y. 1984) (recognizing fugitive defendant's motion to vacate restraining order in light of constitutional nature of claim).

116 S. Ct. 1777 (1996), which held that the fugitive disentitlement doctrine does not bar a fugitive in a criminal prosecution from challenging the civil forfeiture of his property,[74] the continuing validity of these cases is unclear. On the one hand, litigation regarding pretrial restraining orders is much like a civil action. Many courts in fact recognize this similarity by applying the Federal Rules of Civil Procedure to such litigation.[75] Following *Degen*, courts may decide that a fugitive defendant has a right to object to the pretrial restraint or seizure of his property as a matter of due process despite his fugitive status.[76]

On the other hand, the rationale on which *Degen* relied to reach its holding arguably does not apply with equal force to a criminal forfeiture case. In a civil forfeiture case, the Government's threshold burden is merely to show probable cause that the property was connected to a crime. There is no risk of delay or frustration in determining the merits of the Government's claims or in enforcing a resulting forfeiture judgment.[77] In contrast, a prerequisite to criminal forfeiture is conviction of the defendant. If the defendant is a fugitive, the defendant cannot be prosecuted, and the merits of the forfeiture cannot be adjudicated.

Moreover, *Degen* expressed "disquiet" at the spectacle of a criminal defendant residing beyond the jurisdiction of the criminal courts, yet at the same time defending a directly-related civil action in those same courts.[78] Although the Court resolved this concern by granting precedence to "the right of a citizen to defend his property against attack in a court [as a] corollary to the plaintiff's right to sue there,"[79] a stronger case exists for applying the fugitive disentitlement doctrine to a defendant challenging the pretrial restraint or seizure of his assets in a criminal forfeiture case. Accordingly, a district court should be less reluctant to apply the fugitive disentitlement doctrine post-*Degen* where the defendant refuses to appear for purposes of prosecution but nevertheless wishes to challenge the restraint of his assets not only in the same court, but in the same action from which he is a fugitive. After

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[74] *United States v. Degen*, ___ U.S. ___, 116 S. Ct. 1777, 1781 (1996).

[75] *See United States v. Monsanto*, 836 F.2d 74, 83 (2d Cir. 1987) (requirements of Fed. R. Civ. P. 65 are applicable to issuance of post-indictment restraining order); *accord United States v. Riley*, 78 F.3d 367 n.2 (8th Cir. 1996); *Monsanto IV*, 924 F.2d 1186, 1196 (2d Cir. 1991); *United States v. Stazola*, 893 F.2d 34, 37 (3d Cir. 1990); *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir. 1985).

[76] *See United States v. Veliotis*, 586 F. Supp. 1512, 1516 (S.D.N.Y. 1984).

[77] *See United States v. Degen*, ___ U.S. ___, 116 S. Ct. 1777, 1781 (1996).

[78] *Id.* at 1783.

[79] *Id.*

all, the defendant himself could defend against the criminal forfeiture, thereby alleviating any due process concerns, by submitting to the jurisdiction of the criminal court.[80]

The best option in cases in which the defendant is a fugitive is for the government attorney to file a civil forfeiture action. By doing so, the government attorney avoids not only litigating the question whether *Degen* applies to criminal forfeitures, but also holding a due process hearing and disclosing portions of the criminal case if the court rules that *Degen* does apply. The traditional rules of civil discovery will apply, but the government attorney can guard against abuse of these rules by asking the court to enter protective orders, exercise discretion in managing the civil forfeiture case so as to avoid interference with the criminal case (*e.g.*, by controlling or limiting the form of proof or, in the extreme case, the theories the absent claimant may pursue), and impose a range of sanctions, including dismissal against the fugitive should he fail to cooperate or comply with the court's orders.[81] Most importantly, filing a civil forfeiture action enables the Government to obtain a forfeiture judgment on the property notwithstanding the defendant's fugitive status. Otherwise, the Government will have to wait until the defendant is apprehended to pursue a criminal forfeiture judgment.[82]

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[80] *See In re Billman*, 915 F.2d 916, 922 (4th Cir. 1990) (applying *Barker v. Wingo*, 407 U.S. 514 (1972), balancing test to determine that third-party claimant was in no position to complain about delay of resolution of her claim where fugitive whom claimant was sustaining caused delay in criminal trial), *cert. denied sub nom. McKinney v. United States*, 500 U.S. 952 (1991). Prior to *Degen*, the circuits were divided regarding whether the fugitive disentitlement doctrine prevented a fugitive defendant from challenging the civil forfeiture of his property. *See* chapter 2 of this manual. Government attorneys in circuits that have not ruled on the applicability of the fugitive disentitlement doctrine to criminal forfeitures should be familiar with their circuit's pre-*Degen* position on the applicability of the doctrine to civil forfeitures, as it is a good indication whether the circuit considers the defendant's due process rights an insurmountable obstacle to achieving the goals of the doctrine.

[81] *See Degen*, ___ U.S. at ___, 116 S. Ct. at 1782 (expressly approving use of such measures to protect Government's legitimate interest in avoiding abuse and manipulation of process by fugitive claimants).

[82] Filing a civil forfeiture action in cases in which the defendant is a fugitive no longer poses double jeopardy concerns. *See United States v. Ursery*, ___ U.S. ___, 116 S. Ct. 2135, 2140 (1996) (civil forfeiture does not constitute punishment under Double Jeopardy Clause).

G. Third Parties

Third parties are subject to the terms of both pre- and post-indictment restraining orders obtained under section 853(e).[83] The language of the restraining order should not be limited to the defendant, but instead should be worded expansively to include his agents, family members, and attorneys.

In order to eliminate any confusion regarding the scope of the restraining order, the order should specifically advise third-party custodians of the defendant's assets that those assets are subject to restraint. For example, an order that restrains a defendant from withdrawing funds from his bank account should also advise the bank not to release any funds presently held in the defendant's account and, likewise, to restrain any funds that are deposited into the account after the order takes effect.

As a general rule, third parties may not intervene in a criminal forfeiture matter or commence an action against the Government to adjudicate a forfeiture matter except as provided for in the ancillary hearing process under 21 U.S.C. § 853(n).[84] At least one court has extended this principle to third-party challenges to pretrial restraining orders.[85]

In contrast, other courts have held that a third party is entitled to object to the scope of a restraining order affecting its interest in property.[86]

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[83] *See United States v. Jenkins*, 974 F.2d 32, 36 (5th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993); *United States v. Paccione*, 964 F.2d 1269, 1274-75 (2d Cir. 1992); *In re Billman*, 915 F.2d 916, 922 (4th Cir. 1990), *cert. denied sub nom. McKinney v. United States*, 500 U.S. 952 (1991); *United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988); *see also In re Assets of Parent Indus., Inc.*, 739 F. Supp. 248, 256 (E.D. Pa. 1990) (fact that defendant's assets are under third party's control does not limit court's ability to restrain). *But see United States v. Riley*, 78 F.3d 367, 370-71 (8th Cir. 1996) (court may not appoint receiver to operate corporation where only defendant's interest in corporation, not corporation itself, is subject to forfeiture).

[84] *See* 21 U.S.C. § 853(k).

[85] *See United States v. O'Brien*, 836 F. Supp. 438, 442 (S.D. Ohio 1993) (holding that section 853(k) bars third parties from opposing pretrial restraining orders); *see also United States v. Farley*, 919 F. Supp. 276, 279 (S.D. Ohio 1996) (third party who claims in ancillary hearing proceeding that Government did not comply with procedural requirements of sections 853(e) and (f) pretrial is not entitled to relief; those statutes do not create substantive rights in favor of third parties such that governmental error or omission requires it to relinquish property to third parties).

[86] *See United States v. Real Property in Waterboro*, 64 F.3d 752, 752 (1st Cir. 1995); *United States v. Wu*, 814 F. Supp. 491, 495 (E.D. Va. 1993) (discussing legislative history and fairness of allowing a third party to contest restraining order); *see also United States v. Riley*, 78 F.3d 367, 370-71 (8th Cir. 1996).

As a matter of statutory construction, the correct result is probably that third parties may challenge the scope of a restraining order. The expansive language of section 853(e)(1)(B), which applies to "persons appearing to have an interest in the property," facially includes third parties and defendants. Moreover, the legislative history of 18 U.S.C. § 1963(m), on which section 853(k) was based, states that it "is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order."[87] Accordingly, it may be proper for the court to allow third parties to challenge a pretrial restraining order on the ground that less intrusive means exist to preserve the property for forfeiture, or that the Government has restrained the wrong property.

The rule allowing third parties to challenge pretrial restraining orders issued under section 853(e) should be limited, however, to situations where the third party can show that the restraining order is causing an immediate and irreparable injury to his economic interests. A broader rule would swallow the proscription against pretrial intervention by third parties who want to litigate ownership interests. It was such intervention that section 853(k) was designed to avoid. Accordingly, a third party should not be able to challenge a pretrial restraining order on the ground that the property belongs to them, not to the defendant, because that is an issue specifically reserved for the ancillary hearing by section 853(k). Moreover, a third party should not be able to challenge the restraining order on the ground that the property in question is not subject to forfeiture. As discussed *infra*, the forfeitability of the property is of no concern to a third party.

Third parties who challenge the scope of a pretrial restraining order are often bona fide innocent parties who are adversely affected by the defendant's criminal activities. For example, a third-party challenge might arise where the third party is the defendant's business partner who needs access to restrained bank accounts through which the defendant laundered drug proceeds in order to run the business. In such cases, it behooves government attorneys to attempt to negotiate a workable solution with the third party, regardless whether the third party may challenge the scope of the restraining order in the district in which the action is pending, so long as the government attorney is satisfied that the third party is not simply a pawn of the defendant.

Due process considerations may also weigh in favor of allowing third parties to challenge a pretrial restraining order, particularly when the defendant has become a fugitive. In *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S.*

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[87] S. Rep. No. 225, 98th Cong., 2d Sess. 206 n.42 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3389; *see United States v. Wu*, 814 F. Supp. 491, 494 & n.17 (E.D. Va. 1993) (applying legislative history).

Currency, 461 U.S. 555 (1983), the Supreme Court adopted the factors enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972), as the "appropriate framework" for determining whether the duration of a restraining order has violated a third party's due process rights. These factors consider the length of the delay in granting the third party a hearing, the reason for the delay, the third party's assertion of his right to a hearing, and any prejudice that the delay has caused the third party.[88]

In order to prevail on the second *Barker v. Wingo* factor, the reason for the delay, the Government should document its continuing attempts to locate the defendant and be prepared to present this documentation *in camera* to the district court to demonstrate that the delay was not attributable to governmental inaction.[89]

H. Penalty for Violation

The district court may exercise its expansive contempt powers to punish violators of section 853(e) restraining orders. For example, in *United States v. Paccione,* 964 F.2d 1269 (2d Cir. 1992), the Second Circuit affirmed a district court's order holding Vulpis, the father of a convicted Racketeer Influenced and Corrupt Organization (RICO) defendant, in criminal contempt and sentencing him to 180 days incarceration for violating a restraining order and consent order of forfeiture issued pursuant to the RICO forfeiture statute, 18 U.S.C. § 1963.[90] The district court imposed the criminal contempt order on Vulpis after it had already held him in civil contempt and fined him $50,000 for his actions.[91]

Another possible penalty for violation of a section 853(e) restraining order is prosecution under 18 U.S.C. § 2232(a), which makes it illegal to destroy or remove property to prevent its seizure. The maximum penalty that can be imposed on an individual convicted of this offense is a five-year term of imprisonment and $250,000 fine.[92] Although it is presently

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[88] *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 569-70 (1983); *see, e.g., In re Billman*, 915 F.2d 916, 922 (4th Cir. 1990) (denying due process claim of fugitive defendant's girlfriend after applying *$8,850 in U.S. Currency* balancing test), *cert. denied sub nom. McKinney v. United States*, 500 U.S. 952 (1991).

[89] *See Barker v. Wingo*, 407 U.S. 514, 531 (1972).

[90] *See United States v. Paccione*, 964 F.2d 1269, 1274 (1992).

[91] *Id.* at 1273; *see also United States v. Barnette*, 902 F. Supp. 1522, 1542 (M.D. Fla. 1995) (defendant held in civil contempt for scheme to evade criminal forfeiture judgment; former wife also held in contempt for aiding and abetting scheme).

[92] *See* 18 U.S.C. § 3571(b)(3).

unclear whether section 2232(a) may be used to prosecute violations of restraining orders, a pending legislative proposal seeks to clarify that such use of the statute is indeed appropriate.

I. Discovery of Additional Assets Post-restraint

The Government frequently discovers additional assets of the defendant that were not included in the original restraining order. If the original restraining order restrained all of the defendant's assets up to the amount of a "money judgment," or used inclusive language restraining, for example, "all of the defendant's proceeds derived from his narcotics trafficking, *including, but not limited to*, the following" then the Government may simply file a bill of particulars identifying the newly discovered assets as subject to the restraining order.[93] However, if the original restraining order did not restrain all of the defendant's assets up to the amount of the money judgment, then the Government must seek a supplemental restraining order, accompanied by a new probable cause affidavit that identifies the newly discovered assets and explains why they are subject to forfeiture.

J. Appeal

The issuance of a pretrial restraining order under section 853(e) is subject to interlocutory appeal.[94]

III. Criminal Seizure Warrants

The Government may seek a warrant to seize assets subject to criminal forfeiture pursuant to 21 U.S.C. § 853(f). The procedure for obtaining such a warrant mirrors that for obtaining a search warrant under Fed. R. Crim. P. 41. In order to obtain a section 853(f) criminal seizure warrant, the Government must establish probable cause to believe that: (1) the property is subject to forfeiture; and (2) the issuance of a restraining order under

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[93] *See, e.g., United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983) (no need to supersede indictment where forfeiture count used inclusive language; bill of particulars was sufficient to add newly-discovered assets), *cert. denied*, 469 U.S. 837 (1984).

[94] *See* 28 U.S.C. § 1292; *United States v. Floyd*, 992 F.2d 498, 500 (5th Cir. 1993); *In Re Martin*, 1 F.3d 1351, 1355 (3d Cir. 1993); *United States v. Jenkins*, 974 F.2d 32, 34 (5th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993); *United States v. Spilotro*, 680 F.2d 612, 615 (9th Cir. 1982); *United States v. Crozier*, 674 F.2d 1293, 1297 (9th Cir. 1982), *vacated on other grounds*, 468 U.S. 1206 (1984); *accord United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988); *see also United States v. Riley*, 78 F.3d 369 n.2 (8th Cir. 1996) (civil appellate rules govern appeal from order imposing pretrial restraint).

21 U.S.C. § 853(e) would be insufficient to insure the availability of the property for forfeiture.[95]

A. Venue

As a general rule, the Government obtains a criminal seizure warrant from the court in which the indictment will be sought or has been returned. It is not certain, however, that the Government may obtain a section 853(f) seizure warrant from the court in which the criminal case is or will be pending if the property to be seized is located outside that district.

On one hand, section 853(f) authorizes the Government to request and obtain "a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner provided for a search warrant."[96] Fed. R. Crim. P. 41(a), which governs the issuance of search warrants, provides that warrants may be issued: (1) by a federal magistrate judge or a state court within the district for a search of property within the district; or (2) by a federal magistrate judge for a search of property either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.[97] Taken together, section 853(f) and Rule 41(a) seem to indicate that the Government must apply for a criminal seizure warrant in the district in which property is located at the time the warrant is sought.

On the other hand, 21 U.S.C. § 853(l) clearly provides that "the district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section." A warrant is an "order."[98] Given that section 853(l) facially applies to all "orders as provided in this section," the Asset Forfeiture and Money Laundering Section has concluded that it applies to seizure warrants obtained under section 853(f).[99] Thus, section 853(l) effectively modifies section 853(f)'s phrase, "in the same manner as provided for a search warrant," to the limited extent of allowing the court with the criminal indictment to issue seizure warrants

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[95] *See* section 853(f).

[96] *Id.*

[97] *See* Fed. R. Crim. P. 41(a).

[98] *See Black's Law Dictionary* [5th ed. 1979]: 1121 (defining "search warrant" as "order in writing").

[99] *See Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. II.F, at p. 1 — 15.

for property located in other districts. The legislative history of section 853(l) supports this view.[100]

Having the flexibility to obtain section 853(f) seizure warrants in the district where the criminal case is pending for property located outside the district is particularly important in cases involving multiple properties scattered across the nation. In such cases, Rule 41(a)'s maxim that a seizure warrant must be obtained in the district in which the property is located causes obvious logistical and procedural problems. Applying for seizure warrants for all properties in the district in which the criminal prosecution is pending makes much more sense. If the court disagrees and either refuses to issue or grants a motion to vacate such warrants, "back-up" warrant applications should be ready in order to obtain seizure warrants in each district in which the property is located.

In any event, government attorneys should be aware that Fed. R. Crim. P. 41(e) requires a hearing on a motion for return of property to be held in the district in which the property is located.

B. Certain Types of Personal Property

The Fourth Amendment applies to criminal seizure warrants.[101] Thus, if the asset to be seized is located on private property, the Government must obtain a search warrant to legally enter the property and seize the asset.

Moreover, the seizure warrant must be based on probable cause that can be weighed by a neutral magistrate. The inclusion of the subject property in an indictment returned by a Grand Jury is not a sufficient basis, by itself, for the issuance of a section 853(f) warrant.[102] Section 853(f) also requires the Government to establish that the seizure of the property is necessary because a restraining order would be inadequate to preserve the property for trial. The Government may encounter difficulty in meeting this burden when it seeks to seize bank accounts. Because most banks are not involved in the illegal activities of their customers and comply with restraining orders, the Government will have a difficult time establishing that a

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[100] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3390 (section 853(l) "emphasizes the jurisdiction of the court to enter under these criminal forfeiture provisions, without regard to the location of the property [which]...is one of the distinctions between civil and criminal forfeitures because, in civil forfeitures, the power of the court currently extends only to property within the district in which it is located").

[101] *See United States v. Walker*, 943 F. Supp. 1326 (D. Colo. 1996); *United States v. All Right, Title, and Interest in...288-290 North St.*, 743 F. Supp. 1068, 1074 (S.D.N.Y. 1990).

[102] *See United States v. Walker*, 943 F. Supp. 1326 (D. Colo. 1996).

restraining order is insufficient to preserve the availability of bank accounts for forfeiture.[103] With respect to personal property that is easily moved, however, the Government generally has no problem meeting this burden.

C. Real Property

Due to the immobile nature of real property, a restraining order will generally suffice to preserve the property's availability for forfeiture. The eception is in cases in which the Government has strong indications that the defendant intends to destroy or otherwise devalue the real property. However, the Government may not, absent exigent circumstances, seize real property without providing its owner notice and an opportunity for a pre-seizure hearing.[104]

Whenever the Government restrains real property for forfeiture, it should file a notice of *lis pendens* in the county land records where the property is located.[105] A *lis pendens* is a brief notice that describes the real property and states that the Government has an interest in it as a result of the pending criminal litigation. The purpose of a *lis pendens* is to provide notice to the world that someone who takes an interest in the property takes that interest subordinate to the Government's interest. The effect of a *lis pendens* is to prevent a bona fide sale of the property or its refinancing pending the outcome of the criminal forfeiture litigation. Because the filing of a notice of *lis pendens* following indictment of property is not a deprivation of any property interest or a taking under the Fifth Amendment, the defendant is not entitled to a pre-seizure notice or a hearing.[106]

State law governs when a *lis pendens* may be filed. Most states require a pending court action involving the property. In these jurisdictions, the Government must have either filed a civil forfeiture complaint against the property, or obtained an indictment, information, or criminal complaint listing the property as subject to forfeiture, in order to validly file a *lis*

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[103] *Id.*

[104] *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1314 (10th Cir. 1994) (*Good* applies to cases pending at time of its decision).

[105] *See Good*, 510 U.S. 43 (1993).

[106] *Id.*; *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996); *e.g., United States v. Register*, No. 93-305-CR-T-17(A) (M.D. Fla. Sept. 22, 1995) (unpublished) (filing notice of *lis pendens* following indictment of real property is not deprivation of any property interest; thus, even if defendant claims he needs to sell property to pay attorney's fees, he is not entitled to pretrial hearing regarding forfeitability of property).

pendens. Few states, however, permit the filing of a *lis pendens* prior to indictment.[107] A list of citations for *lis pendens* statutes in selected states is set forth in footnote 108 below.[108]

D. Seizure of Substitute Assets

The Government's ability to seize substitute assets is coextensive with its ability to restrain such assets. Thus, in a district where substitute assets may be restrained, they may also be seized.[109] Likewise, where such assets cannot be restrained, they may not be seized.[110]

Because the filing of a *lis pendens* does not exert governmental control over property, but merely provides notice that the property is involved in a pending action, government attorneys may use *lis pendens* as a means of preserving the availability of real property for forfeiture as a substitute asset, even in jurisdictions that prevent pretrial restraint of substitute assets.

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[107] *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 4302 (1981) (*lis pendens* may be filed up to 20 days prior to filing of indictment or complaint).

[108] Ala. Code §§ 35-4-130 to 135 (1991); Alaska Stat. § 09.45.790 (1991); Ariz. Rev. Stat. Ann. § 12-1191 (1982 & Supp. 1991); Ark. Code Ann. §§ 16-59-101 to 107 (Michie 1987); Cal Civ. Proc. Code §§ 409-409.6 (West 1973 & Supp. 1992); Col. Rev. Stat. § 38-35-110 (1982); Col. R. Civ. P. 105(f); Conn. Gen. Stat. Ann. §§ 52-325 to 326 (West 1991); Fla. Stat. Ann. § 48.23 (West 1969 & Supp. 1992); Ga. Code Ann. §§ 44-14-610 to 613 (Michie 1982 & Supp. 1991); Haw. Rev. Stat. § 634-51 (1988 & Supp. 1991); Idaho Code § 5-505 (1990); 765 Ill. Comp. Stat. Ann. 35/84 (Smith-Hurd 1969 & Supp. 1991); Ind. Code Ann. §§ 34-1-4-1 to 8 (Burns 1986 & Supp. 1991); Iowa Code Ann. §§ 617.11 to .15 (West 1950 & Supp. 1991); Kan Stat. Ann. § 60-2201 (1983); Ky. Rev. Stat. Ann. § 382-440 (Baldwin 1989); La. Code Civ. Proc. Ann. arts. 3751-3753 (West 1961); Mass. Gen. Laws Ann. Ch. 184 § 15 (West 1991); Mich. Comp. Laws Ann. §§ 600.2701 to 2731 (West 1986); Minn. Stat. Ann. §§ 557.02 to .021 (West 1988); Miss. Code Ann. §§ 11-47-1 to 15 (1972); Mo. Ann. Stat. § 527.260 (Vernon 1953 & Supp. 1992); Mont. Code Ann. § 70-19-102 (1991); Neb. Rev. Stat. § 25-531 (1989); Nev. Rev. Stat. Ann. §§ 14.010 to .017 (Michie 1986 & Supp. 1991); N.J. Stat. Ann. §§ 2A:15-6 to 15-17 (West 1987); N.M. Stat. Ann. §§ 38-1-14 to 15 (Michie 1978); N.Y. Civ. Prac. L&R 6501-6515 (McKinney 1980); N.C. Gen. Stat. §§ 1-116 to 120.1 (1983); N.D. Cent. Code §§ 28-05-07 to 09 (1991); Ohio Rev. Code Ann. §§ 2703.26 to .27, 5309.58 (Anderson 1989); Okla. Stat. Ann. tit. 12 § 2004.2 (West Supp. 1992); Or. Rev. Stat. § 93.740 (1990); R.I. Gem. Laws § 9-4-9 (Supp. 1991); S.C. Code Ann. §§ 15-11-10 to 50 (Law Co-op. 1976 & Supp. 1991); S.D. Codified Laws Ann. §§ 15-10-1 to 11 (1984); Tenn. Code Ann. §§ 20-3-101 to 104 (1980); Tex. Prop. Code Ann. §§ 12.007 to .008 (West 1984); Utah Code Ann. § 78-40-2 (1987); Va. Code Ann. §§ 8.01-268 to 269 (Michie Supp. 1991); Wash. Rev. Code Ann. §§ 4.28.320 to 325 (West 1988 & Supp. 1991); W. Va. Code §§ 55-11-1 to 3 (1981); Wis. Stat. Ann. § 840.10 (West 1977); Wyo. Stat. §§ 1-6-106 to 109 (1988).

[109] *See, e.g., United States v. Schmitz*, 1156 F.R.D. 136 (E.D. Wis. 1994).

[110] *See, e.g., United States v. Floyd*, 992 F.2d. 498 (5th Cir. 1993).

E. Pre-seizure Planning

Before seizing property subject to forfeiture, the government attorney should plan a joint meeting with the appropriate representative of the U.S. Marshals Service or the contractor that will take custody of the forfeited property and the case agent to assess the financial and managerial impact of the proposed forfeiture.

In cases in which the targeted property poses particularly difficult problems of maintenance or disposition, the government attorney should consult with the Asset Forfeiture and Money Laundering Section before deciding whether to pursue forfeiture.[111] The solution to such problems is often to forfeit substitute assets that are more easily managed. If no or inadequate substitute assets are available, then possible alternatives to forfeiture should be considered, such as seeking an increased fine against the defendant.

F. Post-seizure Procedures

The U.S. Marshals Service takes custody of assets seized by Department of Justice agencies, such as the Federal Bureau of Investigation or Drug Enforcement Administration, pending final disposition of the case. The U.S. Marshals Service may authorize a federal, state, or local agency to retain custody of non-cash personal property pending confirmation of federal forfeiture. A private contractor, EG&G Dynatrend, takes custody of assets seized by Treasury agencies, such as the Internal Revenue Service or the U.S. Customs Service. Seized property may not be put into official use by any federal, state, or local agency until confirmation of forfeiture and approval of official use occur. Seized cash must be deposited into the Department of Justice or other seized asset deposit fund within 60 days of seizure or ten days of indictment, and remain there until it is forfeited.[112]

A defendant may contest the seizure of his property by filing a motion for return of property in the district in which the property was seized pursuant to Fed. R. Crim. P. 41(e). If the defendant files such a motion and requests a hearing, the court will usually order that one be held, even if a Grand Jury investigation is still ongoing. If the motion is filed pre-indictment, the issue at the hearing should be limited to whether the seizure was legal, and

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[111] *See* discussion of pre-seizure planning in chapter 2, part II, of this manual.

[112] *See Asset Forfeiture Policy Manual* (1996), Chap. I, Sec. VI, at p. 1 — 38.

whether the defendant is entitled to lawful possession of the property.[113] The defendant bears the burden of proof.[114] In the Ninth Circuit, the defendant's affidavit in support of his motion must be "sufficiently definite, specific, detailed and non-conjectural [to enable the] court to conclude that a substantial claim is presented."[115] If the motion is filed post-indictment, it is treated as a motion to suppress.[116]

G. Property Already under Governmental Control

A recurring question is whether it is necessary to obtain a restraining order under section 853(e) or a seizure warrant under section 853(f) when contemplating criminal forfeiture of property that is already within the Government's control. If the property was seized as evidence, or was turned over to the Government by the defendant voluntarily, there is probably no reason to obtain a restraining order or seizure warrant. The situation may be different, however, if the property was previously seized for *civil* forfeiture.

One court has held that once the government files a criminal forfeiture action, it no longer has authority to retain property seized with civil process, such as a civil seizure warrant under 21 U.S.C. § 881(b). In such a case, the Government must obtain a criminal seizure warrant to continue to hold the property.[117]

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[113] *See* Fed. R. Crim. P. 41(e); *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987) (citations omitted); *accord United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993); *Pieper v. United States*, 604 F.2d 1131, 1133 (8th Cir. 1979); *United States v. Padilla*, 151 F.R.D. 232, 234-35 (W.D.N.Y. 1992) (quoting *Pirofsky v. United States*, 671 F. Supp. 934, 935 (N.D.N.Y. 1987)).

[114] *See United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987).

[115] *Id.*

[116] *See* Fed. R. Crim. P. 41(e).

[117] *See United States v. Schmitz*, 153 F.R.D. 136, 144 (E.D. Wis. 1994) The property at issue in *Schmitz* consisted of four vehicles seized pursuant to 21 U.S.C. § 881. Under 21 U.S.C. § 888(c), the Government had 60 days within which to initiate a civil judicial forfeiture action against the vehicles after the defendants posted a claim and cost bond. Instead, the Government obtained an indictment containing a forfeiture count against the vehicles, and allowed the 60-day period under section 888(c) to expire without filing a civil forfeiture action. *Id.* at 142-43. Because the Government abandoned the civil forfeiture action against the vehicles, but failed to seek a restraining order or seizure warrant against them under section 853(e) or (f), the district court found a due process violation and ordered the Government to return the vehicles to the defendants. *Id.* at 144.

IV. Fraud Injunction Statute

In fraud cases, 18 U.S.C. § 1345, the civil fraud injunction statute, is available to restrain assets pretrial. This statute provides for the issuance of a preliminary injunction to halt the defendant's fraudulent conduct.[118] The statute also expressly provides for the restraint of both the proceeds of fraud or "property of equivalent value" in FIRREA cases.[119]

A number of courts have held that proceeds of non-FIRREA fraud offenses are likewise subject to restraint under the expansive language of subsection (b) of section 1345.[120] This subsection authorizes the district court, "at any time before final determination, [to] enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought."[121] This language, coupled with the district court's general equitable powers, authorizes the court to "order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case."[122] Issuance of an injunction prohibiting defendants from alienating or disposing of the proceeds of their fraudulent scheme is, thus, within the scope of section 1345 relief.[123]

Although the cases cited in the footnotes each restrained only the actual proceeds of fraud, there is no indication, either in the plain language or the legislative history of section 1345, that a district court acting pursuant to "the authority to issue very broad relief at a

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[118] 18 U.S.C. § 1345(a)(1)(A), (B).

[119] 18 U.S.C. § 1345(a)(2).

[120] *See, e.g., United States v. Brown*, 988 F.2d 658, 662 (6th Cir. 1993); *United States v. Barnes*, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996); *United States v. William Savran & Assocs., Inc.*, 755 F. Supp. 1165, 1177 (E.D.N.Y. 1991); *United States v. Cen-Card Agency/C.C.A.C.*, 724 F. Supp. 313 (D.N.J. 1989), *aff'd without op.*, 961 F.2d 1569 (3d Cir. 1992).

[121] 18 U.S.C. § 1345(b).

[122] *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982); *accord SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105-06 (2d Cir. 1972).

[123] *See United States v. Brown*, 988 F.2d 658, 662-63 (6th Cir. 1993) (legislative history indicates that restraining defendant from alienating or disposing of proceeds of fraudulent activities is within scope of section 1345(b)); *see, e.g., United States v. William Savran & Assocs., Inc.*, 755 F. Supp. 1165, 1184 (E.D.N.Y. 1991) (granting Government's motion to enjoin contents of bank account containing fruits of defendant's fraudulent scheme in order to secure them for future restitution to defendant's victims); *United States v. Cen-Card Agency/C.C.A.C.*, 724 F. Supp. 313, 315 (D.N.J. 1989) (Government "had the right and, indeed, the duty" to procure proceeds under section 1345(b) in order to refund victims of defendants' fraud), *aff'd without op.*, 961 F.2d 1569 (3d Cir. 1992).

preliminary injunction hearing by means of asset freezes and other measures not expressly provided for in [section] 1345,"[124] is limited to restraining only fraud proceeds. Accordingly, it is possible that substitute assets, as well as fraud proceeds, are subject to restraint under section 1345(b) in order to prevent a "continuing and substantial injury" to the fraud victims. The Government should note, however, that a number of courts have declared that a district court may restrain only the fruits of a defendant's fraudulent conduct, not substitute assets, under section 1345,[125] while no courts have yet agreed that section 1345 permits restraint of substitute assets.

The Government initiates a civil fraud injunction action by filing a complaint. The courts are divided regarding the showing that the Government must make in order to obtain an injunction under section 1345. On the one hand, a number of courts have held that the Government need only show probable cause to believe that the defendant is currently engaged or about to be engaged in a fraudulent scheme, and that restraint of his assets is necessary to prevent a "continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought."[126] Under this view, the Government may establish probable cause through evidence not admissible at trial, including hearsay evidence.[127] On the other hand, some courts have held that the Government must establish its case by a preponderance of the evidence.[128]

The better standard is the probable cause standard. Congress enacted section 1345 to provide the Government with a means "to put a speedy end" to a fraudulent scheme

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[124] *United States v. Brown*, 988 F.2d 658, 662-63 (6th Cir. 1993).

[125] *See id.* at 664; *United States v. William Savran & Assocs., Inc.*, 755 F. Supp. 1165, 1183 (E.D.N.Y. 1991) were related to fraud, all were subject to restraint); *United States v. Jones*, 652 F. Supp. 1559, 1560 (S.D.N.Y. 1986).

[126] *See* section 1345(b); *see, e.g., United States v. Weingold*, 844 F. Supp. 1560, 1573 (D.N.J. 1994) (citing *United States v. William Savran & Assocs., Inc.*, 755 F. Supp. 1165, 1177 (E.D.N.Y. 1991) and *United States v. Belden*, 714 F. Supp. 42, 45-46 (N.D.N.Y. 1987)); *see also United States v. Davis*, No. 88-1705-CIV-ARONOVITZ, 1988 WL 168562 at *2-3 (S.D. Fla. Sept. 23, 1988) (unpublished) (test is whether facts and circumstances are sufficient to justify reasonable belief that defendants are engaging in proscribed conduct) (citing 38 U.S.C. § 3007 and *United States Postal Service v. Stimpson*, 515 F. Supp. 1149, 1150 (N.D. Fla. 1981)).

[127] *See United States v. Davis*, No. 88-1705-CIV-ARONOVITZ, 1988 WL 168562 at *2-3 (S.D. Fla. Sept. 23, 1988) (unpublished) (citations omitted).

[128] *See, e.g., United States v. Brown*, 988 F.2d at 663 (Government must show that fraud has been committed and extent of fraud).

whenever the Attorney General has determined that sufficient evidence of a violation of the federal fraud statutes exists to initiate such an action.[129]

At least one court has required the Government to establish by a preponderance of the evidence the requirements of Fed. R. Civ. P. 65 in order to prevail under section 1345.[130] Rule 65 requires the Government to establish:

(1) a probability of success on the merits (*i.e.*, that a fraud is occurring or is about to occur);

(2) a threat of irreparable harm absent the injunction;

(3) such threat of harm outweighs any injury that the injunction's issuance would inflict on the defendant and other interested parties; and

(4) the public interest weighs in favor of the injunction's issuance.[131]

Congress, however, considered the continued existence of a scheme to defraud as irreparable harm *per se*, since it is likely that the victims of such a scheme would not be able to recover money lost as a result of it.[132] Accordingly, proof of irreparable harm should not be necessary for the Government to obtain a preliminary injunction under section 1345.[133]

Proceedings initiated under section 1345 are subject to the Federal Rules of Civil Procedure, including the civil discovery rules. Government attorneys contemplating use of section 1345 to restrain assets should take this into consideration before filing a section 1345 complaint, especially where a parallel criminal action against the defendant has been or will be initiated as well.

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[129] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3540.

[130] *See United States v. Barnes*, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996).

[131] *Id.* at 1192 (citing *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*)).

[132] *See United States v. Belden*, 714 F. Supp. 42, 45 (N.D.N.Y. 1987) (citing *Government of the Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (1st Cir. 1983); *see also SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808-09 (2d Cir. 1975)).

[133] *United States v. Barnes*, 912 F. Supp. at 1195; *United States v. Weingold*, 844 F. Supp. 1560, 1573 (D.N.J. 1994) (citing *United States v. William Savran & Assocs., Inc.*, 755 F. Supp. 1165, 1178-80 (E.D.N.Y. 1991)).

V. Indictment

Two main objectives are at the forefront of charging decisions involving criminal forfeiture: (1) construction of the indictment so as to maximize forfeiture upon the defendant's conviction; and (2) consideration of post-verdict challenges to the forfeiture pursuant to the Excessive Fines Clause of the Eighth Amendment.[134]

A. The Indictment

In order to forfeit a defendant's property criminally, the indictment or information must contain a forfeiture count or allegation that alleges the extent of the defendant's interest in the property.[135] The primary purpose of this requirement is to put the defendant on notice that his property is subject to forfeiture.[136] In addition, the insertion of a forfeiture count or allegation in the indictment provides a basis for the issuance of pretrial restraining orders and criminal seizure warrants[137]; puts third parties on notice, once the indictment is unsealed, that the Government has an interest in the defendant's assets that are subject to forfeiture; and may establish a factual basis for the forfeiture of a defendant's assets in connection with a guilty plea.[138]

For these same reasons, the forfeiture count or allegation should include a substitute assets provision, despite the fact that the forfeitability of substitute assets is not submitted to

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[134] *See Austin v. United States*, 509 U.S. 602 (1993); *Alexander v. United States*, 509 U.S. 544 (1993).

[135] *See* Fed. R. Crim. P. 7(c)(2).

[136] *See United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980); *United States v. Veliotis*, 586 F. Supp. 1512, 1519-20 n.6 (S.D.N.Y. 1984); *United States v. Bergdoll*, 412 F. Supp. 1308, 1318-19 n.17 (D. Del. 1976); *see also* Fed. R. Crim. P. 7, Advisory Committee Notes, 1972 Amendment.

[137] *See* 21 U.S.C. § 853(e), (f); *Monsanto IV*, 924 F.2d 1186, 1197 (2d Cir.), *cert. denied*, 502 U.S. 943 (1991); *United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989).

[138] *See United States v. Bachynsky*, 949 F.2d 722, 730-31 (5th Cir. 1991); *United States v. Crumbley*, 872 F.2d 975, 976-77 (11th Cir. 1989). *But see Libretti v. United States*, 516 U.S. 29, 36 (1995) (because criminal forfeiture is element of sentencing and not underlying offense, factual basis requirement of Fed. R. Crim. P. 11(f) does not apply in plea agreement).

the jury.[139] Personal property the Government seeks to forfeit as substitute assets, however, should be listed in the indictment only in jurisdictions that permit pretrial restraint of substitute assets.[140] Not listing such assets in jurisdictions that forbid pretrial restraint of substitute assets[141] avoids putting the defendant on notice that the Government is aware he owns certain assets, thereby giving him an incentive to conceal or transfer those assets.[142] On the other hand, real property that the Government seeks to forfeit as a substitute asset may be specified in the forfeiture count or allegation even in circuits that prohibit pretrial restraint of substitute assets. This is because once such property is listed in the indictment, the Government may generally file a *lis pendens* against it, thereby securing its availability for forfeiture without imposing a pretrial restraint on it.

How specific must the forfeiture count or allegation be? "Barebones pleading" that tracks the language of the forfeiture statute is legally sufficient. As one court explained, a forfeiture count or allegation that tracks the language of statute is sufficient "so long as it puts the defendant on notice that the [G]overnment seeks forfeiture and identifies the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal evidence in their [sic] defense."[143] Thus, the forfeiture count or allegation may be legally sufficient even if it states only that the Government seeks forfeiture of all of the defendant's illegally

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[139] *See* 21 U.S.C. § 853(p) ("*the court* shall order the forfeiture" of substitute assets) (emphasis added); *United States v. Thompson*, 837 F. Supp. 585, 586 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets); *see also Libretti v. United States*, 516 U.S. 29, 36 (1995) ("the right to jury determination of forfeitability is merely statutory in origin"); *cf. United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (district court retains authority to order forfeiture of substitute assets after appeal is filed).

[140] *See In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990), *cert. denied sub nom. McKinney v. United States*, 500 U.S. 952 (1991); *United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988); *United States v. Schmitz*, 153 F.R.D. 136, 140 (E.D. Wis. 1994); *United States v. O'Brien*, 836 F. Supp. 438, 441 (S.D. Ohio 1993); *United States v. Skiles*, 715 F. Supp. 1567, 1568 (N.D. Ga. 1989); *see also United States v. Swank Corp.*, 797 F. Supp. 497, 501-02 (E.D. Va. 1992).

[141] *See United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *In Re Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993)

[142] *See United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (Rule 7(c)(2) does not require listing of property to be forfeited as substitute assets; sufficient for Government to allege it sought to forfeit $3.7 million in proceeds).

[143] *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

obtained proceeds, without stating a specific amount, or all of his interest in a Continuing Criminal Enterprise.[144]

The better practice is to draft the forfeiture count or allegation as specifically as possible. Not only does such a practice set the stage for the Government's application for a restraining order against the defendant's assets,[145] but some courts that have sanctioned the legal sufficiency of simple forfeiture counts or allegations have also indicated that the Government should, nevertheless, afford the defendant a more specific identification of the property subject to forfeiture in a bill of particulars pursuant to Fed. R. Crim. P. 7(f).[146]

The Government frequently lists certain assets of the defendant as forfeitable in the indictment, then discovers additional assets of the defendant post-indictment. If the forfeiture count or allegation states that the assets subject to forfeiture "include, but are not limited to, the following" then the Government need only file a bill of particulars listing the newly discovered assets as subject to forfeiture.[147] If the forfeiture count or allegation does not contain such inclusive language, however, the Government may have to seek a superseding indictment in order to subject the additional assets to forfeiture.

The Grand Jury's return of an indictment containing a forfeiture count or allegation has a number of effects. It authorizes the district court, upon the Government's application, to enter an immediate *ex parte* restraining order preventing the alienation, removal, or

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[144] *See, e.g., United States v. Strissel*, 920 F.2d 1162, 1166 (4th Cir. 1990); *United States v. Amend*, 791 F.2d 1120, 1125-26 (4th Cir.), *cert. denied*, 479 U.S. 930 (1986); *United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984); *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Grammatikos*, 633 F.2d 1013, 1024-25 (2d Cir. 1980); *United States v. Rupley*, 706 F. Supp. 751, 753 (D. Nev. 1989) (holding neither itemization of assets nor bill of particulars necessary despite barebones statutory forfeiture language in indictment).

[145] *See Monsanto IV*, 924 F.2d 1186, 1197 (2d Cir. 1991); *cf. In Re Seizure of All Funds in Accounts In Names of Registry Publishing, Inc.*, 887 F. Supp. 435, 449 (E.D.N.Y. 1995), *vacated on other grounds*, 68 F.3d 577 (2d Cir. 1995).

[146] *See United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984); *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980); *see also In Re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994) (*"Moffitt I"*) (indictment need not list each asset subject to forfeiture; this can be done with bill of particulars), *aff'd*, 83 F.3d 660, 665 (4th Cir. 1996); *cf. United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir.) (bill of particulars is unnecessary if specific property subject to forfeiture is included in discovery material made available to defendant), *cert. denied*, 479 U.S. 930 (1986).

[147] *See United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984).

destruction of the property listed in the indictment.[148] It also precludes third parties from commencing civil actions against the Government concerning their interest in property subject to forfeiture.[149] Instead, third parties must wait until after the jury has convicted the defendant and returned special verdicts of forfeiture against the property, at which time they may challenge the property's forfeiture in the ancillary hearing proceeding,[150] although third parties may seek limited relief from restraining orders as previously noted.

B. Conspiracy Forfeitures

The general federal conspiracy statute, 18 U.S.C. § 371, is not a predicate crime supporting forfeiture under any criminal forfeiture statute. Accordingly, an indictment seeking forfeiture of a defendant's property based on his involvement in a conspiracy should, if possible, charge the defendant under one of the "specialized" conspiracy statutes, such as 21 U.S.C. § 846 (narcotics conspiracy) or 18 U.S.C. § 1956(h) (money laundering conspiracy).

The exception to this general rule is where the forfeiture statute itself provides that conspiracy to commit a certain offense, for which there is no specialized forfeiture statute, is a predicate forfeiture crime. For example, 18 U.S.C. § 982(a)(2) provides that conspiracy to commit bank fraud or other specified offenses constitutes a predicate forfeiture crime. Likewise, 18 U.S.C. § 982(a)(5) provides that conspiracy to commit certain offenses relating to stolen motor vehicles constitutes a predicate forfeiture crime. In these cases, charging the defendant with conspiracy under section 371 will support a forfeiture count or allegation.

In any event, use of a conspiracy statute to support a criminal forfeiture count or allegation is an important tool in maximizing a case's forfeiture potential. This is because a defendant's conviction on a single count of conspiracy has the potential to "sweep up" all of the property that would be subject to forfeiture if the defendant were convicted of each

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[148] *See* 21 U.S.C. § 853(e)(1)(A); *see also* discussion of pretrial restraining orders in part II of this chapter, *supra*.

[149] *See* 21 U.S.C. § 853(k)(2).

[150] *See* 21 U.S.C. § 853(k), (n); *United States v. Real Property in Waterboro*, 64 F.3d 752, 756-57 (1st Cir. 1995) (third party's *res judicata* argument was nothing more than assertion that property was vested in him instead of defendant; argument must be made in ancillary proceeding following entry of order of forfeiture); *United States v. Hilliard*, 818 F. Supp. 309, 315 (D. Colo. 1993) (forfeiture count not subject to dismissal on grounds that subject property jointly owned by innocent spouse); *see also* S. Rep. No. 1030, 98th Cong., 2d Sess. 191, 201-209 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3389-90 ("This provision assures a more orderly disposition of both the criminal case and third-party claims. Indeed, it is anticipated that the new hearing procedure should provide for more expedited consideration of third-party claims than would the filing of separate civil suits.").

substantive count on which the conspiracy was based. For example, a defendant charged with one count of conspiracy to distribute narcotics under 21 U.S.C. § 846, and three counts of substantive distribution of narcotics under 21 U.S.C. § 841(a)(1). The forfeiture count or allegation of the indictment lists the following property of the defendant as subject to forfeiture as drug proceeds under 21 U.S.C. § 853(a)(1):

(1) one 1995 gold Lexus, subject to forfeiture as proceeds of the conspiracy count and the first substantive count;

(2) one three-carat diamond ring, subject to forfeiture as proceeds of the conspiracy count and the second substantive count; and

(3) real property located at 123 Main Street, Anytown, USA, subject to forfeiture as proceeds of the conspiracy count and the third substantive count.

Suppose the defendant is convicted of only the second substantive distribution count and of the conspiracy count. The defendant's conviction of the second substantive count supports forfeiture of only the diamond ring, but his conviction of the conspiracy count supports forfeiture of all three assets. This "sweeping up" effect of a forfeiture count predicated on a conspiracy charge is important not only at trial, but also in plea negotiations, where a defendant may be convinced to plead guilty to a single conspiracy count that supports forfeiture of all the property he acquired as proceeds of that conspiracy.

In criminal forfeiture cases, the defendant's interest in property may be forfeited only if the defendant is convicted of the offense giving rise to the forfeiture. The same is true in conspiracy cases, but note that in such cases the forfeiture of the defendant's interest may be based on the illegal acts of co-conspirators for which the defendant is liable, and need not be based on acts the defendant committed himself.[151]

[151] *See United States v. Dethlefs*, 934 F. Supp. 475 (D. Me. 1996) (although the defendant did not personally use his farm to distribute marijuana, his interest was forfeitable because he was member of a conspiracy and his co-conspirators used his farm for that purpose).

VI. Trial and Plea Agreements

A. Bar on Intervention of Third Parties

Section 853 expressly prohibits third parties who claim an interest in property subject to criminal forfeiture from intervening in the trial or appeal of the criminal case.[152] Third parties also may not file a civil action in another court to circumvent the criminal forfeiture proceedings.[153] Rather, the claims of third parties are addressed either in the ancillary hearing process following the defendant's conviction and the jury's return of special verdicts of forfeiture against his property[154] or through petitions for remission or mitigation.[155]

The rationale for this result is that the issues at trial—namely, whether the crime occurred, whether the defendant committed the crime, and whether the property was involved in the crime—are matters solely between the Government and the defendant. Thus, the forfeitability of the property, established at trial, is of no concern to a third party. The third party's only right is to litigate his or her ownership interest which cannot be resolved until after conviction, because there is no point in litigating third-party interests in property that may never be forfeited. Moreover, after conviction, the third party is fully protected because the defendant will be unable to assert any rights to the property.[156] Accordingly, there is no reason for the third party to be allowed to intervene in the trial, and no reason why the forfeitability should be raised in the ancillary hearing.[157]

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[152] *See* 21 U.S.C. § 853(k)(1); *United States v. BCCI Holdings (Luxembourg), S.A.*, 795 F. Supp. 477, 479 (D.D.C. 1992).

[153] *See* 21 U.S.C. § 853(k)(2); *United States v. BCCI Holdings (Luxembourg), S.A.*, 795 F. Supp. 477, 479 (D.D.C. 1992) (third party may not file interpleader when ordered to surrender forfeited funds); *United States v. Security Marine Credit Corp.*, 767 F. Supp. 260, 262 (S.D. Fla. 1991) (section 853(k) bar on intervention precludes civil *in rem* suit brought to enforce maritime lien); *In Re Smouha*, 136 B.R. 921, 926 (S.D.N.Y 1992) (third party may not attempt to assert interest in defendant's forfeitable assets by initiating action in bankruptcy court), *appeal dismissed without op.*, 979 F.2d 845 (2d Cir. 1992).

[154] *See* 21 U.S.C. § 853(n); *United States v. Kramer*, 912 F.2d 1257, 1260 (11th Cir. 1990) (third party claiming interest in criminally forfeited property has "sole remedy" of petitioning district court for hearing under section 853(n) to adjudicate validity of alleged interest).

[155] *See* 21 U.S.C. § 853(i).

[156] *See* 21 U.S.C. § 853(n)(2) (disqualifying defendant from asserting claim in ancillary hearing process).

[157] For a more detailed discussion of this point, *see* Cassella, Stefan D., "Third Party Rights in Criminal Forfeiture Cases," *supra* note 8.

The plain language of subsections 853(k) and (n) makes no distinction between property directly forfeitable under 21 U.S.C. § 853(a) and substitute assets forfeitable under 21 U.S.C. § 853(p). Thus, the section 853(n) ancillary hearing process applies to substitute assets.[158]

B. Burden of Proof

Before 1995, the Government's burden of proof in a criminal forfeiture case depended on the statute governing the forfeiture. In RICO cases under 18 U.S.C. § 1963, the reasonable doubt standard was held to apply.[159] But in drug and money laundering cases under 21 U.S.C. § 853 and 18 U.S.C. § 982, respectively, the Government was held to a burden of proving its case by the preponderance of the evidence.

There were two rationales for using the preponderance standard. A number of courts reasoned that forfeiture is part of the defendant's sentence to which the preponderance standard applies.[160] Other courts took a more narrow approach by noting that 21 U.S.C. § 853(d) expressly establishes a rebuttable presumption that property is subject to forfeiture as drug proceeds if the Government establishes by a preponderance of the evidence that: (1) the defendant acquired the property during the period of the drug violation or within a reasonable time thereafter; and (2) the defendant's felony drug violation is the only likely

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[158] *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (ancillary proceeding applies equally to property forfeited as substitute assets); *United States v. Henry*, 850 F. Supp. 681 (M.D. Tenn. 1994) (determining validity of third-party claimant's alleged interest in substitute assets during ancillary hearing process), *aff'd*, 64 F.3d 664 (6th Cir. 1995), *cert. denied*, 516 U.S. 1147 (1996).

[159] *See United States v. Pellullo*, 14 F.3d 881, 904 (3d Cir. 1994).

[160] *See United States v. Tanner*, 61 F.3d 231, 234 (4th Cir. 1995), *cert. denied*, 516 U.S. 1119 (1996); *United States v. Myers*, 21 F.3d 826, 829 (8th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995); *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir.), *cert. denied*, 513 U.S. 878 (1994); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992); *see also United States v. Elgersma*, 971 F.2d 690, 694 (11th Cir. 1992) ("*Elgersma II*") (*en banc*) (because forfeiture is part of sentence, preponderance standard is unobjectionable if that is what Congress intended to apply); *United States v. Herrero*, 893 F.2d 1512, 1541-42 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987); *see also United States v. Investment Enter., Inc.*, 10 F.3d 263, 270 (5th Cir. 1993) (not burden of proof case, but holding that forfeiture under federal obscenity laws is part of sentence).

source of the property. This provision, these courts reasoned, signals congressional intent to apply the preponderance standard in drug forfeiture cases.[161]

On November 7, 1995, the Supreme Court held that criminal forfeiture is not a criminal offense, but rather constitutes part of the defendant's sentence.[162] Because the Due Process Clause permits sentencing issues to be decided by a preponderance of the evidence, it should now be clear that forfeiture issues, which are part of the sentence, should likewise be decided by the preponderance standard unless Congress explicitly indicates otherwise.[163] Thus, based on *Libretti*, the Government may now argue that its burden of proof in RICO and money laundering forfeitures, as well as in drug forfeitures, is preponderance of the evidence.[164] This conclusion is further supported as to the RICO statute by application of the canon of statutory construction "express mention means implied exclusion."[165] Two of the criminal forfeiture statutes—obsenity and child exploitation—expressly hold the Government to proof of forfeiture beyond a reasonable doubt.[166] The express mention of this general standard of proof in two of the criminal forfeiture statutes, coupled with the omission of such mention in the others (including RICO) supports a conclusion that the standard under RICO should be proof by a preponderance of the evidence.

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[161] *See, e.g., United States v. Tanner*, 61 F.3d 231, 234 n.2 (4th Cir. 1995), *cert. denied*, 516 U.S. 1119 (1996); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576-77 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *see also Elgersma II*, 971 F.2d 690, 692-97 (11th Cir. 1992) (*en banc*) (holding that section 853(d) indicates that preponderance standard applies to forfeitures of drug proceeds under section 853(a)(1), but reserving judgment on standard of proof applicable to forfeitures under sections 853(a)(2) and (3)); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987).

[162] *See Libretti v. United States*, 516 U.S. 29, 35 (1995); *accord United States v. Rogers*, 102 F.3d 641, 648 (1st Cir. 1996) (criminal forfeiture is akin to jail sentence or fine and lacks historical and moral roots that have led to higher proof requirements for finding of criminal guilt).

[163] *See, e.g.*, 18 U.S.C. §§ 1467(e)(1), 2253(e) (specifically providing for application of reasonable doubt standard in obscenity and child exploitation forfeitures).

[164] *But see United States v. Voigt*, 89 F.3d 1050, 1082-83 (3d Cir. 1996) (post-*Libretti* case applying preponderance standard to money laundering cases but reaffirming, *in dicta*, *Pelullo* holding that reasonable doubt standard applies to RICO forfeiture); *United States v. DeFries*, 909 F. Supp. 13, 16 n.3 (D.D.C. 1995) (reasonable doubt standard applies to post-*Libretti* RICO forfeiture where the Government agreed to application of that standard at trial).

[165] *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) (citations omitted); *Oregon Natural Resources Council, Inc. v. Kantor*, 99 F.3d 334, 339 (9th Cir. 1996); *Garcia v. United States*, 88 F.3d 318 (5th Cir. 1996).

[166] *See* 18 U.S.C. §§ 1467(e)(1) (obscenity), 2253(e) (child exploitation).

C. Rebuttable Presumption of Forfeitability Regarding Drug Proceeds

Under 21 U.S.C. § 853(d), the Government may take advantage of a rebuttable presumption that property is subject to forfeiture as drug proceeds if it establishes by a preponderance of the evidence that: (1) the defendant acquired the property during the period of his narcotics violation or within a reasonable time thereafter; and (2) a likely source does not exist for the property other than the defendant's felony narcotics violation. Even if the Government satisfactorily proves these elements, the statutory presumption remains permissive or rebuttable in nature.[167] Thus, the trier of fact retains the discretion to reject the application of this presumption "if it is not merited under the facts of the case or in light of evidence produced by the defendant which would bring into question its validity if it were applied."[168]

D. Bifurcation

Most courts bifurcate the forfeiture phase of a defendant's criminal trial from the adjudicative, or "guilt" phase, so that the jury hears evidence and argument regarding the forfeiture issues only after it has found the defendant guilty of a predicate forfeiture

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[167] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3395 (presumption is framed as permissive instead of mandatory in order to meet constitutional requirements); *see also Ulster County Court v. Allen*, 442 U.S. 140, 163-67 (1979).

[168] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191, 201 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3395; *see also United States v. Eighty Three Thousand Three Hundred Twenty Dollars ($83,320) in U.S. Currency*, 682 F.2d 573, 577-78 (6th Cir. 1982) (mere speculation as to legitimate alternative source for property sufficient to overcome Government's circumstantial evidence of taint in civil forfeiture action); *United States v. $131,602.00 in U.S. Currency*, 563 F. Supp. 921, 923 (S.D.N.Y. 1982) (credible evidence of legitimate alternative source for property subject to civil forfeiture sufficient to rebut the Government's probable cause showing that property was traceable to narcotics proceeds).

offense.[169] The Government may retry the forfeiture phase of the trial alone if the jury is unable to reach a unanimous forfeiture verdict after convicting the defendant of the underlying charges.[170]

E. Bench Trial/Stipulation

Following the guilty verdict, the defendant may decide not to submit the forfeiture issue to the jury by agreeing either to stipulate to the forfeiture or to submit the issue to the judge with or without stipulated facts regarding the forfeiture.[171] In either event, the Government should require the defendant to execute (and the court to approve) a written jury waiver pursuant to Fed. R. Crim. P. 23(a) pertaining to the forfeiture proceeding because the defendant is otherwise statutorily entitled to a jury determination of the forfeiture issues.[172]

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[169] *See, e.g., Elgersma II*, 971 F.2d 690, 697-98 (11th Cir. 1992) (*en banc*) (Kravitch, J., concurring) (bifurcation safeguards against jury confusion on appropriate burden of proof as to defendant's guilt); *United States v. Feldman*, 853 F.2d 648, 662 (9th Cir. 1988) (advocating bifurcation of guilt determination from forfeiture argument and deliberations to avoid prejudicial choice between Fifth Amendment right against self-incrimination and due process right to present evidence on extent of assets subject to forfeiture), *cert. denied*, 489 U.S. 1030 (1989); *United States v. Sandini*, 816 F.2d 869, 874 (3d Cir. 1987) (requiring that entire forfeiture phase be presented to jury only after its return of guilty verdict); *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983) (strongly recommending bifurcation because it eases jurors' task in determining guilt or innocence and prevents potential penalty of forfeiture from influencing jurors' deliberations about guilt or innocence; failure to bifurcate not, however, *per se* reversible error), *cert. denied*, 465 U.S. 1005 (1984); *see also United States v. Desmarais*, 938 F.2d 347, 349-50 (1st Cir. 1991) (defendant not prejudiced from bifurcated trial; noting bifurcation is strongly favored among circuits). *But see Jenkins*, 904 F.2d 549 (10th Cir. 1990) (absent request by defendant for bifurcation to testify on forfeiture issues, court is entitled to assume evidence concerning guilt and forfeiture may be heard together); *United States v. Linn*, 880 F.2d 209, 216 (9th Cir. 1989) (no abuse of discretion in not bifurcating forfeiture and guilt phases); *United States v. Perholtz*, 842 F.2d 343, 367-68 (D.C. Cir.) (per curiam) (declining to adopt blanket bifurcation rule; unitary procedure does not violate due process where jury jointly charged as to both guilt and forfeiture issues for single deliberation as long as instructed not to consider forfeiture until guilt found), *cert. denied*, 488 U.S. 821 (1988).

[170] *See United States v. Smith*, No. 92-105-CR-ORL-19 (M.D. Fla. Mar. 19, 1993) (unpublished); *see also United States v. Sandini*, 816 F.2d 869, 8776 (3d Cir. 1987) (remanding for new trial on criminal forfeiture alone in order to give defendant opportunity to testify in that phase); *cf. United States v. Ofchinick*, 883 F.2d 1172, 1180-81 (3d Cir. 1989) (declining to order new forfeiture trial where Government failed to present sufficient evidence for forfeiture but recognizing that purpose of special verdict is to limit scope of new trial in event that judgment on such verdict is vacated in whole or in part).

[171] *See, e.g., United States v. Hess*, 691 F.2d 188, 190-91 (4th Cir. 1982) (if parties enter into stipulation regarding extent of defendant's interest in enterprise, and jury subsequently finds that defendant operated or controlled enterprise in violation of CCE statute, court may then order forfeiture of entire interest described in stipulation, regardless of absence of special verdict on forfeiture issue).

[172] *See* Fed. R. Crim. P. 31(e); *see also United States v. Garrett*, 727 F.2d 1003, 1012-13 (11th Cir. 1984) (jury waiver must be in writing unless purely technical violation occurs, such as when the Government plainly demonstrates that defendant was not ignorant of jury right and consented to waiver), *aff'd on other grounds*, 471 U.S. 773 (1985).

The court should also make an independent inquiry as to the voluntariness of the defendant's jury waiver.[173]

One caveat: if a defendant pleads guilty to the predicate criminal offense but asks for a bench trial on the forfeiture of his assets as part of the plea agreement, his waiver of the right to a jury trial in the plea agreement operates as an effective waiver of the jury trial right as to the forfeiture as well. Under such circumstances, no separate waiver by the defendant of his right to a jury trial on the forfeiture proceeding is necessary.[174]

The Government should insure that any stipulated forfeiture clearly states that: (1) it is a forfeiture rather than a general settlement of fines, penalties, and forfeitures; (2) it is entered under the applicable forfeiture statute and all of its subsections; and (3) the Government does not waive any of its rights under that statute. In *United States v. Paccione*, 948 F.2d 851 (2d Cir. 1991), the parties entered into a letter agreement whereby the defendants agreed to forfeit cash to the Government.[175] The defendants defaulted. The court nevertheless held that the Government could not forfeit the defendants' property because by entering into a general agreement to satisfy "forfeiture, fines, and restitution," the Government waived its forfeiture rights, including its right to substitute assets, and became creditor under state law pursuant to Fed. R. Civ. P. 69(a).[176] In order to protect the Government's forfeiture interests in situations like *Paccione*, stipulations of forfeiture should provide: "In the event of the defendant's default on any of the provisions of this stipulation, all right, title, and interest in [insert the property as specified in the indictment and any bill of particulars] shall be forfeited to the United States pursuant to [insert applicable forfeiture statutes cited in indictment]."

F. Special Verdict

A defendant does not have a constitutional right to a jury determination of forfeiture issues,[177] but Fed. R. Crim. P. 31(e) requires that the jury return a special verdict when the

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[173] *See United States v. Robinson*, 8 F.3d 418, 421-22 (7th Cir. 1993); *United States v. Herndon*, 982 F.2d 1411, 1418 (10th Cir. 1992).

[174] *See Libretti v. United States*, 516 U.S. 29 (1995).

[175] *United States v. Paccione*, 948 F.2d 851, 854 (2d Cir. 1991).

[176] *Id.* at 855-56.

[177] *See Libretti v. United States*, 516 U.S. 29, 36 (1995) ("right to jury determination of forfeitability is merely statutory in origin").

indictment contains a forfeiture allegation.[178] According to Rule 31(e), the special verdict must specify "the extent of the interest or property subject to forfeiture, if any."[179] There is no dispute that the special verdict must ask the jury to determine whether the asset is subject to forfeiture under the theory the Government has propounded.[180] There is considerable debate, however, regarding whether Rule 31(e) requires the jury to determine whether the defendant has an interest in the asset subject to forfeiture and, if so, the extent of that interest.

One view is that Rule 31(e) requires the jury to make a threshold determination whether the defendant has an interest in the property subject to criminal forfeiture. This inquiry may be phrased in terms as simple as, "Did Defendant have an interest in [the identified property]?" Where the Government seeks a money judgment of forfeiture, this threshold inquiry may be phrased simply as, "Did the defendant receive proceeds from commission of the crimes as to which you have returned a verdict of guilty?" Similarly, where the defendant purchased a property with commingled funds (*i.e.*, both criminally tainted and untainted), the threshold inquiry may be phrased as, "Did the defendant acquire an interest in [the identified property], in whole or in part, with proceeds of the offenses as to which you have returned a verdict of guilty?"

Under this view, neither the jury (in the special verdict) or the court (in the preliminary order of forfeiture) should determine the *extent* of a defendant's interest in any particular property ordered forfeited vis a vis third parties. The rationale behind this view is that Congress has left such determinations to post-conviction ancillary hearings[181] and/or petitions for remission or mitigation of the forfeiture.[182]

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[178] *Id.* at 40-41 (because right to have jury determine forfeitability is statutory, not constitutional, defendant's waiver of right to jury on forfeiture issues need not be knowing and informed); *United States v. Saccoccia*, 58 F.3d 754, 785 (1st Cir. 1995) (Rule 31(e) applies only to jury trials; no special verdict required when defendant waives right to jury on forfeiture issues), *cert. denied*, 517 U.S. 1105 (1996).

[179] Fed. R. Crim. P. 31(e).

[180] *See, e.g., United States v. Cauble*, 706 F.2d 1322, 1346 n.90 (5th Cir. 1983) (special verdict form asking jury to determine whether property was maintained in violation of RICO statute, or afforded defendant source of influence over RICO enterprise), *cert. denied*, 465 U.S. 1005 (1984); *accord United States v. L'Hoste*, 609 F.2d 796, 813 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

[181] *See* 21 U.S.C. § 853(n).

[182] *See* 21 U.S.C. § 853(i).

However, this view has been criticized as opening the door to needless litigation.[183] If the jury has the duty to determine that the defendant has an interest in the property, then will not the defendant have a right to introduce evidence on this subject? It is not uncommon for the defendant to attempt to prove that he does *not* own the property, and that it belongs to his wife, his children, or his nominee.[184] There is no purpose, critics assert, in allowing the defendant to introduce evidence that he does not own the property when third parties will have the right in the ancillary hearing to establish their ownership of the property.[185]

A second view is that Rule 31(e) requires the jury not only to find that the defendant has an interest in the asset subject to forfeiture, but also to specify the *extent* of that interest *vis a vis* third parties. This notion is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited.[186] At least one circuit has adopted this view.[187] This interpretation of the rule, however, leads to even more unnecessary litigation than the first view. As discussed *infra*, the ancillary proceeding is about establishing the third party's interest in the property *vis a vis* the defendant. Requiring the parties to litigate this question in the criminal trial, in order to determine the *extent* of the defendant's interest in accordance with Rule 31(e), means that the same issue will have to be litigated twice: once at trial and in the ancillary proceeding.

A third view is that after the jury has determined whether the defendant has an interest in the property subject to forfeiture, the district court should then make a finding regarding the precise extent of that interest at the time it enters the preliminary order of forfeiture. The Government would give notice of the forfeiture of that particular interest so that third parties would know whether to file a claim or not, and the ancillary hearing proceeding would be limited to determining whether the judge's initial determination was correct.

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[183] *See* Cassella, *supra* notes 8, 158 (expressing concern regarding determination of extent of defendant's interest in property subject to forfeiture in case-in-chief; this determination should be reserved for ancillary hearing proceeding).

[184] *See, e.g., United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996) (defendant permitted to call witnesses to establish property belongs to father, son and girlfriend; when jury forfeited property anyway, same third parties filed claims in ancillary hearing proceeding).

[185] *See, e.g.*, Cassella, *supra* note 158.

[186] *United States v. Riley*, 78 F.3d 367, 370-71 (8th Cir. 1996).

[187] *See United States v. Ham*, 58 F.3d 78, 83 (4th Cir.) (district court cannot enter order of forfeiture unless jury has entered special verdict regarding extent of defendant's interest in property), *cert. denied*, ___ U.S. ___, 116 S. Ct. 513 (1995).

This view is subject to attack on grounds that at the time of the defendant's sentencing, when the district court enters the preliminary order of forfeiture, the record will be entirely inadequate for the court to determine the defendant's interest in forfeited property vis a vis third parties. The defendant, whose own interest the jury will have declared forfeited, has no incentive to represent adequately the interests of third-party owners. Likewise, neither the Government nor the court should be relied upon to fully and fairly speak for third-party interests prior to the ancillary hearing. The third-party owners themselves cannot be relied upon to defend their interests because they are barred from participating in the trial except in the post-conviction ancillary hearing.[188] Thus, only the ancillary hearing may offer a full and fair opportunity for the litigation and resolution of third-party claims to the forfeited property.

A final view is that nothing in Rule 31(e) mandates a jury verdict concerning whether the defendant has an interest in the property sought to be forfeited. Under this view, Rule 31(e) requires a jury special verdict on only the extent of the interest that is presumptively forfeitable due to its status as proceeds, facilitating property, etc. Once the verdict is returned, the district court would then issue a preliminary order of forfeiture which similarly presumes the forfeitability of the property, but subject to any third-party claims concerning ownership.

The Department of Justice has submitted a proposal to amend the Federal Rules of Criminal Procedure to clarify what finding must be made to criminally forfeit a defendant's property. Until such changes are made, government attorneys must look to the law in their

[188] *See* 21 U.S.C. § 853(k).

circuits and to model special verdict forms provided by the Asset Forfeiture and Money Laundering Section for guidance in applying Rule 31(e).[189]

Property is often subject to forfeiture under more than one criminal count (*e.g.*, the property constitutes proceeds of both a narcotics conspiracy and substantive narcotics distribution activity) or under more than one forfeiture theory (*e.g.*, defendant purchased vehicle with proceeds of narcotics distribution, then used vehicle to transport narcotics intended for distribution). In such cases, the special verdict form should require the jury to specify the counts and theories that it relied upon in determining the property's forfeitability. Such a finding will preserve the forfeiture in the event the court of appeals reverses the defendant's conviction on one count supporting the forfeiture but not the other, or finds insufficient evidence to support the forfeiture under one theory of forfeiture but not the other.[190]

The special verdict form should not ask the jury to decide the ultimate question whether the defendant should be required to forfeit the assets. Rather, the district court will enter a

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[189] A number of circuits have held that the special verdict form should include a proportionality interrogatory if the property is subject to forfeiture under either a source of influence or proceeds theory. *See, e.g., United States v. Angiulo*, 897 F.2d 1169, 1211-12 (1st Cir.) (source of influence), *cert. denied*, 498 U.S. 845 (1990); *United States v. Porcelli*, 865 F.2d 1352, 1362-65 (2d Cir.) (source of influence), *cert. denied*, 493 U.S. 810 (1989); *United States v. Horak*, 833 F.2d 1235, 1242-43 (7th Cir. 1987) (proceeds); *United States v. McKeithen*, 822 F.2d 310, 314-15 (2d Cir. 1987) (CCE source of influence). The rationale behind requiring the inclusion of such an interrogatory is that while a defendant's interest in a criminal enterprise, *see, e.g.*, 18 U.S.C. § 1963(a)(2), is forfeitable in its entirety, forfeitable assets outside the scope of the enterprise, that may have been acquired with legitimate funds, should be forfeited only to the extent that they are tainted by the underlying illegal activity. *See Angiulo*, 897 F.2d at 1211 ("Under this proportionality rule, proceeds or profits and property affording a source of influence are only subject to forfeiture to the extent they are tainted by the racketeering activity. This is in contrast to the treatment of interest in an enterprise which are forfeitable regardless of taint."). Likewise, although a defendant's interest in facilitating property is generally forfeitable in its entirety (subject to Eighth Amendment concerns), the majority rule is that only that portion of an asset a defendant purchased with criminal proceeds is forfeitable. *See Horak*, 833 F.2d at 1242. *But see United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 250 (E.D. Va. 1993) (ordering entire $22,000 car forfeited as criminal proceed even though $9,000 allegedly came from untainted funds). In addition, because the defendant's interest in a legal enterprise may not be forfeitable in its entirety under the Eighth Amendment, the special verdict form seeking forfeiture of such an interest should also include a proportionality interrogatory. *See United States v. Sarbello*, 985 F.2d 716, 722 (3d Cir. 1993) (proportionality analysis must be applied to source of influence forfeitures; citing cases). For these reasons, the special verdict form should require the jury to identify the appropriate theory of forfeiture. If the jury finds that the property is forfeitable under a proceeds or source of influence theory, the special verdict form should require the jury to specify what portion of the property actually influenced the enterprise or represented the actual proceeds from the defendant's illegal activity.

[190] *See United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (if conviction on substantive offense supporting forfeiture is reversed, order of forfeiture must be vacated).

preliminary order of forfeiture requiring the defendant to forfeit the assets based on the jury's factual findings.[191]

Asking the jury to determine whether the defendant should be required to forfeit the defendant's assets has resulted in internal inconsistencies in the special verdict.[192] For example, in *United States v. Wilson*, 742 F. Supp. 905 (E.D. Pa. 1989), *aff'd*, 909 F.2d 1478 (3d Cir.) (Table), *cert. denied*, 498 U.S. 1016 (1990), the jury's special verdict of forfeiture found that the RICO enterprise that served as the basis for four defendants' convictions acquired a total of $180,700 in gross proceeds.[193] Instead of ending its inquiries there, the special verdict form then asked the jury to determine the amount that each defendant "is required to forfeit." In response to this question, the jury replied that three defendants should forfeit $5,000 each, and the fourth defendant should forfeit nothing. The district court subsequently disregarded this portion of the special verdict, entered a forfeiture judgment for the full $180,700, and held the four defendants jointly and severally liable for that sum. The court defended its actions on grounds that the defendant has no right to have a jury determine the ultimate question whether forfeiture should occur because forfeiture is statutorily mandatory once the jury determines that the property has been used or acquired in violation of federal law.[194]

G. Joint and Several Liability

In multi-defendant forfeitures, the jury should not apportion the amount of proceeds that each defendant should forfeit because co-defendants are jointly and severally liable for the

[191] *See United States v. Kravitz*, 738 F.2d 102, 105-06 (3d Cir. 1984) (final determination of forfeiture results automatically from jury's findings on essential factual issues contained in special verdict interrogatories); *United States v. L'Hoste*, 609 F.2d 796, 814 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

[192] *See, e.g., Kravitz*, 738 F.2d at 103-04 (jury answered affirmatively when asked if defendant violated law, but answered negatively when asked if property should be forfeited; district court held jury's response regarding forfeiture not binding and ordered forfeiture).

[193] *United States v. Wilson*, 742 F. Supp. at 907-08.

[194] *Id.* at 908.

entire amount of proceeds their illegal acts generated, at least in conspiracy cases.[195] Courts uniformly have imposed joint and several liability in recognition of congressional intent that the forfeiture statutes be utilized to make a full recovery of assets and to punish defendants.[196]

The Eleventh Circuit was the first court to consider the imposition of joint and several forfeiture liability in *United States v. Caporale,* 806 F.2d 1487 (11th Cir. 1986), *cert. denied,* 482 U.S. 917 (1987). In a precedent-setting opinion, the court declared that joint and several forfeiture liability among RICO defendants is entirely appropriate when viewed against the congressional purpose in creating criminal forfeiture and considering the inherent difficulty in proving how proceeds were allocated among a group of co-conspirators. More specifically, the *Caporale* court found that it would be a nearly impossible burden for the Government to prove exactly which defendant was responsible for what portion of the proceeds, and that the imposition of such a burden upon the government would defeat the purpose of the forfeiture statute.[197]

H. Plea Bargaining: Voluntary Forfeiture

To forfeit a defendant's assets as part of a plea agreement, the indictment or information must include a forfeiture count or allegation, and the defendant must plead to a statutory violation that provides for forfeiture upon conviction. Otherwise, the forfeiture will be invalid even though the defendant may have been willing to agree to forfeiture in the plea agreement.

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[195] *See United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995) (RICO co-conspirators jointly and severally liable for proceeds), *cert. denied sub nom. Saccoccia v. United States*, ___ U.S. ___, 116 S. Ct. 1322 (1996); *United States v. Masters*, 924 F.2d 1362, 1369 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991); *United States v. Caporale*, 806 F.2d 1487, 1504, 1506-09 (11th Cir. 1986) (imposing joint and several liability for proceeds received under RICO forfeiture provisions), *cert. denied*, 482 U.S. 917 (1987); *United States v. Benevento*, 663 F. Supp. 1115, 1118 (E.D.N.Y. 1987) (upholding joint and several liability as to forfeiture of drug proceeds under section 853(a)), *aff'd*, 836 F.2d 129 (2d Cir. 1988); *see, e.g., United States v. Wilson*, 742 F. Supp. 905, 909 (E.D. Pa. 1989) (overturning jury verdict that erroneously apportioned proceeds among RICO conspirators, and imposing instead joint and several liability).

[196] *See, e.g., Benevento*, 663 F. Supp. at 1118 ("the sweep of the statute is broad enough to impose joint and several liability upon those who engaged in and furthered the criminal enterprise that produced the funds subject to forfeiture").

[197] *See United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *see also United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (Government can collect total amount subject to forfeiture only once, but subject to that cap it can collect from any defendant so much of that amount as was foreseeable to that defendant); *United States v. McCarroll*, No. 95-Cr-48, 1996 WL 355371 at *9 (N.D. Ill. 1996) (unpublished) (following *Hurley*); *United States v. DeFries*, 909 F. Supp. 13, 19-20 (D.D.C. 1995) (defendants are jointly and severally liable even if the Government is able to determine precisely how much each defendant benefitted from scheme).

The written plea agreement should provide for the defendant's voluntary forfeiture of all assets in the indictment, including any listed in bills of particulars. The plea agreement also often requires the defendant to assist in identifying, locating, returning, and forfeiting *all* forfeitable assets, not only the defendant's assets, but also the forfeitable assets of his co-defendants or defendants in related cases.[198]

Department of Justice policy regarding plea agreements and the global settlement of parallel criminal actions and civil forfeiture proceedings provides that:

> The [G]overnment may conclude a civil forfeiture action in conjunction with the criminal charges against the defendant which provided the cause of action against the property. The [G]overnment should *not* agree, however, to release property subject to forfeiture (civil or criminal) in order to *coerce* a guilty plea on the substantive charges, nor should the [G]overnment agree to dismiss criminal charges in order to *coerce* a forfeiture settlement. If a plea agreement is not to conclude the civil forfeiture case, language to that effect should also be stated in the plea agreement. Failure to specify in this manner could be fatal to the concurrent civil forfeiture action. Further specific principles governing "global" settlements are as follows:
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> (1) In all cases, agreements must be based upon facts which support forfeiture. The Department does not release property which is otherwise subject to forfeiture to encourage guilty pleas; nor does it permit defendants to submit property which is otherwise not subject to forfeiture in order to lighten the potential incarceration component of the punishment.
>
> (2) To the maximum extent possible, the criminal plea and forfeiture should conclude the defendant's business with the [G]overnment. Delaying forfeiture considerations until after the conclusion of the criminal case unnecessarily extends the [G]overnment's involvement with the defendant and diminishes its effectiveness.
>
> (3) Where the claimant/defendant has negotiated a plea agreement and concurrently wishes to forfeit the property subject to a civil forfeiture action, the plea agreement should state that the defendant has waived any and all rights—constitutional, statutory or otherwise. Any civil settlement should be documented independently of the plea agreement and should include the following information: (a) the claimant/defendant's interest in the property; (b) an admission of the facts supporting forfeiture; (c) the claimant/defendant gives up all right to the property; (d) he/she gives up any right to contest the forfeiture; and (e) settlement should be supported by written agreement. Furthermore, the defendant, in the plea agreement, must admit to facts sufficient to support the forfeiture. The [G]overnment, however, should not waive its right to reopen a civil forfeiture action where it is later

[198] If the Government agrees to forego the forfeiture of certain assets as a part of the plea agreement, and the pleading defendant testifies as a witness against his co-defendants, government attorneys should report this agreement to the co-defendants' attorneys as *Giglio* material. *See Giglio v. United States*, 405 U.S. 150, 155 (1972) (due process violated when the government attorney did not disclose to defense counsel agreement of immunity made between the Government and its chief witness).

determined that the settlement was based on false information or where the defendant violates his plea agreement.[199]

In addition to these guidelines, both the plea agreement and the civil forfeiture settlement agreement should expressly waive any excessive fines defense.[200]

The Assistant Attorney General of the Criminal Division must approve any agreement to exempt an asset from forfeiture so that it can be transferred to an attorney as fees.[201] Assuming the fees are legitimate, Department of Justice approval will be given only if there are reasonable grounds to believe that the particular asset is not subject to forfeiture.[202]

Settlements should not provide for satisfaction of the total amount to be forfeited by payment plans, except upon the advice and approval of the Asset Forfeiture and Money Laundering Section, in consultation with the Headquarters Seized Assets Division of the U.S. Marshals Service.[203] Plea agreements and settlements may not provide for the use of forfeited assets to pay criminal fines, taxes, or other debts owed the United States.[204]

If the defendant pleads guilty to a criminal violation that does not provide for forfeiture, the Government can civilly forfeit his assets. In such a case, the plea agreement should provide that the defendant will not file a claim in any subsequent civil forfeiture proceedings, and that he waives any double jeopardy and excessive fines defenses he might otherwise raise in such proceedings.

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[199] *Asset Forfeiture Policy Manual* (1996), Chap. 3, Sec. I, at p. 3 — 6. The appropriate investigative agency and the U.S. Marshals Service should be consulted in all settlements.

[200] *See Austin v. United States*, 509 U.S. 602 (1993); *Alexander v. United States*, 509 U.S. 544 (1993).

[201] *See* "Attorney Fee Forfeiture Guidelines," *United States Attorneys' Manual* § 9-111.700.

[202] *Cf. United States v. Magini*, 973 F.2d 261, 263, 265 (4th Cir. 1992) (defendant claimed Sixth Amendment violation on grounds that defense attorney had conflict of interest in negotiating plea agreement that provided for use of defendant's assets to pay attorney's fees rather than for forfeiture; court reversed and remanded for evidentiary hearing).

[203] *See Asset Forfeiture Policy Manual* (1996), Chap. 3, Sec. I, at p. 3 — 6.

[204] *Id.* at p. 3 — 7.

Alternatively, a monetary amount may be accepted in lieu of forfeiture under 19 U.S.C. § 1613(c).[205] To do so, the Government must first initiate a civil or criminal forfeiture action naming the property and alleging the defendant's interest in it. The parties must then file a written agreement to substitute money in lieu of the property to be forfeited. This agreement should incorporate the language of section 1613(c). After the court approves the agreement, the U.S. Marshals Service will accept and deposit the money in the same manner as the proceeds of the sale of forfeited property.

I. Plea Hearings

Fed. R. Crim. P. 11(f), which requires the district court to find a factual basis for the plea before accepting it, does not apply to criminal forfeiture so long as the court has found a factual basis for the defendant's plea to the predicate forfeiture offense.[206] Nevertheless, as a general rule, the Government should submit and ask the court to find a factual basis for the forfeiture in order to establish a record for the ancillary hearing proceedings. Care should also be taken to establish a factual basis anticipating a challenge under the Excessive Fines Clause in any case in which the defendant generally reserves the right to appeal and/or does not knowingly and voluntarily waive this constitutional protection. For example, the Government should include in its factual submission favorable facts regarding third-party interests in the assets in order to "lock in" the pleading defendant's testimony prior to the ancillary hearing. This action is particularly important because the ancillary hearing generally takes place after the defendant has been sentenced, when he is more likely to assist third parties in making their claims.

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[205] *See* 19 U.S.C. § 1613(c) (Secretary may grant relief from forfeiture upon terms requiring deposit or retention of monetary amount in lieu of property to be forfeited; amount recovered shall be treated in same manner as proceeds of sale of forfeited property); *Asset Forfeiture Policy Manual* (1996), Chap. 3, Sec. I, at p. 3 — 13.

[206] *See Libretti v. United States*, 516 U.S. 29, 36 (1995); *see also United States v. Boatner*, 966 F.2d 1575, 1581-82 (11th Cir. 1992) (Rule 11 does not require sentencing judge to determine whether factual basis supports defendant's concession to criminal forfeiture pursuant to plea bargain); *accord United States v. Herndon*, 982 F.2d 1411, 1418 (10th Cir. 1992) (following *Boatner,* but expressing preference that district court determine if there is factual basis for forfeiture).

VII. Post-trial Proceedings

A. Preliminary Order of Forfeiture

1. Form and Contents

Once a special verdict or stipulation has determined that a defendant's property is indeed forfeitable, forfeiture is statutorily mandated.[207] The legislative history discussing section 853(a) and the parallel RICO provision notes that their language "emphasizes the mandatory nature of criminal forfeiture, requiring the court to order forfeiture in addition to any other penalty imposed."[208]

Although the court has the authority to set the "terms and conditions" of the seizure of forfeited property,[209] it does not have comparable discretion as to the imposition of forfeiture.[210] Neither may the court direct that a criminal fine be satisfied with forfeited assets.[211] Rather, the court must enter a preliminary order of forfeiture to the United States of all of the defendant's interests and assets that the jury has found to be forfeitable within the scope of the underlying forfeiture statute.[212]

Under Fed. R. Crim. P. 32(d)(2), the preliminary order of forfeiture "must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper." The order should not, however, include specific directions or provisions

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[207] *See* 21 U.S.C. § 853(a) ("The court, in imposing sentence...*shall* order...that the person forfeit to the United States all property described in this subsection.") (emphasis added); *United States v. Kravitz*, 738 F.2d 102, 105-06 (3d Cir. 1984) (final determination of forfeiture results automatically from jury's findings on essential factual issues contained in special verdict interrogatories).

[208] S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3383, 3394.

[209] *See* 21 U.S.C. § 853(g); Fed. R. Crim. P. 32(d)(2); *see also United States v. L'Hoste*, 609 F.2d 796, 811-12 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

[210] *See United States v. DeFries*, 909 F. Supp. 15 (D.D.C. 1995) (court has no discretion to withhold forfeiture or adjust amount; its role is "merely to ascertain if the requisite nexus exists").

[211] *See United States v. Trotter*, 912 F.2d 964, 966 (8th Cir. 1990) (*en banc*) (district court cannot require fines levied against defendant to be paid from forfeited money because the Government's title in forfeiture property relates back to time at which crime committed).

[212] *See* Fed. R. Crim. P. 32(d)(2); *Hess*, 691 F.2d at 190; *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. L'Hoste*, 609 F.2d 796, 811-12 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

regarding the sale or other disposition of the forfeited property by the Government. Rather, it should specifically identify each forfeited asset and state simply that the interest of the defendant in each asset is "forfeited to the United States for disposition in accordance with law," omitting any more specific provisions regarding third-party interests until the conclusion of the ancillary hearing process and the entry of the final order of forfeiture.[213]

2. Personal Money Judgments

Instead of, or in addition to, forfeiture of specific assets, the preliminary order of forfeiture may include a money judgment against the defendant for the total amount subject to forfeiture, so long as the indictment sought such money judgment and the jury returned a special verdict finding that the defendant's criminal activity generated the amount of the judgment sought.[214] The preliminary order should impose joint and several liability on the defendant and his co-conspirators for the amount of the proceeds they garnered through their conspiratorial or other illegal activities.[215]

3. Timing of the Preliminary Order

When should the district court enter the preliminary order of forfeiture? The criminal drug forfeiture statute refers to the court ordering forfeiture "in imposing sentence,"[216] and authorizing seizure of forfeitable assets "upon entry of an order of forfeiture."[217] Historically,

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[213] *See* Memorandum, entitled "Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets," Directive 86-1, issued by the Office of the Deputy Attorney General on June 25, 1986 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. I, at p. 5 — 1].

[214] *See United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (Government is entitled to a personal money judgment equal to the amount of money involved in a money laundering offense, but the Government may only *seize* property directly traceable to this offense, or forfeitable as substitute assets); *See United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1011 (1986); *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

[215] *See United States v. Caporale*, 806 F.2d 1487, 1506 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987).

[216] *See* section 853(a).

[217] *See* section 853(g); *see also United States v. Alexander*, 772 F. Supp. 440, 440-41 (D. Minn. 1990) (preliminary order of forfeiture in RICO case may be entered only at time of sentencing).

the rationale for delaying the entry of the preliminary order of forfeiture until sentencing was that forfeiture is part of the defendant's punishment.[218]

Despite the statutory language seemingly mandating entry of the preliminary order of forfeiture only at sentencing, some courts routinely entered preliminary orders of forfeiture prior to sentencing by agreement of the parties or following the entry of a guilty plea.[219] This conflict between statutory language and judicial practice was resolved on December 1, 1996, when new Fed. R. Crim. P. 32(d)(2) became effective. This new Rule allows the court to enter the preliminary order of forfeiture at any time after the jury returns special verdicts of forfeiture or the defendant pleads guilty. The new Rule 32(d)(2) applies to all cases pending on December 1, 1996. Thus, the Government should be prepared to move the court to enter the preliminary order of forfeiture immediately upon the jury's return of the special verdicts.

If the court omits entry of the preliminary order of forfeiture at the defendant's sentencing, it must enter the order within seven days thereafter.[220] This is because a court's failure to order forfeiture constitutes substantive judicial error rather than a "clerical mistake" which could be corrected at any time.[221] Rule 35(c)'s seven-day limit is jurisdictional.[222]

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[218] *See Libretti v. United States*, 516 U.S. 29, 36 (1995); *see, e.g., United States v. Alexander*, 772 F. Supp. at 440-41 (denying Government's motion for forfeiture prior to sentencing); *see also United States v. Songer*, 842 F.2d 240, 244 (10th Cir. 1988) (imposing sentence of forfeiture in defendant's absence violates Fed. R. Crim. P. 43(a)).

[219] *See, e.g., United States v. Douglas*, 55 F.3d 584, 585 (11th Cir. 1995) (recognizing district court's preliminary order of forfeiture after defendant pled guilty and agreed to forfeiture in plea agreement); *Mosley v. United States*, No. 95-CV-69, 92-CR-51, 1995 WL 118180 at *1 (N.D.N.Y. Mar. 8, 1995) (unpublished) (issuing preliminary order of forfeiture in accordance with plea agreement).

[220] *See* Fed. R. Crim. P. 35(c) (providing for correction of sentence for "clear error" only within seven days of imposition); Fed. R. Crim. P. 45(b) ("the court may not extend the time for taking any action under Rule...35, except to the extent and under the conditions stated [therein]"). The courts are split regarding whether Rule 35(c)'s seven-day period runs from the oral pronouncement of sentence in the presence of the defendant or the entry of the formal, written sentencing order. *Compare United States v. Abreau-Cabrera*, 64 F.3d 67, 73-74 (2d Cir. 1995) (period runs from oral pronouncement of sentence) *and United States v. Thompson*, 33 F.3d 1230, 1231 (10th Cir. 1994) (same) *with United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994) (period runs from date judgment is entered rather than date sentence is orally pronounced) *and United States v. Morillo*, 8 F.3d 864, 869 n.8 (1st Cir. 1994) (same).

[221] *See* Fed. R. Crim. P. 36.

[222] *See United States v. Abreau-Cabrera*, 64 F.3d at 70-74; *United States v. Lopez*, 26 F.3d 512, 519-20 & n.1 (5th Cir. 1994); *United States v. Fahm*, 13 F.3d 447, 453-54 (1st Cir. 1994); *United States v. Turner*, 998 F.2d 534, 535-36 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *see also Carlisle v. United States*, ___ U.S. ___, 116 S. Ct. 1460, 1464 (1996) (seven-day time limit in which court may grant motion for judgment of acquittal following jury's return of guilty verdict under Fed. R. Crim. P. 29(c) is jurisdictional).

Government attorneys should thus ensure that the sentencing order (including, at least in some circuits, the oral pronouncement of sentence in the presence of the defendant)[223] mentions the criminal forfeiture where a jury has returned a verdict of forfeiture or the defendant has agreed to the forfeiture as part of his plea agreement. If no mention is made at sentencing, and the seven-day correction period has elapsed, the Government's only possible recourse is to appeal the failure of the sentencing order to include the mandatory preliminary order of forfeiture. The district court may then, on remand, correct the sentence to include the criminal forfeiture.[224]

4. Effect of Forfeiture on Sentencing

Criminal forfeiture is not a basis for downward departure under the United States Sentencing Guidelines.[225] The district court may hold the defendant in contempt for attempting to conceal or dissipate assets in an effort to avoid the criminal forfeiture order.[226]

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[223] *See, e.g., United States v. Shannon*, 87 F.3d 1325 (9th Cir. 1996) (unpublished) (order of forfeiture vacated because judge failed to mention forfeiture at sentencing, even though forfeiture was included in indictment and plea agreement).

[224] *See* Fed. R. Crim. P. 35(a).

[225] *See United States v. Hendrickson*, 22 F.3d 170, 176 (7th Cir.) (forfeiture pursuant to plea agreement does not reflect "extraordinary acceptance of responsibility" meriting downward departure; under Sentencing Guidelines, forfeiture is imposed in addition to, not in lieu of, incarceration), *cert. denied*, 513 U.S. 878 (1994); *United States v. Shirk*, 981 F.2d 1382, 1397 (3d Cir. 1992) (reversing district court's downward departure from Sentencing Guidelines on forfeiture grounds because the guidelines viewed monetary forfeiture as entirely separate from other sentencing issues), *cert. denied*, 510 U.S. 1068 (1994); *see also United States v. Weinberger*, 91 F.3d 642 at *2-3 (4th Cir. Aug. 2, 1996) (civil forfeiture is not valid basis for downward departure under Sentencing Guidelines); *United States v. Various Computers*, 82 F.3d 582, 588 (3d Cir. 1996) (imposition of both restitution and forfeiture at worst forces offender to pay twice the value of proceeds of crime, which in no way is disproportionate to harm inflicted upon the Government or society by offense).

[226] *See, e.g., United States v. Barnette*, 902 F. Supp. 1522, 1539, 1542 (M.D. Fla. 1995) (holding defendant in civil contempt for engaging in "systematic effort designed to evade" forfeiture judgment; defendant's wife also held in contempt for aiding and abetting defendant's evasion efforts); *see also United States v. Paccione*, 964 F.2d 1269, 1274 (2d Cir. 1992) (affirming district court order holding father of convicted RICO defendant in criminal contempt for violating a restraining order and consent order of forfeiture).

5. Third-party Rights

Third parties cannot object to the entry of the preliminary order of forfeiture,[227] nor move to dismiss or quash it once it is entered.[228] Instead, they must file a claim in the ancillary hearing proceeding in order to assert their interest in property subject to forfeiture.[229]

B. Substitute Assets

The issue of the forfeitability of substitute assets is not submitted to the jury.[230] Instead, if the defendant's directly forfeitable assets are unavailable at the time the jury returns its special verdict of forfeiture, the Government should file a motion requesting that the district court enter an order forfeiting substitute assets up to an equivalent value of the unavailable assets.[231]

In order to obtain such an order, the Government must establish that the directly forfeitable property, as a result of any act or omission of the defendant:

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

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[227] *See United States v. BCCI Holdings (Luxembourg), S.A., (Petition of ICIC Investments)*, 795 F. Supp. 477, 479 (D.D.C. 1992).

[228] *See United States v. Farley*, 919 F. Supp. 276 (S.D. Ohio 1996) (denying motion to dismiss); *United States v. Duboc*, No. GCR-94-01009-MMP (N.D. Fla. May 9, 1996) (unpublished) (denying motion to quash preliminary order of forfeiture); *see also United States v. Sokolow*, No. 93-CRIM-394-01, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpublished) (third party may not relitigate propriety of special verdict form, legality of forfeiture count, or whether court properly ordered forfeiture of substitute assets).

[229] The ancillary hearing proceeding is discussed in detail in part VIII of this chapter, *infra.*

[230] *See* 21 U.S.C. § 853(p) ("the court shall order the forfeiture [of substitute assets]"); *Libretti v. United States*, 516 U.S. 29, 41 (1995) ("right to jury determination of forfeitability is merely statutory in origin"); *United States v. Thompson*, 837 F. Supp. 585, 586 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets); *see, e.g., United States v. Henry*, 64 F.3d 664 n.1 (6th Cir. 1995) (affirming order of forfeiture of house as substitute asset despite jury verdict that it was not directly forfeitable), *cert. denied*, 516 U.S. 1147 (1996).

[231] *See* section 853(p).

(4) has been substantially diminished in value; or

(5) has been commingled with other property that cannot be divided without difficulty.[232]

The Government should file its motion for substitution of assets immediately following the jury's return of the special verdict of forfeiture. The motion should be accompanied by an affidavit setting forth facts establishing that: (1) the directly forfeitable asset is no longer available; (2) its unavailability is due to the defendant's action or inaction in one of the categories listed in section 853(p); (3) the defendant has an interest in the asset to be substituted; and (4) the extent to which the value of the substituted asset compares with that of the originally forfeited asset. Either the government attorney or the case agent can swear to such an affidavit. The district court then includes in its preliminary order of forfeiture a provision providing for the forfeiture of the defendant's legitimate assets up to the amount of the unavailable directly forfeitable assets.[233]

If the Government has taken post-conviction depositions to locate directly forfeitable assets or to identify the defendant's legitimate assets that could be forfeited as substitute assets,[234] the Government may submit deposition excerpts satisfying the above requirements in lieu of, or in addition to, an affidavit.

Third parties may assert an interest in substitute assets in the ancillary hearing proceeding in the same manner they would assert a claim against directly forfeitable assets.[235]

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[232] *Id.*

[233] *See, e.g., United States v. Marmolejo*, 89 F.3d 1185, 1197-98 (5th Cir.) (fact that the Government could not trace proceeds of defendant's crimes satisfied burden of showing that defendant had made his property unavailable by transferring it to third parties), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1424 (1996); *United States v. Sokolow*, No. CRIM-93-394, 1995 WL 113079 (E.D. Pa. Mar. 14, 1995) (unpublished) (where forfeitable property is diminished in value due to defendant's bad business investment, forfeiture of substitute assets is appropriate), *aff'd*, 81 F.3d 397 (3d Cir. 1996); *United States v. Swank Corp.*, 797 F. Supp. 497 (E.D. Va. 1992) (order of forfeiture for substitute assets must be satisfied out of something not itself subject to forfeiture; otherwise, forfeiture order would be satisfied out of something that belongs to United States, rendering substitute assets provision meaningless).

[234] *See* 21 U.S.C. § 853(m).

[235] *See United States v. Lester*, 85 F.3d. 1409 (9th Cir. 1996); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996).

The Government may continue to move for the substitution of assets discovered well after the criminal case and original ancillary hearings are completed.[236] But the Government should repeat the ancillary hearing process as to the newly substituted assets, including provision of notice to any known third parties, in order to resolve any third party claims to the assets and obtain a final order of forfeiture for them.[237]

No discussion of substitute assets is complete without an examination of *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996). The Government sought to forfeit real property held jointly by Mr. and Mrs. Lester as a substitute asset following Mr. Lester's conviction on drug charges and the jury's return of a special verdict finding that Mr. Lester had generated $2.5 million through the sale of narcotics. The district court upheld the forfeiture of Mrs. Lester's interest in the property on grounds that under California law, both spouses' interest in community property could be forfeited to satisfy Mr. Lester's "debt" to the United States.[238]

The Ninth Circuit reversed. Although a party's ownership interest in property subject to forfeiture is determined by state law, whether that interest is forfeitable is determined solely by reference to the applicable forfeiture statute and federal case law.[239] Under 21 U.S.C. § 853(n)(6)(A) and (p), the Government may not forfeit "the community property interest of an innocent spouse in substitute property."[240] Because only property of the defendant may be

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[236] *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to forfeit substitute assets after appeal if filed); *accord United States v. Voight*, 89 F.3d at 1000 (following *Hurley*, court may amend order of forfeiture at any time to include substitute assets); *see, e.g., United States v. Martenson*, 780 F. Supp. 492, 494-95 (N.D. Ill. 1991) (substitute asset forfeited four years after sentencing).

[237] The forfeiture of substitute assets is an alternative means of collecting a forfeiture judgment, not an enhanced penalty. Consequently, application of the substitute assets forfeiture provision to criminal violations occurring before its enactment in 1986 does not violate the Ex Post Facto Clause. *See United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991); *Martenson*, 780 F. Supp. at 495. *Cf. United States v. Jackson*, 718 F. Supp. 1288, 1292 (N.D.W. Va. 1989) (substitution of assets not available for restraint of property for forfeiture based on money laundering violation alleged to have occurred before effective date of incorporation of substitute assets provision in 18 U.S.C. § 982).

[238] *United States v. Lester*, 85 F.3d 1409, 1410 (9th Cir. 1996).

[239] *Id.* at 1414 n.9.

[240] *Id.* at 1413.

forfeited as a substitute asset, the court held that Mrs. Lester's undivided community property interest in the realty was not subject to forfeiture.[241]

C. Discovery to Locate Forfeitable Assets

Following the entry of the preliminary order of forfeiture, the Government may apply to the district court for an order permitting it to take the depositions of witnesses in order to facilitate the identification and location of forfeited property and to require the witnesses to produce any documents relevant to identifying such property.[242] Section 853(m) provides that such depositions be conducted in the same manner as provided for the taking of depositions under Fed. R. Crim. P. 15. At least one court has held that this mandate endows the convicted defendant with a statutory right to be present at any deposition conducted for the purpose of locating his forfeitable assets.[243]

D. Interlocutory Sale

The Government generally cannot sell or dispose of property subject to a preliminary order of forfeiture until the ancillary hearing proceeding has been completed, a final forfeiture order has been entered in the Government's favor, and the 60-day period within which the defendant may appeal his conviction has lapsed without appeal.[244] The exception to this rule is that the Government may sell the property if the defendant does not obtain a stay of the forfeiture order, and if all third-party claimants reach a stipulated agreement to sell the property and substitute the sale proceeds pending the outcome of the ancillary proceeding. If the claimants refuse to agree to an interlocutory sale, the Government may file a motion to show cause why the property should not be sold pending resolution of the third-party claims. If the court orders the property sold, the Government may then sell the property and deposit the sale proceeds in an interest-bearing escrow account pending disposition of all third-party petitions.

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[241] Nevertheless, because the Government obtained a money judgment against Mr. Lester, it could enforce that judgment under state law by levying against any of Mr. Lester's property in a separate enforcement action. Under state community property law, Mrs. Lester's interest in the realty and, indeed, the entire community property estate could be attached to satisfy Mr. Lester's $2.5 million "debt" to the United States in that separate action.

[242] *See* 21 U.S.C. § 853(m); *see, e.g., United States v. Saccoccia*, 898 F. Supp. 53, 60-61 (D.R.I. 1995) (Government can take depositions of defense counsel to determine source of fees for purposes of locating pool of assets controlled by defendant and subject to forfeiture).

[243] *See United States v. Saccoccia*, 913 F. Supp. 129, 131 (D.R.I. 1996).

[244] *See* Fed. R. App. P. 4(a)(1).

E. Protection of Government's Interest

The preliminary order of forfeiture should direct the U.S. Marshals Service to seize and take custody of the property listed as subject to forfeiture in that order.[245] The U.S. Marshals Service deposits all liquid assets in the Department of Justice Seized Asset Deposit Fund.

For forfeitures initiated by the Department of the Treasury agencies, such as Internal Revenue Service and the U.S. Customs Service, the preliminary order of forfeiture should direct EG&G Dynatrend—the private corporation that Department of the Treasury has contracted to manage forfeited property—to take custody of the property. All liquid assets subject to forfeiture by Department of the Treasury agencies are deposited into the Customs Suspense Account.

With regard to real property, *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), held that the Due Process Clause requires the Government to give the owner of real property pre-seizure notice and an opportunity for a hearing. *Good* should not apply, however, to the seizure of real property post-trial but before the completion of the ancillary hearing proceeding because implicit in the preliminary order of forfeiture is the finding that the property, which once belonged to the defendant, is now forfeited to the United States, which is presumptively the owner until a third-party claimant successfully asserts his interest in that property.

In addition to authorizing its seizure, the district court, upon the Government's application, may take other measures to protect the Government's interest in forfeited property prior to the entry of the final order of forfeiture. For example, the court may issue restraining orders or injunctions; require the execution of satisfactory performance bonds; appoint receivers, conservators, appraisers, accountants, or trustees; or take whatever other action it finds appropriate and necessary to protect the Government's interest.[246] These alternatives to seizure are particularly useful when the property in question is not susceptible to physical custody, such as an interest in a partnership or partial ownership of a continuing business concern. Any income accruing to or derived from the forfeited property, interest, or enterprise may be used to offset its ordinary and necessary expenses if those expenses are

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[245] *See* 21 U.S.C. § 853(g) (upon entry of preliminary order of forfeiture, district court "shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper").

[246] *Id.*

required by law, or are needed to protect the interests of the Government or third parties.[247] Any income not necessary to pay the asset's expenses should be deposited into the Seized Asset Deposit Fund pending completion of the ancillary hearing proceeding and entry of the final order of forfeiture.

F. Recovery of Property Transferred to Third Parties

If the property has already been transferred to a successful third-party claimant, the Government can void the transfer and return the property to the defendant.[248] This scenario becomes much more complicated, however, if the third party has disposed of the property by the time the defendant's appeal is decided because, in such a case, the Government may not recover substitute assets from the third party.[249] Rather, the Government may recover only property traceable to the forfeitable property transferred to the third party.[250] The Government may, however, file a civil action against the third party under state law to recover the property.[251]

VIII. Ancillary Hearing Proceeding

When criminal forfeiture statutes were first enacted in the 1970s, there was no provision for adjudicating third-party rights in the forfeited property. In 1984, Congress enacted the ancillary proceeding provisions to provide third parties with a forum in which they could establish that the order of forfeiture entered in the criminal case was "invalid" because the property belonged to them, not to the criminal defendant.[252]

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[247] *Id.*

[248] *See* 21 U.S.C. § 853(c) (codifying relation back doctrine); *see also United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997) (relation back doctrine applies to substitute assets; any transfer of substitute assets by defendant to third party that occurs after defendant is named as target of investigation is void under section 853(c)).

[249] *See In Re Moffitt, Zwerling & Kemler, P.C.*, 864 F. Supp. 527 (E.D. Va. 1994) (*"Moffitt II"*).

[250] *See generally In Re Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1152 (E.D. Va. 1995) (*"Moffitt III"*) (Government may conduct discovery to locate and identify such traceable property), *aff'd in part and rev'd in part*, 83 F.3d 660 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 788 (1997).

[251] *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 669 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 788 (1997).

[252] *See* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3391; *see generally* Cassella, *supra* notes 8 and 158.

The procedures governing the ancillary hearing proceeding are set forth in 21 U.S.C. § 853(n). That statute gives third parties the opportunity, post trial, to establish that either: (a) the property belonged to them, not to the defendant, at the time that the crime giving rise to the forfeiture occurred; or (b) they subsequently purchased the property from the defendant without reason to know that it was subject to forfeiture.[253]

A. When Ancillary Hearing Proceedings Must Take Place

The Government need not conduct an ancillary hearing proceeding at all if the only property subject to forfeiture is a money judgment against the defendant. This is because section 853(n) applies only when specific property is ordered forfeited and there may be a person other than the defendant with an interest in that property. An ancillary proceeding must take place, however, in any case in which the Government wishes to forfeit a specific asset of the defendant either as property directly traceable to the criminal offense or as substitute assets in order to ensure that no third parties have an interest in that asset.

B. Choice of Law

Federal law applies in the ancillary hearing proceeding to interpret the meaning of terms in the federal forfeiture statutes.[254] The law of the forum state, however, applies in determining whether the claimant has the requisite legal interest in the property to have standing.[255] For example, federal law would be applied to determine whether Congress intended to protect lienholders, spouses or bailees who attempt to assert an interest in the

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[253] 21 U.S.C. § 853(n)(6); *see* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386 ("if a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interest invalid"); *United States v. Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992) (order directing forfeiture of property that actually belongs to third person and not to defendant would be invalid because criminal court does not have jurisdiction over third party's property).

[254] *E.g., United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Foreign Branches)*, 48 F.3d 551, 553 (D.C. Cir.) (using federal laws to determine that corporate defendant's foreign branches are "the defendant" for purposes of 18 U.S.C. § 1963(l)(2)), *cert. denied*, ___ U.S. ___, 116 S. Ct. 563 (MEM) (1995).

[255] *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (where claim is filed in ancillary hearing, court looks to state law to see what interest claimant has in property, and looks to federal statutes to see that interest is protected).

forfeited property, but state property law would determine whether a valid lien or bailment was created or a valid spousal interest exists.[256]

C. Procedure

Following the entry of the preliminary order of forfeiture, the Government commences the ancillary hearing phase by publishing "notice of the order and of its intent to dispose of the property."[257] Unlike the civil forfeiture statutes, section 853(n)(1) contains no cross reference to the Customs laws regarding how many times the Government must publish notice of forfeiture,[258] or to the admiralty rules regarding place of publication.[259] Rather, section 853(n)(1) simply instructs that the Government shall publish notice of the forfeiture "in such manner as the Attorney General may direct." In accordance with this direction, the Asset Forfeiture and Money Laundering Section recommends publishing notice three times in a newspaper of general circulation.

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[256] *See, e.g., United States v. Alcaraz-Garcia*, 79 F.3d 769, 774-75 (9th Cir. 1996) (under California law, defendant carrying claimants' property to Mexico was gratuitous bailee and not owner of property); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (state law determines whether defendant's children have superior interest based on express oral trust); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank)*, 941 F. Supp. 180 (D.D.C. 1996) (court looks to New York banking law to determine that claimant had legal interest in defendant-depositor's property by virtue of right of set-off); *United States v. Rutgard*, Crim. No. 94-0408GT (S.D. Cal. Mar. 7, 1996) (unpublished) (wife cannot acquire legal interest in criminal proceeds under state community property law); *United States v. Tanner*, 853 F. Supp. 190, 196 (W.D. Va. 1994) (applying Virginia divorce statute to determine interest in property); *United States v. Henry*, 850 F. Supp. 681, 684 (M.D. Tenn. 1994) (defendant's spouse has standing to contest forfeiture of marital residence in which she has legal interest under state law), *aff'd without op.*, 64 F.3d 664 (6th Cir. 1995), *cert. denied*, 516 U.S. 1147 (1996); *see also United States v. 5.382 Acres in Franklin County*, 871 F. Supp. 880, 885 (W.D. Va. 1994) (claimant who fails to perfect lien consistent with state law is not "owner" entitled to relief under civil forfeiture statute), *aff'd sub nom. United States v. Fisher*, 61 F.3d 901 (4th Cir. 1995); *United States v. One 1987 Cadillac Deville*, 774 F. Supp. 221, 224 (D. Del. 1991) (applying Delaware law governing perfection of security interest in civil forfeiture case); *United States v. One 1965 Cessna 32OC Twin Engine Airplane*, 715 F. Supp. 808, 810 (E.D. Ky. 1989) (claimant who failed to file or record financial statement as required by UCC to perfect security interest in airplane was "unsecured creditor and, as such, [did] not have standing to recover against the forfeiture of the seized aircraft"); *accord United States v. One 1951 Douglas DC-6 Aircraft*, 525 F. Supp. 13, 16 (W.D. Tenn. 1979) (same holding on very similar facts), *aff'd*, 667 F.2d 502 (6th Cir. 1981), *cert. denied*, 462 U.S. 1105 (1983).

[257] 21 U.S.C. § 853(n)(1).

[258] *See* 19 U.S.C. § 1607(a) (requiring publication of notice for three successive weeks).

[259] *See United States v. TWP 17R4, Certain Real Property in Main*, 970 F.2d 984, 986 n.4 (1st Cir. 1992) (discussing where notice of forfeiture must be posted under Supp. R. Cert. Adm. & Mar. Cl. E(4)(b)).

Sending direct notice to individual potential claimants is discretionary under section 853(n)(1).[260] Nevertheless, the Asset Forfeiture and Money Laundering Section recommends sending direct written notice to any persons with a plausible legal interest in the property in order to foreclose a due process challenge by such persons later. Sending an individual direct notice does not estop the Government from later moving to dismiss or otherwise defending against his claim.

Although there is no statutory time by which publication must occur, the Asset Forfeiture and Money Laundering Section recommends commencing publication promptly following the entry of the preliminary order of forfeiture in order to hasten resolution of any third-party claims that might otherwise present an obstacle to entry of the final order of forfeiture and ultimate sale or disposition of the property.

An individual has 30 days from his receipt of direct notice or the last date of publication, whichever is earlier, to file a claim asserting his interest in the forfeited property.[261] Thus, sending potential claimants direct notice promptly after the entry of the preliminary order of forfeiture shortens the time within which they may file a claim. In contrast, publishing promptly but sending direct notice later may arm a claimant receiving direct notice after the last date of publication with an equitable argument for filing a late claim.[262]

Although the claimant's third-party petition need not be in any particular form, it must be signed by the petitioner, not counsel, under penalty of perjury, and set forth the nature and extent of the petitioner's right, title, or interest in the forfeited property.[263]

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[260] *But see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (despite disactionary language, sending direct notice is mandatory because section 853(d) incorporates 19 U.S.C. § 1607).

[261] *See* 21 U.S.C. § 853(n)(2); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of B. Gray Gibbs)*, 916 F. Supp. 1270, 1275 (D.D.C. 1996) (court may dismiss claim as untimely filed under 18 U.S.C. § 1963(l)(2)); *cf.* 19 U.S.C. § 1608 (civil forfeiture claimant must file claim within 20 days of first publication).

[262] *See United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Indosuez Bank)*, 916 F. Supp. 1276, 1282 (D.D.C. 1996) (court may "equitably toll" time for filing claim if claimant demonstrates due diligence after receiving direct notice); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Delphi Bank)*, Crim. No. 91-0655 (JHG), 1992 WL 753228 (D.D.C. Nov. 13, 1992) (unpublished) (where the Government sends two notices to claimant at different addresses, and claimant reasonably believed he had 30 days from second notice to file claim, court may waive statutory requirement).

[263] *See* 21 U.S.C. § 853(n)(3); *see also United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Richard Eline)*, 916 F. Supp. 1286, 1289 (D.D.C. 1996) (dismissing claim for failure to set forth nature and extent of legal interest as required by 18 U.S.C. § 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg), S.A. (Fourth Round Petitions of General Creditors)*, 956 F. Supp. 1 (D.D.C. 1996) (petition stating only that "property belong to me" was held insufficient).

Section 853(n)(4) suggests that a hearing on the merits of a third-party claim be held within 30 days of the date of its filing "to the extent practicable and consistent with the interests of justice." Holding an ancillary hearing in such a short period of time, however, is rarely practicable except perhaps in single claim, single asset cases. Complex criminal forfeiture cases, in contrast, present multiple victims with competing claims and standing issues. Naturally, holding a hearing within 30 days of the filing of petitions in such cases is anything but practicable.[264]

No hearing is necessary if the Government can dispose of the third-party claim with a motion to dismiss.[265] Even though section 853(n) does not mention the application of the Federal Rules of Civil Procedure, courts typically have allowed the Government to file motions analogous to Rule 12(b) motions to dismiss for lack of standing,[266] and for failure to state a claim upon which relief may be granted.[267]

Under either theory, the filing of a motion to dismiss places the burden on the petitioner to establish a *prima facie* case that he has standing to file a claim under section 853(n)(2), and he is entitled to relief under one of the two prongs of 21 U.S.C. § 853(n)(6).[268] In other words, the petitioner must first establish that it has standing and then establish either that: (1) it has a legal right, title, or interest in the property subject to forfeiture that was either vested in it instead of the defendant, or superior to any right of the defendant, at the time of the commission of the acts giving rise to forfeiture, as required by section 853(n)(6)(A); or

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[264] *See United States v. Rutgard*, Crim. No. 94-0408GT (S.D. Cal. Mar. 7, 1996) (unpublished) (claimant cannot use court's failure to hold hearing within 30 days as reason why claim should be granted).

[265] *See United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Ahmad)*, 923 F. Supp. 264 (D.D.C. 1996) (court may dismiss petition for lack of subject matter jurisdiction if property claimed was not among assets forfeited from defendant); *United States v. BCCI Holdings (Luxembourg), S.A. (Petitions of General Creditors)*, 919 F. Supp. 31, 36 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing.")

[266] *See United States v. Lavin*, 942 F.2d 177, 179 (3d Cir. 1991).

[267] *See United States v. Campos*, 859 F.2d 1233, 1235 (6th Cir. 1988).

[268] *United States v. Lavin*, 942 F.2d at 179; *United States v. Campos*, 859 F.2d at 1263; *Decker v. United States*, 837 F. Supp. 1148, 1152 (M.D. Fla. 1993); *United States v. BCCI Holdings (Luxembourg), S.A. (Petitions of Chawla)*, 833 F. Supp. 9, 13 (D.D.C. 1993); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Depositors)*, 833 F. Supp. 17, 19 (D.D.C. 1993); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Trade Creditors)*, 833 F. Supp. 22, 25 (D.D.C. 1993); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Republic of Panama)*, 833 F. Supp. 29, 31 (D.D.C. 1993); *United States v. BCCI Holdings (Luxembourg), S.A. (Petitions of Foreign Branches)*, 833 F. Supp. 32, 36 (D.D.C. 1993); *United States v. Dean*, 835 F. Supp. 1383, 1395 (M.D. Fla. 1993).

(2) it acquired a legal right, title, or interest in the property from the defendant as a bona fide purchaser for value who was, at the time of the purchase, reasonably without cause to believe that the property was subject to forfeiture, as required by section 853(n)(6)(B). If the petitioner is unable to establish a *prima facie* case, the court may dismiss its petition on the pleadings without a hearing.[269]

D. Standing

In order to have standing to file a petition in the ancillary hearing proceeding, a claimant must assert "a legal interest in property which has been ordered forfeited to the United States."[270]

The defendant lacks standing to file a claim in the ancillary hearing proceeding.[271] This prohibition includes the defendant's nominees, alter egos, liquidators standing in the defendant's shoes, and branches of a defendant corporation.[272]

Spouses, lienholders, secured creditors, and persons who took title from the defendant or were using the defendant as a nominee owner are usually able to meet the standing requirements.[273] Two groups of claimants who frequently file claims, however, generally

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[269] *United States v. Campos*, 859 F.2d at 1240; *BCCI Holdings (Petition of Chawla)*, 833 F. Supp. at 13; *BCCI Holdings (Depositors)*, 833 F. Supp. at 20; *BCCI Holdings (Trade Creditors)*, 833 F. Supp. at 25; *BCCI Holdings (Panama)*, 833 F. Supp. at 31; *BCCI Holdings (Branch Petitioners)*, 833 F. Supp. at 37; *United States v. Mageean*, 649 F. Supp. 820, 825 (D. Nev. 1986), *aff'd*, 822 F.2d 62 (9th Cir. 1987); *see* S. Rep. No. 1030, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3391 ("The court may decline to grant a hearing, for example, if the petition fails to state any basis for relief described in this provision."); *e.g., United States v. Davis*, 724 F. Supp. 268, 269 (S.D.N.Y. 1989).

[270] 21 U.S.C. § 853(n)(2); *see United States v. Sokolow*, No. CRIM-93-394-01, 1996 WL 32113 at *17 (E.D. Pa. Jan. 26, 1996) (unpublished) (bare legal title without exercise of dominion and control insufficient to establish standing), *aff'd*, 91 F.3d 396 (3d Cir. 1996); *United States v. Rogers*, No. 94-CR-1388, 93-CV-156, 1996 WL 252659 (N.D.N.Y. 1996) (unpublished) (same nominee's name on title to car was shown to protect true owner from forfeiture).

[271] *See* 21 U.S.C. § 853(n)(2); *see, e.g., United States v. Tanner*, 853 F. Supp. 190, 194 (W.D. Va. 1994) (defendant's demand for corporate satisfaction of four promissory notes valued at $509,000 constituted claim by defendant against value of forfeited property in violation of section 853(n)(2)).

[272] *See BCCI Holdings (Petitions of Foreign Branches)*, 48 F.3d at 554 (branches of defendant bank are part of "defendant" and may not file claims).

[273] *But see United States v. Tanner*, 853 F. Supp. 190, 197 (W.D. Va. 1994) (stating in dicta that wife's interest in equitable distribution in divorce settlement would not be "legal interest").

cannot meet the standing requirements: General unsecured creditors and victims who have causes of action in tort against the defendant.[274]

1. Unsecured Creditors

Unsecured creditors generally cannot demonstrate a legal interest in the specific property subject to forfeiture.[275] They have only a general interest in the debtor's entire estate.[276] Therefore, general creditors do not have statutory standing to file claims in the ancillary proceeding.[277] "Because general creditors are unable to assert interests in specific assets, they cannot assert legal rights, titles, or interests in property which has been ordered forfeited."[278]

A general creditor lacks standing even if he can identify one asset as the likely source of the payment of his debt.[279] One circuit has formulated an exception to the general rule that unsecured creditors lack standing. In *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1997), the Fourth Circuit held that a general creditor has standing to file an ancillary hearing petition if the defendant's entire estate has been ordered forfeited. The rationale for this holding is that where the Government attempts to forfeit the defendant's entire estate, the

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[274] For a thorough discussion of this point, *see generally*, Cassella, *supra* notes 8 and 158.

[275] *See United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992); *United States v. Campos*, 859 F.2d 1233, 1240 (6th Cir. 1988).

[276] *See United States v. $20,193.93 U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994) ("Unlike secured creditors, general creditors cannot claim an interest in any particular asset that makes up the debtor's estate."); *BCCI Holdings (Depositors)*, 833 F. Supp. at 20 (citations omitted); *BCCI Holdings (Petition of Chawla)*, 833 F. Supp. at 14; *BCCI Holdings (Trade Creditors)*, 833 F. Supp. at 26; *BCCI Holdings (Foreign Branches)*, 833 F. Supp. at 39.

[277] *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir.), *cert. denied*, 515 U.S. 1160 (MEM) (1995); *United States v. Campos*, 859 F.2d 1233, 1233 (6th Cir. 1988); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992),

[278] *BCCI Holdings (Depositors)*, 833 F. Supp. at 20; *BCCI Holdings (Trade Creditors)*, 833 F. Supp. at 26; *see United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) ("[The statute] requires more than a showing of a legal interest in the debtor's property. It requires that the interest exist in the property subject to forfeiture.").

[279] *See United States v. Ribadeneira*, 920 F. Supp. 553 (S.D.N.Y. 1996) (person with drug check drawn on defendant's bank account is general creditor with no standing), *aff'd*, 105 F.3d 833 (2d Cir. Jan. 30, 1997); *cf. United States v. $4,255,000*, 762 F.2d 895, 907 (11th Cir. 1985) (holder of check drawn on forfeited bank account is a mere creditor of the account holder with no standing to contest forfeiture of the account), *cert. denied*, 474 U.S. 1056 (1986); *United States v. $3,799.00 in United States Currency*, 684 F.2d 674, 678 (10th Cir. 1982) (claimant who asserts that seized property would have been used to satisfy gambling debt owed to him lacks standing to contest forfeiture); *United States v. Contents of Account No. 11671-8*, 763 F. Supp. 53, 54 (S.D.N.Y. 1991).

general creditor's legal interests—unspecific they may be—may be said to lie somewhere in the estate being forfeited.[280] No other circuits have adopted *Reckmeyer*, however, and at least one circuit has specifically rejected it:

> We respectfully disagree with *Reckmeyer*. We think the [G]overnment is correct that a general creditor can never have an interest in specific forfeited property, no matter what the relative size of his claim vis a vis the value of the defendant's post-forfeiture estate. Were it otherwise, the court litigating the forfeiture issue would be converted into a bankruptcy court and would not be able to grant forfeiture to the [G]overnment until it determined that no general creditor would be unable to satisfy its claim against the defendant. That result appears patently at odds with the statutory scheme, which directs parties without an interest in specific property to seek relief from the Attorney General, not the court adjudging the forfeiture. The Attorney General has authority to dispense confiscated funds "to protect the rights of innocent persons," 18 U.S.C. § 1963(g)(1), and general creditors seem precisely the type of innocent persons Congress had in mind.[281]

2. Victims

In any criminal forfeiture case involving the forfeiture of the proceeds of white collar crime, there is a good chance that most of the third party claims will be filed by the victims of the offense who want to take advantage of the forfeiture proceeding to try to get their money back. Like unsecured creditors, however, victims generally lack standing to file a claim in the ancillary hearing proceeding: Although they have a tort cause of action against the defendant, they lack a legal interest in the specific property subject to forfeiture.[282] This result, while legally correct, sometimes places the Government in the unenviable position of moving to dismiss third-party claims filed by innocent victims. If the defendant's assets subject to forfeiture are of sufficient value to cover the claims of all the victims, then the

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[280] *United States v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1997).

[281] *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1191-92 (D.C. Cir.), *cert. denied sub nom. Chawla v. United States*, 515 U.S. 1160 (MEM) (1995); *accord United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5 (D.D.C. 1997); *Prosecution and Defense of Forfeiture Cases* [Dec. 1991]: ¶ 14.08, at 14-53 ("The ancillary hearing is not a bankruptcy proceeding or a proceeding to settle all civil claims against the convicted defendant before he goes to prison. Thus, the [G]overnment has argued with some force that unsecured creditors have no standing to make claims to the forfeited property.").

[282] *See United States v. Lavin*, 942 F.2d 177 (3d Cir. 1991); *see, e.g., United States v. BCCI Holdings (Luxembourg), S.A., (Petition of Central Bank of Peru)*, 814 F. Supp. 111, 114-15 (D.D.C. 1993) (victim of tortious interference with honest services of employees bribed by defendant may not recover damages in ancillary hearing).

Government may choose not to oppose the victim's petitions, even if they technically lack standing.[283]

Such a situation, however, arises infrequently. An example of a more likely scenario is a large-scale fraud scheme in which the defendants defrauded numerous victims, and the forfeited assets are insufficient to return to each victim more than a few cents on the dollar. In such cases, some victims will attempt to file claims for the full amount of their loss, while others will file no claim at all. Clearly, it would be unfair to allow the savvy victims to take more than their fair share of the defendant's estate. For this reason, the ancillary hearing proceeding is not the appropriate method of providing restitution to victims in that kind of case.

Moreover, some victims (most often the chronologically "last" victims) will be able to point to a specific asset subject to forfeiture, such as a bank account, and say, "There's my money." Victims whom the defendant defrauded early in the criminal scheme, however, will rarely be able to trace their interest to a specific asset because their funds will have already been dissipated. But the fact that a victim can trace property to the defendant's estate does not mean that the victim has a legal interest in this property. Therefore, the Government need not endorse the "tracing" victims' recovery of 100 percent of their loss while the "non-tracing" victims recover little or nothing. Relying on state property law, the Government can move to dismiss the claims of the tracing victims on standing grounds because they voluntarily transferred ownership of their property to the defendant, albeit under fraudulent pretenses, and therefore no longer have standing to object to its forfeiture.[284]

The outcome is different for victims of a tort like theft or embezzlement, where the defendant takes the victim's property without the victim's consent. For example, if a defendant steals the victim's car, the victim has standing to contest the forfeiture of the car, because he never transferred ownership of the car and his alleged ownership interest, therefore, lies in the particular car being forfeited. On the other hand, if the defendant no

[283] Government attorneys should beware, however, of the possible adverse precedent created by this practice.

[284] *See United States v. $3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995), *aff'd sub nom. United States v. Moylan*, 103 F.3d 121 (4th Cir. 1996) (Table). Government attorneys should check the law of the applicable state to ensure that no exceptions to such voluntary transfer of ownership exist in fraud cases.

longer has the car, and the Government is forfeiting other property of defendant, the victim has no legal interest in any particular asset being forfeited and therefore has no standing.[285]

It is also different if a third-party victim has reduced a claim to a judgment lien on the forfeited property. In such a case, the victim will have standing to file a claim in the ancillary hearing proceeding because the victim will have a legal interest in the property subject to forfeiture under section 853(n)(2).[286] Once the Government has successfully moved to dismiss the victim's claims, it may dismiss the forfeiture proceeding and petition the district court to turn the forfeitable assets over to a trustee to parcel out the money to the victims equitably.[287] Alternatively, it may complete the forfeiture process and invite the victims to file petitions for relief under the remission regulations.

3. Constructive Trust

Victims frequently attempt to address the standing issue by arguing that the defendant held the property subject to forfeiture for them in a constructive trust. Thus, the argument goes, the tort victims are not simply creditors of the defendant with no interest in particular assets that comprise the estate. Rather, as beneficiaries of a constructive trust, they have a legal interest in the particular assets held for them by the defendant.

There are several ways to respond to the constructive trust argument. First, a constructive trust is not a "legal interest." Rather, it is an equitable remedy insufficient to confer standing under section 853(n)(2). No court, however, has accepted this argument yet, choosing to find instead that Congress meant to protect both legal and equitable interests in the ancillary hearing proceeding despite the clear language of section 853(n)(2).[288]

Second, even if a constructive trust constitutes a "legal interest" within section 853(n)(2), it did not exist at the time of the act giving rise to the forfeiture, as section

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[285] *See United States v. BCCI Holdings (Luxembourg), S.A. (Republic of Panama)*, 833 F. Supp. 29, 32 (D.D.C. 1993) (victim of embezzlement may not recover in ancillary proceeding unless it can trace its property to forfeited funds).

[286] *See United States v. Douglas*, 55 F.3d 584, 589 (11th Cir. 1995); *e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank)*, 941 F. Supp. 180 (D.D.C. 1996) (bank that converted debt to legal interest in specific property by exercising right of setoff against customer's account had standing).

[287] *See, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1192 (D.C. Cir.) (creditors/victims denied standing to challenge criminal forfeiture; defendant's estate disbursed by trustee to all victims pro rata), *cert. denied*, 515 U.S. 1160 (MEM) (1995).

[288] *See United States v. Coluccio*, 51 F.3d 337, 340 (2d Cir. 1995).

853(n)(6)(A) requires.[289] Third, even if a constructive trust is a cognizable legal interest that existed at the time of the criminal act, the victim must be able to trace his property directly to the property allegedly held in trust. If a claimant cannot satisfy the tracing requirement, the claimant's constructive trust theory will fail.[290]

Fourth, because a constructive trust is an equitable remedy, a claimant may not benefit from such a trust if he did not have "clean hands."[291]

Fifth, a federal court, acting as a court of equity, should not impose a constructive trust in favor of a third-party petitioner where that party has an adequate remedy at law. For example, the Second Circuit has held that if a petitioner has a right to petition the Attorney General for relief under the remission regulations, which the court viewed as a remedy "at law," no constructive trust should be imposed.[292]

Sixth, because standing to assert a claim turns on the petitioner's ability to establish a legal interest in the forfeited property as a matter of state law, a constructive trust may be imposed only if the petitioner satisfies all of the elements of a constructive trust under state law.[293] In addition to the tracing requirement, state law typically requires a showing of a fiduciary relationship between the putative beneficiary and the defendant[294]; a particular harm

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[289] *See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d at 1190-91 (because constructive trust does not come into existence until imposed by court, it did not exist at time of act giving rise to forfeiture and, thus, would not relate back to pre-date the Government's interest that vested at time of act giving rise to forfeiture).

[290] *See United States v. Schwimmer*, 968 F.2d 1570, 1583-84 (2d Cir. 1992) (constructive trust constitutes legal interest, but tracing required to show property held in constructive trust is same property being forfeited); *accord County of Oakland v. Vista Disposal, Inc.*, 826 F. Supp. 218, 223 (E.D. Mich. 1993); *see, e.g., United States v. Coluccio*, 51 F.3d 337, 340 (2d Cir. 1995) (mother who gave son money with expectation that it be returned is beneficiary of constructive trust and has standing to contest forfeiture).

[291] *See United States v. $3,000 in Cash*, 906 F. Supp. 1061, 1066 (E.D. Va. 1995) (constructive trust not imposed even though claimant could trace assets because claimant did not have clean hands).

[292] *See United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997).

[293] *Id.*

[294] *See Hibernia Nat'l Bank v. FDIC*, 733 F.2d 1403, 1407 (10th Cir. 1984) (citing *Kershaw v. Jenkins*, 71 F.2d 647 (10th Cir. 1934)).

to the purported beneficiary that differs from the harm suffered by others[295]; and the likelihood of unjust enrichment if a constructive trust is not imposed.[296]

Finally, a court should not impose a constructive trust if to do so would give an advantage to some victims over others. The courts generally reject constructive trust claims where one defendant is inclined to recover property that otherwise would be distributed equally to all.[297]

E. Substantive Right to Relief

Even if a claimant can establish having a legal interest in the property subject to forfeiture sufficient to confer standing under section 853(n)(2), the claimant must still establish the substantive requirements of section 853(n)(6) to obtain amendment of an order of forfeiture.[298] Section 853(n)(6) provides that a claimant may successfully challenge the forfeiture if the claimant can establish that either: (1) the claimant has a legal right, title, or interest in the property subject to forfeiture that was either vested in the claimant instead of the defendant, or superior to any right of the defendant, at the time of the commission of the acts giving rise to forfeiture; or (2) the claimant acquired a legal right, title, or interest in the property from the defendant as a bona fide purchaser for value and was, at the time of the purchase, reasonably without cause to believe that the property was subject to forfeiture.[299]

1. Vested or Superior Right, Title, or Interest

In a criminal forfeiture, the Government may forfeit only property that belongs to the defendant at the time the Government's interest vests in that property.[300] An order directing the forfeiture of property that actually belongs to a third person, instead of the defendant, at

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[295] *See Downriver Community Fed'l Credit Union v. Penn Square Bank*, 879 F.2d 754, 762 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

[296] *See Matter of Kennedy and Cohen, Inc.*, 612 F.2d 963, 965 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

[297] *See United States v. Sokolow*, No. 93-CRIM-394-01, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpublished) (constructive trust should not be imposed if result would be to deprive victims of funds the Government plans to distribute equitably once forfeiture is final); *BCCI Holdings*, 833 F. Supp. at 14 (same); *cf. United States v. Durham*, 86 F.3d 70 (5th Cir. 1996) (in fashioning restitution order, court may distribute property pro rata to all victims and need not impose constructive trust for benefit of "tracers").

[298] *See BCCI Holdings (Depositors)*, 833 F. Supp. at 19.

[299] *See* 21 U.S.C. § 853(n)(6)(A), (B).

[300] *See United States v. Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992).

the time the Government's interest in that property vests would be invalid because the court has no jurisdiction over a third person's property.[301] Thus, "the categories of *vested* and *superior* [in section 853(n)(6)(A)] are intended to cover those cases where the [c]ourt lacks jurisdiction over the property because it is not really 'property of the defendant.'"[302] Accordingly, in order for a claimant to prevail under section 853(n)(6)(A), it must show that ownership of the property was vested in it rather than in the defendant, or that it had an interest in the property superior to that of the defendant, at the time the Government's interest in the property vested.[303]

A general creditor of the defendant is not entitled to relief under section 853(n)(6)(A) because he lacks an interest superior to that of the defendant's many particular assets.[304] Thus, general creditors would not be entitled to relief under section 853(n)(6)(A) even if they could establish standing under section 853(n)(2). Persons entitled to recover under section 853(n)(6)(A) include spouses, bailors, lienholders, and others with a legal interest in specific property.[305]

In order to succeed under subparagraph 853(n)(6)(A), a claimant need not show that he is "innocent" so long as he establishes an ownership interest in the property. In other words, a person such as the defendant's spouse will prevail in the ancillary proceeding if the spouse has a marital interest in the property, even if the spouse was complicitous in the criminal

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[301] *Id.* at 1580.

[302] *BCCI Holdings (Depositors)*, 833 F. Supp. at 20 (quoting *United States v. Schwimmer*, 968 F.2d at 1581) (emphasis in original).

[303] *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 n.10 (9th Cir. 1996) (allegation of ownership sufficient to establish standing under section 853(n)(2), but may not satisfy "superior interest" requirement of section 853(n)(6)(A)); *see generally United States v. Sokolow*, No. CRIM-93-394-01, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpublished) (wife and daughter who acquired property from defendant after crime occurred cannot state claim under section 853(n)(6)(A), which requires that claimant's legal interest exist at time of crime giving rise to forfeiture); Cite *Roshid*, p. 19 of Outline—*United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996) (bald legal title insufficient to satisfy section 853(n)(6)(A); claimant must demonstrate true legal interest superior to defendant's interest; denying third-party petitions where evidence showed that defendant had purchased and exercised control over property and did not intend to transfer true ownership to any third parties); *United States v. Messino*, 917 F. Supp. 1307 (N.D. Ill. 1996) (same).

[304] *United States v. Schwimmer*, 968 F.2d at 1581. *BCCI Holdings (Depositors)*, 833 F. Supp. at 20; *accord BCCI Holdings (Class Depositors)*, 833 F. Supp. at 15; *BCCI Holdings (Trade Creditors)*, 833 F. Supp. at 27; *BCCI Holdings (Branch Petitioners)*, 833 F. Supp. at 39.

[305] *See United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (bailor retains legal interest in bailed property); *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (wife's community property interest sufficient under section 853(n)(6)(A)).

offense.[306] In regard to civil forfeiture cases, under most federal statutes, the claimant must establish that he is an "innocent owner in order to successfully challenge the forfeiture."[307] Accordingly, a "guilty" spouse who had knowledge of her husband's drug dealing but is not prosecuted may recover her ownership interest in a criminal forfeiture, but not in a civil forfeiture.

2. Bona Fide Purchaser

Section 853(n)(6)(B) provides that a person with a legal interest in forfeited property may recover the property if he acquired the interest as a "bona fide purchaser for value" who was at the time of the purchase "without cause to believe that the property was subject to forfeiture." The term "bona fide purchaser for value" in section 853(n)(6)(B) is "a legal term of art referring to certain buyers of tangible property."[308] In fact, the bona fide purchaser provision serves the same purpose in the criminal forfeiture statute as it does in commercial law; it protects an innocent purchaser who gives valuable consideration to a seller whose title in the property conveyed is defective.[309]

Because the term "bona fide purchaser" was derived from commercial law and serves the same purpose in section 853(n)(6)(B) as it serves in commercial law, courts have construed the term to have the same meaning in the forfeiture statute as it has traditionally

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[306] *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (section 853(n)(6) is not innocent owner statute; it requires only showing of superior interest; because only defendant's interest is forfeitable, innocent owner defense is unnecessary).

[307] *See, e.g., United States v. Premises Known as 281 Syosset Woodbury Rd.*, 71 F.3d 1067, 1072 (2d Cir. 1995).

[308] *BCCI Holdings (Depositors)*, 833 F. Supp. at 21 (citations omitted); *accord BCCI Holdings (Chawla)*, 833 F. Supp. at 15; *BCCI Holdings (Trade Creditors)*, 833 F. Supp. at 28; *see United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991) (Congress derived BFP provision "essentially from hornbook commercial law").

[309] *United States v. Lavin*, 942 F.2d 177, 186 (3d Cir. 1991); S. Rep. No. 255, at 201, *reprinted in* 1984 U.S.C.C.A.N. at 3384 ("Section 1963(c), as amended by the bill, makes it clear that this provision may not result in the forfeiture of property acquired by an innocent BFP. Such purchasers are entitled to relief under the new ancillary hearing procedure in section 1963[(l)]."); *see, e.g., In Re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463, 472 (E.D. Va. 1994) ("*Moffitt I*") (forfeiture of legal fees from attorney who failed to establish that he acquired fees as bona fide purchaser), *aff'd*, 83 F.3d 660 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 788 (MEM) (1997).

been given in commercial law.[310] Thus, the term "bona fide purchaser" does not encompass every person engaging in an arm's-length business transaction with the defendant.[311]

A donee who acquired property from the defendant after the commission of the criminal offense cannot succeed under section 853(n)(6)(B) because he did not obtain the property as a bona fide purchaser for value.[312] In contrast, the innocent owner defense in civil forfeiture cases: Anyone with an ownership interest can assert a claim, including donees, because there is no bona fide purchaser requirement for those who acquire the property after the offense.[313]

Even if the claimant "purchased" the property from the defendant in an arm's-length transaction, the claimant cannot succeed under section 853(n)(6)(B) if, at the time of the purchase, he knew that the property was subject to forfeiture. This is because section 853(n)(6)(B) plainly requires that "a petitioner asserting an interest as a bona fide purchaser must establish that it was unaware of the forfeitability of purchased assets when its interest arose."[314]

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[310] *See United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991); *United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir. 1988).

[311] *See BCCI Holdings (Class Depositors)*, 833 F. Supp. at 15; *BCCI Holdings (Depositors)*, 833 F. Supp. at 21; *BCCI Holdings (Trade Creditors)*, 833 F. Supp. at 28. *But see United States v. Reckmeyer*, 836 F.2d at 208 (general unsecured creditors should be considered "bona fide purchasers for value" of legal interest in forfeited property); *accord United States v. Mageean*, 649 F. Supp. 820, 829 (D. Nev. 1986), *aff'd*, 822 F.2d 62 (9th Cir. 1987). *Contra BCCI Holdings*, 46 F.3d at 1192 (specifically rejecting *Reckmeyer* as "contrary to the natural meaning of what Congress said").

[312] *See, e.g., United States v. Hentz*, No. CR.A-90-00276-03, 1996 WL 355327 (E.D. Pa. June 20, 1996) (unpublished) (defendant's mother, who gave no value for property held in her name and who understood the currency reporting requirements that defendant violated, was not a bona fide purchaser); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (wife is not bona fide purchaser of property husband placed in her name because she gave nothing of value in exchange for the property); *United States v. Sokolow*, No. CRIM-93-394-01, 1996 WL 32113 at *20 (E.D. Pa. Jan. 26, 1996) (unpublished) (wife is not a bona fide purchaser if she gave no value for property; obtaining property pursuant to separation agreement is insufficient); *id.* at *21 (daughter who received property as gift knowing father had been indicted is not bona fide purchaser).

[313] *See United States v. A Parcel of Land...Known as 92 Buena Vista Ave.*, 507 U.S. 111, 123 (1993).

[314] *BCCI Holdings (Central Bank of Peru)*, 814 F. Supp. at 115 (citing *United States v. Lavin*, 942 F.2d 177, 179 (3d Cir. 1991)); *accord Moffitt I*, 846 F. Supp. 463, 472 (E.D. Va. 1994).

F. Substitute Assets

Substitute assets should be treated like directly forfeitable property for purposes of the ancillary proceeding.[315] However, an interesting question arises regarding the application of section 853(n)(6)(A) to substitute assets. Section 853(n)(6)(A) provides that a third-party claimant must show that his interest in property subject to forfeiture existed at the time of the act giving rise to the forfeiture, which is the time at which the Government's interest vests in forfeitable property under the relation back doctrine.[316] The defendant, however, may very well not own the substitute asset subject to forfeiture at the time he committed the offense giving rise to its forfeiture. Accordingly, the task becomes the identification of the time at which the Government's interest vests in substitute assets.

At the latest, the Government's interest in substitute assets vests when the court orders those assets forfeited. It is unclear, however, whether the Government can argue that its interest vests, and thus precludes third-party claims, at an earlier point, such as when the defendant acquired an interest in the property, when the property was named in the indictment, subjected to pretrial restraint (in jurisdictions that permit such action), or upon the jury's return of the verdict of forfeiture, at which time any assets of the defendant not involved in the criminal offense become subject to forfeiture in order to satisfy the forfeiture judgment.[317]

One view is that the Government's interest in substitute assets vests as early as the time of the criminal act giving rise to forfeiture. This theory reasons that by committing the criminal act, the defendant implicitly forfeits substitute assets up to the value of any proceeds or facilitating property that he thereafter dissipates or conceals. Critics of this position, however, reason that the event giving rise to forfeiture may not be the criminal act itself, because the substitute assets were not involved in that act and may not even have been held by the defendant at that time.

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[315] *See United States v. Henry*, 850 F. Supp. 681, 683 (M.D. Tenn. 1994).

[316] *See* 21 U.S.C. § 853(c).

[317] *See In Re Moffitt, Zwerling & Kemler, P.C.*, 864 F. Supp. 527, 532-33 (E.D. Va. 1994) ("*Moffitt II*") (substitute assets provision is merely codification of pre-existing rule that criminal forfeiture judgment is *in person* judgment that may be satisfied out of any of defendant's assets) (citing *In re Billman*, 915 F.2d 916, 920 (4th Cir. 1990), *cert. denied sub nom. McKinney v. United States*, 500 U.S. 952 (1991)); *e.g., United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1011 (1986); *United States v. Connor*, 752 F.2d 566 (11th Cir.), *cert. denied sub nom. Taylor v. United States*, 474 U.S. 821 (1985).

One court has held that the relation back doctrine applies to substitute assets, and accordingly any transfer of such assets by the defendant to a third party that occurs after the defendant is named as the target of an investigation is void under section 853(c).[318]

G. Answer and Discovery

If the district court denies the Government's motion to dismiss the claimant's petition, the Government may then file an answer to the petition and request discovery. Although section 853 does not explicitly provide for discovery in the ancillary proceedings, courts routinely permit the parties to engage in tradition, two-way discovery pursuant to the Federal Rules of Civil Procedure.[319] If a claimant fails to provide the discovery requested by the Government, the sanction is the dismissal of the claim.[320]

H. Trial

Third-party claims are usually resolved by motion to dismiss or settlement, very little case law exists regarding the ancillary hearing itself. Section 853(n)(6) provides that the district court shall determine the merits of a third-party petition.[321] The ancillary hearing proceeding is essentially an action to quiet title. Third-party claimants, therefore, do not have the right to a jury trial.[322] The entire record from the criminal case is admissible at the ancillary hearing,[323] but claimants have also challenged the constitutionality of this practice because they are barred from becoming parties to the criminal case.[324]

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[318] *See United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997).

[319] *See United States v. Duboc*, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (third party may obtain discovery from the Government, but only pertaining to issue of ownership); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Dept. of Private Affairs)*, 1993 WL 760232 (D.D.C. Dec. 8, 1993) (unpublished) (the Government may obtain discovery from claimant); *United States v. Porcelli*, No. CR-85-00756 (CPS), 1992 WL 355584 (E.D.N.Y. Nov. 5, 1992) (unpublished) (court may use inherent powers to permit third-party claimant to obtain discovery from defendant in accordance with civil rules).

[320] *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of BCP)*, 169 F.R.D. 220 (D.D.C. 1996) (failure to provide discovery blocks the Government's ability to litigate merits of claim; sanction less severe than dismissal could not be effective).

[321] *See, e.g., United States v. Henry*, 64 F.3d 664 (6th Cir. 1995) (third-party claimant does not have constitutional right to jury trial in ancillary hearing proceeding), *cert. denied*, 516 U.S. 1147 (1996).

[322] *See United States v. Duboc*, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (unpublished).

[323] *See* 21 U.S.C. § 853(n)(5); *e.g., United States v. Messino*, 917 F. Supp. 1307 (N.D. Ill. 1996).

[324] *See* 21 U.S.C. § 853(k).

I. Settlement

The Government can settle a third-party claim at any time. The district court generally approves such a settlement because the preliminary order of forfeiture typically instructs the U.S. Marshals Service to hold forfeited assets pending further order of the court. Thus, approval of a settlement is part of the court's modification of the preliminary order of forfeiture to deduct the amount or remove the asset owed to the petitioner before the order becomes final. Alternatively, the Government can effect a settlement of sorts by convincing the petitioner to withdraw his claim, allow the preliminary order of forfeiture to become final, and submit a petition for remission to the Attorney General seeking to recover his interest.

In a multi-petitioner case in which there are sufficient assets to cover all claims, the Government should ask the district court to approve the settlement and order the U.S. Marshals Service to disburse a portion of the seized property to the settling petitioner while holding the remaining property until all outstanding claims are resolved and the order of forfeiture is final. If multiple petitioners are all claiming the same property, or if there are insufficient assets to satisfy all claims, the Government obviously cannot enter into a settlement agreement with only some petitioners while other claims are pending. The Government can, however, enter into a "contingent settlement" which provides that in the event that all other claims are resolved in favor of the Government, the Government agrees to ask the district court to disburse a portion of the forfeited property to the settling petitioners.

J. Final Order of Forfeiture

By law, following the court's disposition of all petitions, or if no petitions are timely filed, the United States gains clear title to property subject to the preliminary order of forfeiture.[325] This is accomplished by the entry of a final order of forfeiture.[326] The order of forfeiture becomes final *as to the defendant* at the time of sentencing, but it becomes final as to third parties only when the ancillary proceeding is concluded.[327]

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[325] 21 U.S.C. § 853(n)(7).

[326] *See United States v. Hertz*, No. CR.A-90-00276-03, 1996 WL 355327 (E.D. Pa. 1996) (unpublished) (once third party fails to file claim in the ancillary proceeding, Government has clear title under section 853(n)(7) and can market the property).

[327] *See* Fed. R. Crim. P. 32(d)(2).

K. Appeal By Petitioner

A losing petitioner may appeal the district court's denial of his petition. The Federal Rules of Appellate Procedure applicable to civil actions apply to such an appeal.[328]

If more than one petitioner has filed a claim in the ancillary hearing proceeding, it is unclear if one petitioner can appeal from the denial of his petition while other petitions are still pending. The Government or the petitioner can, however, ask the court to file a final judgment pursuant to Fed. R. Civ. P. 54(b) to clarify the petitioner's ability to appeal.

L. Appeal By Defendant

Section 853 provides that persons other than the defendant, or someone acting with or on behalf of the defendant, may obtain a stay of the sale or other disposition of forfeited property pending appeal of the underlying criminal case if they can demonstrate to the court that they will suffer irreparable injury, loss, or harm if the sale or disposition is allowed to proceed.[329] A third party may also seek removal of a stay of forfeiture if it adversely affects the value of property that may be sold.[330]

It is unclear whether the ancillary hearing proceeds if the defendant appeals his conviction because the Federal Rules of Criminal Procedure and the forfeiture statutes are in conflict regarding stays pending appeal. Fed. R. Crim. P. 38(e) provides that the district court may stay a criminal forfeiture pending the defendant's appeal upon the defendant's motion. Section 853(h), however, provides that only third parties, and not the defendant, may request a stay of the execution of the forfeiture order. This provision is somewhat odd because, generally, the defendant would be the party seeking to stay the forfeiture of property which, in the event his conviction were reversed, would be returned to him. The third party, in contrast, usually wants the forfeiture to proceed.

One court resolved this conflict by holding that the clear language of the forfeiture statute more accurately reflects congressional intent that the defendant lacks standing to

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[328] *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996) (civil appellate rules apply to appeal from denial of third-party claim); *accord United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991).

[329] *See* 21 U.S.C. § 853(h).

[330] *See United States v. Edmond*, 780 F. Supp. 42, 43-44 (D.D.C. 1992) (mortgagee of forfeited property entitled to lifting of stay to allow sale of realty lying idle and depreciating in value).

request a stay of the forfeiture pending appeal.[331] In the alternative, the court held that even if Rule 38(e) expressed Congress' intent for courts to apply equity principles to the motion for a stay, those principles would call for a denial of the stay.[332]

In any event, the provision of section 853(h) allowing third parties to request a stay pending appeal implies that without a stay, the ancillary proceeding goes forward despite the appeal. Moreover, this position is consistent with the statutory notion of resolving the ancillary hearing proceeding within 30 days after a third-party claim is filed.[333] Finally, this position is logical. Only the defendant's interest in the property is forfeitable in the criminal case, so only the defendant's interest is subject to his appeal. The third party, on the other hand, should be able to vindicate his interest and have the preliminary order of forfeiture modified notwithstanding the defendant's appeal. The property should then remain in governmental custody until the defendant loses his appeal. Only then should the U.S. Marshals Service release the property to the petitioner.

The Government may also attempt to persuade the defendant to waive in writing any objection to fulfilling the third party's claim. This tactic is more likely to work where the petitioner is a secured creditor or lienholder whom neither the Government nor the defendant disputes should be paid.

If the defendant obtains a stay of the forfeiture proceedings pending appeal, the third party may obtain relief from the stay and an early ancillary hearing if the asset is deteriorating in value and the third party will be prejudiced by the delay in awaiting the outcome of the defendant's appeal.[334]

A separate question is whether the district court retains jurisdiction over the forfeiture while the defendant's appeal is pending. The consensus is that it does retain jurisdiction and

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[331] *See United States v. Bachner*, 741 F. Supp. 221, 223 (S.D. Fla. 1990).

[332] *Id.* (costs of maintaining forfeited airplanes pending indeterminate appeal period outweighed any prejudice to defendant who, if successful on appeal, could recover value of airplanes).

[333] *See United States v. Hurley*, 63 F.3d 1, 23 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed), *cert. denied sub nom. Saccoccia v. United States*, 517 U.S. 1105 (1996); *United States v. Messino*, 907 F. Supp. 1231, 1232-33 (N.D. Ill. 1995) (district court retains jurisdiction over forfeiture matters while appeal pending; court may order forfeiture of substitute assets and enter final order of forfeiture where no third party files claim).

[334] *See generally United States v. Edmond*, 780 F. Supp. at 42.

thus may amend the order of forfeiture as necessary to include substitute assets or to reflect the results of the ancillary hearing proceeding.[335]

M. Petitions for Remission or Mitigation

Under 21 U.S.C. § 853(i)(1), the Attorney General has discretion to remit forfeited property to third parties after the conclusion of the ancillary hearing proceedings and the entry of the final order of forfeiture.[336] The process by which this is accomplished, called the granting of petitions for remission or mitigation, is discussed in chapter 9 of this manual.

[335] *See United States v. Hurley,* 63 F.3d at 23 (1st Cir. 1995); *United States v. Voight,* 89 F.3d 1050 (3d Cir. 1996); *United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995).

[336] *See United States v. Schwimmer*, 968 F.2d 1570, 1577 (2d Cir. 1992) (the Government has no authority to remit forfeited funds until entire amount of funds is clear of third-party claims).

Chapter 7

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Chapter 7

Settlement, Dismissal, or Discontinuance of Federal Forfeiture Proceedings

I. Administrative Forfeiture Proceedings

A. Pre-notice Deferral to State or Local Forfeiture Actions

A seizing agency may decide to defer to state or local forfeiture actions before a federal administrative forfeiture is initiated by notice of intention to forfeit.[1]

B. Discontinuance in Favor of State or Local Forfeiture Actions

Even after the administrative process has been initiated through notice of the proposed forfeiture, the seizing agency may choose to forego the federal action in favor of state or local proceedings.[2] The procedure for such a discontinuance is the same as that for pre-notice deferral,[3] except that notice of the termination of the federal proceeding must be provided to all known interested parties.[4]

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[1] This issue is discussed in chapter 3, part II.B, of this manual.

[2] *See* 19 U.S.C. § 1616a; *The Attorney General's Guidelines on Seized and Forfeited Property* [hereinafter *Attorney General's Guidelines*] (July 1990).

[3] According to the *Attorney General's Guidelines*, the decision to discontinue must be approved by the head of the seizing agency, who must consider the effect of such a decision on the Assets Forfeiture Fund and, where appropriate, consult with the U.S. Marshals Service. *Attorney General's Guidelines* § IX.B. *See* discussion in chapter 3, part II.B, of this manual.

[4] 19 U.S.C. § 1616a(b)(2).

II. Judicial Forfeiture Proceedings

A. Pre-process Deferral to State or Local Forfeiture Actions

Prior to the filing of the complaint in a judicial forfeiture proceeding, the federal prosecutor may also decide to defer to a state or local forfeiture action.[5]

B. Dismissal in Favor of State or Local Forfeiture Actions

Even after the complaint has been filed and process issued, the federal prosecutor may still choose to forego the federal action in favor of state or local forfeiture proceedings. The procedure for such a dismissal is the same as that for pre-process deferral,[6] except that notice of the dismissal must be given to all known interested parties.[7]

Under the concurrent jurisdiction doctrine, as a general rule, concerns of comity prohibit the maintenance of concurrent *in rem* proceedings involving the same *res*. However, appropriate action and coordination with state authorities should be taken to ensure that a *res* is not returned to claimants who may abscond with it when a federal forfeiture action is dismissed in favor of state or local proceedings. For example, it may be appropriate for state authorities to seize the property pursuant to an "anticipatory seizure warrant" prior to the dismissal of the federal action.[8] Alternatively, a state court may proceed to judgment and enter a lien resulting in the seizure of the asset when it is released from federal jurisdiction and stay execution of its judgment until federal jurisdiction has been perfected.[9]

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[5] *See* 19 U.S.C. § 1616a; *Attorney General's Guidelines* § IX.A. This issue is discussed in chapter 4, part I.B.3.d, of this manual.

[6] A decision to defer or dismiss in favor of state forfeiture proceedings must be personally approved by the United States Attorney after a review of the recommendation of the investigating agency and an assessment of the status of the Assets Forfeiture Fund. A decision to discontinue a federal judicial forfeiture must be documented. *Attorney General's Guidelines* § IX.A. *See* discussion in chapter 4, part I.B.3.d, of this manual.

[7] 19 U.S.C. § 1616a(b)(2).

[8] For a discussion of the use of an "anticipatory seizure warrant" issued to permit federal authorities to seize property prior to the dismissal of a state forfeiture action, *see United States v. $490,920 in United States Currency*, 937 F. Supp. 249, 252-53 (S.D.N.Y. 1996).

[9] *See generally United States v. $300,000 Obligation of Qatar National Bank*, 810 F. Supp. 116 (S.D.N.Y. 1993).

C. Settlement or Closing of Federal Judicial Forfeiture Actions

1. Decisionmaking Authority

In pertinent part, Attorney General Order No. 1598-92 provides:

(a)(1) Each U.S. Attorney is authorized in cases delegated to the Assistant Attorney General of the Criminal Division—

(A) To accept or reject offers in compromise of—

(i) Claims on behalf of the United States...in all civil or criminal forfeiture cases, except that the U.S. Attorney shall consult with the Asset Forfeiture and Money Laundering Section of the Criminal Division before accepting offers in compromise or plea offers in forfeiture cases in which the original claim was $5,000,000 or more, and in forfeiture cases in which the original claim was between $500,000 and $5,000,000, when the gross amount of the original forfeiture sought and the proposed settlement exceeds 15 percent of the original claim and...

(B) To close (other than by compromise or entry of judgment) claims asserted by the United States...in all civil or criminal forfeiture cases, except that the U.S. Attorney shall consult with the Asset Forfeiture and Money Laundering Section of the Criminal Division before closing a forfeiture case in which the gross amount of the original forfeiture sought is $500,000 or more.

(2) This subsection does not apply when—

* * *

(B) The U.S. Attorney is of the opinion that because of a question of law or policy presented, or for any other reason, the matter should receive the personal attention of the Assistant Attorney General;

(C) A settlement converts into a mandatory duty the otherwise discretionary authority of an agency or department to revise, amend, or promulgate regulations;

(D) A settlement commits a department or an agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization; or

(E) A settlement limits the discretion of a Secretary or agency administrator to make policy or managerial decisions committed to the Secretary or agency administrator by Congress or the Constitution.

* * *

(d) Notwithstanding any of the above redelegations, when the agency or agencies involved have objected in writing to the proposed closing or dismissal of a case, or to the acceptance or rejection of an offer in compromise, any such unresolved objection shall be referred to the Assistant Attorney General for resolution.

2. Considerations on Closing or Settlement

a. General

One of the primary considerations in determining whether to settle or close a forfeiture action is the strength of the Government's case and the chance for ultimate success in the litigation. This consideration should involve an evaluation of the defenses that may be raised by potential or known claimants. Moreover, the probability that petitions for remission or mitigation will eventually be granted should be taken into account when deciding if further processing of the lawsuit will be prudent or beneficial.

Other factors taken into account should include such matters as the desires of the investigative agencies involved in the case,[10] whether the criminal acts of the property owner are sufficiently egregious to warrant forfeiture, and the effect of a discontinuance on the Assets Forfeiture Fund.[11] The U.S. Marshals Service should also be consulted to ascertain what expenses have been incurred in maintaining the property.

b. Special Considerations on Settlement

The decision to settle a forfeiture case requires a balancing of the equities among the parties involved in the case. As a general rule, settlement agreements should be made only with those who have a valid, good faith interest in the subject property and who did not have reason to believe that the wrongdoer would be likely to use the property unlawfully.[12] An obvious corollary to this general rule is that settlement agreements normally should not be made with the wrongdoer himself.

Any settlement stipulation into which the Government enters with an owner should generally contain a specific provision calling for the payment of the costs and expenses of forfeiture from the proceeds of sale of the property, though such costs (other than any costs of

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[10] *See* Attorney General Order 1598-92(d).

[11] *See Attorney General's Guidelines* § IX.A.2, B.2 (requiring an assessment of impact on the Assets Forfeiture Fund in decisions to forego federal forfeiture proceedings in favor of state or local forfeiture actions).

[12] *See* 28 C.F.R. § 9.5(a). The regulations on petitions for remission or mitigation provide useful guidelines for settlement decisions as well because both processes focus, at least in part, on the equities involved.

sale) should be waived if the owner is not guilty of any wrongdoing.[13] If the settlement is made with a lienholder, the government attorney should obtain from that party either a "hold harmless" agreement or a written release of the lienholder's right, title, and interest in the property.

Further information concerning a settlement with a creditor holding a perfected lien or mortgage interest against property may be found in the *Expedited Forfeiture Settlement Policy for Mortgage Holders* (rev. October 1993), discussed in part E, *infra*.

D. Forfeiture Settlement Policies

Forfeiture settlements should be consistent with the Department of Justice forfeiture policies.

For example, settlement agreements may provide for the exemption from forfeiture of an asset transferred to an attorney as fees for legal services, but only with the prior approval of the Assistant Attorney General of the Criminal Division. Such agreements may be approved only if: (1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.[14]

Forfeiture settlements must also comply with the applicable provisions of the *Policy Regarding Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions*.[15] The following provisions of this policy should be noted in particular:

(1) The critical principle that must be applied to all settlements is that civil forfeiture, either judicial or administrative, should not be used to gain an advantage in a criminal case. The Government may conclude a civil forfeiture action in conjunction with the criminal charges against the defendant which provided the cause of action against the property. However, the Government should *not* agree to release property subject to either criminal or civil forfeiture to *coerce* a guilty plea on the substantive charges, nor should the Government agree to dismiss criminal charges to *coerce* a forfeiture

[13] *See* 28 C.F.R. § 9.7(a); Memorandum, entitled "Waiver of Costs to Owner Victims in Remission Cases," Directive 94-6, issued by the Office of the Deputy Attorney General on June 7, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. II, at p. 4 — 4].

[14] *See United States Attorneys' Manual* § 9-111.700.

[15] *Asset Forfeiture Policy Manual* (1996), Chap. 3, Sec. I, at p. 3 — 1.

settlement. If a plea agreement is not to conclude a civil forfeiture case, language to that effect must be stated in the plea agreement as the failure to do so may be fatal to the concurrent forfeiture action.[16]

(2) All settlements must comply with Attorney General Order No. 92-1598 which sets out the settlement authority redelegated from the Assistant Attorney General of the Criminal Division to United States Attorneys.

(3) There must be a statutory basis for the forfeiture of the property and sufficient facts stated in the settlement documents to satisfy the elements of the statute.

(4) All settlements must be negotiated in consultation with the seizing agency and the U.S. Marshals Service.

(5) It is the obligation of the Assistant United States Attorney and the investigating agent before any type of settlement is discussed to determine what property, if any, is being processed for administrative forfeiture. Assistant United States Attorneys may not reach agreements with defendants or their counsel about the return of property that is the subject of an administrative forfeiture without first consulting the seizing agency. Property which has been administratively forfeited belongs to the Government and, therefore, cannot be returned to the defendant or used to pay restitution as part of a plea agreement. Additionally, a judicial forfeiture action may not be commenced against any property that has administrative forfeiture potential pursuant to 19 U.S.C. §§ 1607, 1609 unless it falls into one of the three exceptions identified in the policy regarding administrative and judicial forfeiture. Properties subject to administrative forfeiture must be forfeited administratively unless one of the following three exceptions applies:

1. Several items personalty are subject to civil forfeiture:

   a. under the same statutory authority;

   b. on the same factual basis;

[16] Additional principles governing global settlements are set out in the Memorandum, entitled "Policy Regarding Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions," Directive 94-7, issued by the Office of the Deputy Attorney General on November 9, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 3, Sec. II, at p. 3 — 1].

c. have a common owner;

d. have a combined appraised value in excess of $500,000. Monetary instruments as defined by 31 U.S.C. § 5312(a)(3); and

e. 31 C.F.R. Pt. 103, hauling conveyances or seizures of personalty that occur over weeks are not subject to this aggregation policy.

2. Prosecutive considerations dictate the criminal forfeiture of the property as part of a criminal prosecution.

3. The Criminal Division has expressly authorized judicial forfeiture based upon exceptional circumstances.[17] Before pursuing judicial forfeiture under one of these exceptions, an Assistant United States Attorney must consult the seizing agency to ensure that the agency has not already commenced an administrative forfeiture and to inform the seizing agency of the intent to initiate a judicial forfeiture so that it can stop any administrative proceeding which it commenced.

(6) Settlements should not provide for unsecured partial payments except upon the approval of the Asset Forfeiture and Money Laundering Section, in consultation with the U.S. Marshals Service.

(7) Settlements should state that the claimant/defendant may not reacquire the forfeited property directly or indirectly through family members or others acting in concert with claimant/defendant.

(8) Settlements shall not provide for payment of criminal fines, taxes, or other debts owed to the United States (*e.g.*, Small Business Administration or student loans) with forfeited assets.

(9) No settlement or plea agreement may contain any provision binding the Department of Justice and other federal agencies to a particular decision on a petition for remission and mitigation.

A settlement that purports to "forfeit" property binds only the parties to that agreement; therefore, it is necessary to complete the forfeiture action so that a forfeiture of the property

[17] *Asset Forfeiture Policy Manual* (1996), Chap. 2, Sec. I, at p. 2 — 1.

occurs. The Department of Justice's settlement policy requires government attorneys to follow certain procedures in all judicial forfeiture cases, whether civil or criminal in nature.

In civil forfeiture cases, the government attorney must assure that a valid and complete forfeiture occurs by:

(1) filing a verified civil complaint for forfeiture with the district court having jurisdiction over the property;

(2) ensuring that a warrant of arrest *in rem* has been executed against the property;

(3) providing notice to all known parties personally and noticing other parties by publication, as required by the Supplemental Rules;

(4) seeking a default judgment pursuant to Fed. R. Civ. P. 55, if no claim has been filed within ten days after process has been executed, as required by Rule C(6) of the Supplemental Rules; and

(5) filing with the court proposed orders of forfeiture which include the terms of the settlement with the settlement agreement.

If the settlement occurs in the context of a criminal case by way of a *plea agreement*, the government attorney must remember that a defendant can agree to forfeit *only* that interest in the property that belongs to him or her. Any settlement in the context of a plea agreement technically results in a forfeiture of only the defendant's interest in the property, with the interests of third parties to be resolved in the ancillary proceeding. Accordingly, government attorneys must ensure that a valid forfeiture results through a plea agreement by:

(1) including a forfeiture count in the indictment or information, otherwise forfeiture is legally impossible; identifying property known to be forfeitable in the indictment, information or subsequent bill of particulars, and ensuring that the criminal pleadings comply with Fed. R. Crim. P. 7 and 31;

(2) complying with the requirements applicable to third party interests (*e.g.*, 21 U.S.C. § 853(n)(1)-(7), including notice of the forfeiture and the right of third parties to obtain an adjudication of their interests in the property;

(3) reducing the entire settlement agreement to writing and requiring that the defendant concedes facts supporting the forfeiture. Department of Justice

policy, as well as the reasons for requiring that a defendant concede facts supporting the forfeiture, are discussed in *United States v. Libretti*, 116 U.S. 356 (1995);

(4) addressing potential double jeopardy issues. Plea or settlement agreements should include waivers of any and all double jeopardy claims that might otherwise be asserted with respect to any subsequent government enforcement action. Therefore, a *Halper* waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement. The settlement document should also include a "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution;

(5) ensuring that the court forfeits the property and then complies with the requirements applicable to third party interests (*e.g.*, 21 U.S.C. § 853(n)(1-7)), including notice of the forfeiture and the right of third parties to obtain an adjudication of their interests in the property;

(6) ensuring that the court issues a Final Order of Forfeiture that incorporates the settlement and, if necessary, addresses *all* third-party claims; and

(7) whenever possible, accepting only unencumbered property, with the exception of valid financial institution liens, to avoid protracted litigation of ownership issues.

There is one other aspect of the Department of Justice's settlement policy that should also be remembered when settling forfeiture cases: *only* forfeited property or the funds obtained from the sale of forfeited property can be placed in the Assets Forfeiture Fund. Accordingly, when reaching a particular settlement, the government attorney should be certain there is a factual and legal basis for the forfeiture. However, in certain instances, the settlement may provide for the acceptance of a monetary amount instead of the forfeiture of specific property, if the settlement is within the context of an existing judicial proceeding, pursuant to 19 U.S.C. § 1613(c), or in a criminal forfeiture case where the requirements for forfeiture of substitute assets are satisfied.[18]

[18] 19 U.S.C. § 1613 is part of the Customs laws and is incorporated by reference in many of the forfeiture statutes. This provision provides that a "deposit or retention of a monetary amount in lieu of the forfeiture...shall be treated in the same manner as the proceeds of sale of a forfeited item." The ability to treat monetary amounts in this manner is significant to the Department of Justice because such amounts can be placed in the Assets Forfeiture Fund and be shared with state and local law enforcement agencies pursuant to 19 U.S.C. § 1616(a) or other statutes.

If a monetary amount in lieu of the forfeiture of property is to be accepted, the following procedures must be followed:

(1) A civil complaint against the property or an indictment or information naming the property, alleging the defendant's interest in the property, and alleging the statutory basis for the forfeiture must be filed.

(2) In a civil case, a written statement incorporating the language of 19 U.S.C. § 1613(c) must be filed with and approved by the court.

(3) The agreement to substitute money in lieu of forfeiture of property in judicial cases must be approved by the court.

(4) The U.S. Marshals Service will accept a court approved settlement and deposit the money in the same manner as the proceeds of sale of a forfeited item.

(5) Monies received in lieu of forfeiture must be transferred to the U.S. Marshals Service district in custody of the asset being returned.

(6) When the U. S. Postal Inspection Service or the U. S. National Marine Fisheries Service is the primary federal investigative agency, the U.S. Marshals Service must deposit the money; deduct expenses, if any, incurred with respect to the property being returned; and deduct the approved equitable shares attributable to other agencies participating in the Department of Justice Assets Forfeiture Fund, and transfer the balance by refund to the above services, as appropriate. Each service will be responsible for sharing with participating state and local agencies in these cases.[19]

Prosecutors should first consult with the Asset Forfeiture and Money Laundering Section before engaging in settlement negotiations in civil forfeiture cases in which the claimants are fugitives in U.S. criminal proceedings.

E. Expedited Settlement Policy

The Department of Justice has adopted an expedited settlement policy designed to resolve claims of lienholders holding a perfected lien or mortgage against property subject to forfeiture in a particular case. The policy is set forth in a publication, entitled *Expedited*

[19] *See* 28 U.S.C. § 524(c)(4).

Forfeiture Settlement Policy for Mortgage Holders (rev. October 1993), available from the Asset Forfeiture and Money Laundering Section.

The policy applies only to forfeiture actions where the statute provides an innocent owner defense. The policy was initially limited to "financial institutions" and to mortgages on real property. Since February 1, 1993, the policy has applied to all lienholders regardless of whether they are a "financial institution," and to liens or mortgages on any type of tangible property.[20]

Under the policy, the United States Attorney's Office conducting a civil or criminal forfeiture *must* notify any lienholder that appears to have a perfected lien or mortgage of record of its right to request an expedited settlement. Such notice must be given immediately after property is restrained, arrested, seized or charged with civil or criminal forfeiture.

A lienholder who wishes to enter into an expedited settlement must submit a request for an expedited settlement to the United States Attorney who initiated the action against the property. In the form described in the expedited settlement policy, the request must include copies of documents and evidence that will satisfy the United States Attorney of the requestor's status as an innocent owner and its perfected lien or mortgage on the property.

The United States Attorney's Office must make a decision on the request within 60 days of its receipt. The United States Attorney shall enter into an expedited settlement agreement with a lienholder who establishes: (1) a valid, good faith security interest in the property as lienholder or mortgagee; (2) that the lien or mortgage is perfected; and (3) that the lienholder qualifies as an innocent owner under the applicable forfeiture statute and case law. If a request by a financial institution, as defined in 31 U.S.C. § 5312, for an expedited settlement is denied, the United States Attorney's Office must so notify the Asset Forfeiture and Money Laundering Section within ten days of the denial.

When the Government enters into an expedited settlement, it agrees to pay the following upon entry of a final judgment or order of forfeiture: (1) unpaid principal due and owing under the promissory note; (2) accrued interest at the contractual (not default) rate of interest to the date of payment; and (3) unpaid casualty insurance premiums for the seized property from the date of termination or expiration of the existing coverage to the date of payment of the lienholder's interest (providing the lien or mortgage instrument expressly requires the payment of this insurance). Such payments may normally be made only after the forfeiture judgment or order is final, meaning that title to the forfeited property is vested in the United

[20] *See Expedited Forfeiture Settlement Policy for Mortgage Holders* (rev. October 1993).

States and all appeals are exhausted or the 60-day time period for filing any appeals has expired pursuant to Fed. R. App. P. 4(a).

Even if the lien or mortgage instrument provides for attorney fees in the event of default, such fees may only be paid in "exceptional circumstances" and then only with the concurrence of the Asset Forfeiture and Money Laundering Section. The expedited settlement policy gives two examples of such circumstances: (1) a foreclosure action had been commenced prior to the forfeiture action; and (2) extensive discovery litigation is required before a settlement can be reached.

An expedited settlement agreement may be voided at any time prior to payment for "legal" reasons—*e.g.*, the case is dismissed due to evidentiary problems. An expedited settlement may also be voided within 90 days of the execution of the expedited settlement agreement for "economic" reasons—*e.g.*, the United States Attorney has determined that the aggregate of all liens and mortgages against the property and other allowable fees are likely to exceed the United States' equity in the property. In any event, an expedited settlement is contingent upon the Government obtaining a final judgment or order of forfeiture.

As part of an expedited settlement, a lienholder must stipulate in the expedited settlement agreement to relinquish to the United States any rights that the lienholder has under the lien or mortgage instruments, including the right to foreclose. A lienholder must agree to join in any government motion for an interlocutory or stipulated sale or motion to remove any occupants who fail to abide by the terms of an occupancy agreement. A lienholder also must agree to notify the United States Attorney and the U.S. Marshals Service at the end of any payment cycle where the debtor fails to make a payment under the mortgage contract, as such payments are typically a condition of occupancy agreements. Lastly, a lienholder must agree to provide the United States with a release of the lien or mortgage, it must convey its security interest with recordable documents, and it must agree to release the Government and its agents from any claims arising out of the forfeiture action.

In situations of extreme hardship to individuals, it is possible to obtain permission from the Asset Forfeiture and Money Laundering Section to pay off liens and mortgages prior to the entry of an order or judgment of forfeiture. All other options, including interlocutory sales, must be pursued prior to seeking this authority.[21]

[21] *See* Memorandum, entitled "Expedited Payment of Lienholders in Forfeiture Cases," Directive 93-3, issued by the Office of the Deputy Attorney General on January 15, 1993 [*Asset Forfeiture Policy Manual* (1996), Chap. 3, Sec. II, at p. 3 — 16].

Appellate Review of Forfeiture Proceedings

Chapter 8

Appellate Review of Forfeiture Proceedings

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Chapter 8

Appellate Review of Forfeiture Proceedings

I. Appeal of Judgment

Either the claimant or the Government may appeal an adverse judgment in a civil forfeiture action. The rules governing such appeals are the same as those generally applicable to civil appeals.[1] Interlocutory appeals are also permitted in certain circumstances.[2] A defendant may appeal an adverse judgment in a criminal case but the Government's authority is somewhat more circumscribed.[3] However, both the defendant and the Government may appeal an otherwise final sentence if the sentence was imposed in violation of the law.[4] Since criminal forfeiture is an aspect of sentencing,[5] issues involving criminal forfeiture judgments generally should be appealable by the Government.

A. Procedures

If the Government is a litigant in any civil or criminal action before a United States district court or court of appeals and a decision is rendered adverse to the Government's position, the United States Attorney's Office must immediately transmit a copy of the decision to the appellate section of the division responsible for the case, with a memorandum addressing whether further appellate review should be sought.[6] The appropriate section for

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[1] *See* 28 U.S.C. § 1291; Fed. R. App. P. 3-12.

[2] *See* 28 U.S.C. § 1292(a), (b).

[3] *See* 18 U.S.C.§ 3731.

[4] *See* 18 U.S.C. § 3742(a)(1), (b)(1).

[5] *See Libretti v. United States*, 516 U.S. 29 (1995).

[6] *United States Attorneys' Manual* §§ 2-2.110 and 2-2.111. The format for the memorandum concerning further appellate review is set forth in the *United States Attorneys' Manual. Id.* § 2-2.111.

cases involving *civil or criminal* forfeiture enforcement of federal criminal statutes is the Appellate Section of the Criminal Division.[7] Notification of adverse decisions in such cases should *not* be sent to the Appellate Section of the Civil Division.

Copies of all adverse decisions and the original of all memoranda concerning further appellate review should be sent to:

Chief, Appellate Section
Criminal Division
U.S. Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044-0899
Telephone: (202) 514-3521

To facilitate review by the Appellate Section of the Criminal Division, and ultimately by the Solicitor General's Office, copies of all such decisions and memoranda should be simultaneously submitted to:

Assistant Chief
Asset Forfeiture and Money Laundering Section
Criminal Division
U. S. Department of Justice
1400 New York Avenue, N.W.
Bond Building, Room 10100
Washington, D.C. 20005
Telephone: (202) 514-1263

In cases involving interlocutory appeals, contact with the above offices should immediately be made by telephone and all necessary papers should be transmitted by telefax or by overnight delivery service.[8] The fax number for the Appellate Section of the Criminal Division is (202) 514-8232. The fax number for the Asset Forfeiture and Money Laundering Section of the Criminal Division is (202) 514-5522.

Upon receipt, the Asset Forfeiture and Money Laundering Section prepares a recommendation concerning appellate review of the adverse decision and transmits it to the

[7] *See* 28 C.F.R. § 0.55(d).

[8] *See United States Attorneys' Manual* § 2-112.

Appellate Section. The Appellate Section reviews the recommendation, and that of the United States Attorney's Office, and then, prepares its own recommendation to the Solicitor General's Office. The Solicitor General's Office then reviews all the documents and memoranda and makes a decision concerning the appeal, *en banc* review, amicus briefs, petitions for *certiorari*, or petitions seeking mandamus or other extraordinary relief.[9]

The United States Attorney's Office is responsible for filing a notice of appeal or cross-appeal after the Solicitor General's Office grants authorization.[10] If the time for appeal or cross-appeal is about to expire and the United States Attorney's Office has not received a decision, it may file a "protective" notice of appeal to preserve the Government's right to appeal.[11] Such action should not be taken sooner than five days before the time for appeal or cross-appeal expires and should be reported to the Appellate Section.[12]

The time for filing an appeal in the court of appeals in a civil forfeiture case is 60 days after entry of the judgment or decree appealed from.[13] In a criminal forfeiture case, the time for filing in the court of appeals is 30 days after entry of the judgment or decree appealed from.[14] Note, however, that if the appeal is taken from a judgment entered in the "ancillary hearing" of a criminal forfeiture case (*e.g.*, a hearing pursuant to 21 U.S.C. § 853(n)), the appellant has 60 days after entry of the judgment or decree to file the appeal.[15] If the Government seeks to file a petition for rehearing (with or without suggestion for rehearing *en banc*) in the court of appeals, the time for filing is 14 days after entry of the judgment unless the time is shortened or enlarged by order or by local rule.[16] If rehearing *en banc* is desired, a 30-day extension beyond the 14-day period should be requested to permit full consideration by the Solicitor General's Office.[17] Rules governing appeals to the Supreme Court may be found in the *United States Attorneys' Manual* §§ 2-4.110(D) and 2-4.210(A)-(C).

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[9] *See United States Attorneys' Manual* § 2-120.

[10] *See United States Attorneys' Manual* § 2-2.130.

[11] *Id.*

[12] *Id.*

[13] *See* 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1). *See also United States Attorneys' Manual* § 2-4.200.

[14] *See* Fed. R. App. P. 4(b); 28 U.S.C. § 2107. *See also United States Attorneys' Manual* § 2.4-100.

[15] *See United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991).

[16] *See* Fed. R. App. P. 26(b); 35; 40(a).

[17] *See United States Attorneys' Manual* § 2-4.110.

B. Stays Pending Appeal

If the Government prevails in the district court in a civil *in rem* forfeiture action and the claimant fails to obtain a stay pending appeal, the Government may dispose of the property. Obviously, the Government may not dispose of property ordered forfeited in a criminal *in personam* forfeiture action immediately upon sentencing since the statutes mandate that post-conviction ancillary hearings be held to determine the validity of other interests in the property.[18] If notice is given and no one files petitions claiming an interest in the property, or the ancillary hearing is held and a final order of forfeiture is entered, the Government is thereafter free to dispose of the property in the absence of a stay pending appeal. Conversely, if a claimant prevails in the district court in a civil *in rem* action and the Government fails to obtain a stay pending appeal, the claimant may dispose of the property.

Until recently, several courts held that such disposition of the property ended the jurisdiction of the courts over the property and the prevailing party could thereafter obtain dismissal of the losing party's appeal.[19] This view stemmed from a long-settled rule of admiralty law that removal of the property from the territorial borders of the district court defeats continuing *in rem* jurisdiction, except where the *res* was removed accidentally, fraudulently, or improperly.[20] Other courts rejected this "no *res*/no jurisdiction" rule at least where the *res* was currency and the "removal" consisted merely of depositing or transferring the funds in question into the Assets Forfeiture Fund.[21] Two recent developments combined to end application of this rule in civil forfeiture cases.

First, Congress enacted 28 U.S.C. § 1355(c), effective October 28, 1992, to provide that an appellate court is not deprived of jurisdiction over an otherwise proper appeal in a civil

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[18] *See, e.g.,* 18 U.S.C. § 1963(*l*); 21 U.S.C. § 853(n).

[19] *See United States v. $84,740.00 U.S. Currency,* 900 F.2d 1402 (9th Cir. 1990); *United States v. Ten Thousand Dollars ($10,000.00) in United States Currency,* 860 F.2d 1511, 1513 (9th Cir. 1988); *United States v. One Lear Jet Aircraft, Serial No. 35A-280,* 836 F.2d 1571, 1573 (11th Cir.) *(en banc), cert. denied,* 487 U.S. 1204 (1988); *United States v. One 1979 Rolls-Royce Corniche Convertible,* 770 F.2d 713, 717 (7th Cir. 1985).

[20] *See, e.g., United States v. $84,740.00 U.S. Currency,* 900 F.2d at 1402; *United States v. Tit's Cocktail Lounge,* 873 F.2d 141, 143 (7th Cir. 1989).

[21] *See United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390),* 956 F.2d 801 (8th Cir. 1992); *United States v. One Lot of $25,721.00 in Currency,* 938 F.2d 1417 (1st Cir. 1991); *United States v. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars & Fifty-Eight Cents,* 938 F.2d 433 (3d Cir. 1991); *United States v. $95,945.18,* 913 F.2d 1106 (4th Cir. 1990); *United States v. Aiello,* 912 F.2d 4 (2d Cir. 1990).

forfeiture action simply because the *res* has been removed from the court's jurisdiction.[22] The new statute also provides that, upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property, including entry of a stay pending appeal or requiring the posting of an appeal bond.[23]

Second, the Supreme Court conclusively held that the so-called "no *res*/no jurisdiction rule" never existed in admiralty and certainly does not exist in civil forfeiture cases.[24] The Court further held that jurisdiction arises the moment a district court acquires control over the *res* at the commencement of an action *in rem*, and such jurisdiction may not thereafter be divested by removal of the *res*.[25] The Court unanimously rejected the Government's alternative argument that the Appropriations Clause of the United States Constitution[26] bars release of the funds once the *res* has been sold and the proceeds from the sale deposited into the Assets Forfeiture Fund.[27]

Notwithstanding the legislative and judicial abolishment of the "no *res*/no jurisdiction rule" in civil forfeiture cases, it is still important for the Government to move for a stay of the

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[22] *See* Money Laundering Enforcement Improvements Act of 1991, Pub. L. 102-550, Title XV, § 1521, 106 Stat. 4062, 102d Cong., 2d Sess. (Oct. 28, 1992).

[23] *Id.*

[24] *Republic National Bank v. United States,* 506 U.S. 80 (1992). Justice Blackmun wrote the majority opinion on this issue and was joined in this part of his opinion by all Justices except Justice Thomas. *Id.* at 81-99. Justice Thomas concurred in the result but wrote separately to state his view that the case should have been disposed of on the basis of 28 U.S.C. § 1355(c), which had been enacted while the case was pending decision. *Id.* at 99-102. The majority noted the enactment of this statute but declined either to interpret it or to determine its retroactive application to the pending case. *Id.* at 89 n.5.

[25] *Republic National Bank v. United States*, 506 U.S. 80, 88-89 (1992). The majority interpreted the early admiralty decisions on which the Government relied as creating the sole and very limited exception to this rule of "continuing jurisdiction" where removal of the *res* would have the effect of rendering a final judgment "useless" with no remedial effect whatsoever. *Id.* at 87-88. Clearly, this exception would not apply where "removal" of the *res* is accomplished by its sale or placement into "official use," so that the *res* itself or proceeds from the sale of *res* may be restored to the party that ultimately prevails on the merits.

[26] U.S. Constitution, Art. I, § 9, cl. 7.

[27] *Republic National Bank v. United States*, 506 U.S. 80, 89-96 (1992). A majority of seven Justices (per C.J. Rehnquist) concluded that 31 U.S.C. § 1304 and 28 U.S.C. §§ 2414 and 2465 provide the requisite "appropriations authority." *Id.* at 93-96. Justice Blackmun, separately concurring in the result and joined by two other Justices on this issue (Justice Stevens concurred with both the Chief Justice and Justice Blackmun on this issue), reasoned that: (1) the Appropriations Clause is limited to expenditures of "public money," and property subject to civil forfeiture litigation does not constitute "public money"; and (2) in any event, the requisite "appropriations authority" may be found in 28 U.S.C. § 2465 or in the recognized authority of the Comptroller General to correct erroneous or accidental deposits into a Treasury account. *Id.* at 89-92.

judgment, the posting of an appeal bond, or some other form of judicial security[28] if it seeks to appeal an adverse judgment or dismissal of a civil forfeiture case. Such security will insure that the Government may still obtain the *res*, or its fair value equivalent, in the event the adverse judgment or ruling is reversed and the Government ultimately prevails on the merits. If the district court denies the requested relief, the Government may seek relief in the court of appeals.[29] However, if the relief sought is a stay of judgement pending appeal and the district court denies relief, approval of the Solicitor General is required before moving for a stay in the court of appeals.

II. Constitutional Challenges

Even after formal forfeiture proceedings have been completed, persons with an interest in the subject property occasionally seek judicial relief based on allegedly unconstitutional conduct by the Government in pursuing the forfeiture. Such suits are usually brought under the Tucker Act, in which the plaintiffs seek monetary damages, or Fed. R. Crim. P. 41(e), in which the plaintiffs seek equitable relief.

A. Monetary Damages

The Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), generally provide an avenue of redress for claims against the United States founded on the Constitution or a statute.[30] The court of claims has exclusive jurisdiction over claims against the United States under the Tucker Act, 28 U.S.C. § 1491, for damages that exceed $10,000. The Little Tucker Act, 28 U.S. C. § 1346(a)(2), gives the district courts concurrent jurisdiction with the court of claims over lawsuits against the United States for monetary damages not exceeding $10,000. The current view is that the Tucker Act does not provide a remedy for unlawful or unconstitutional forfeitures,[31] although some courts in the past have allowed actions under those statutes in which plaintiffs sought awards of monetary damages

[28] *See* 28 U.S.C. § 1355(c).

[29] *Id.*

[30] *See* 28 C.F.R. § 0.20(b); *United States Attorneys' Manual* § 2-2.120.

[31] *See, e.g., Lark v. United States*, 17 Cl. Ct. 567, 569-70 (1989) (citing cases); *see also Willis v. United States*, 600 F. Supp. 1407, 1412-15 (N.D. Ill. 1985).

by challenging the underlying forfeiture.[32] The better position is that the Tucker Act does not create a substantive right enforceable against the United States for monetary damages in the absence of a specific statute authorizing their payment.[33]

B. Equitable Relief

Persons who fail to file a claim in an administrative forfeiture action or answer a judicial forfeiture action sometimes file motions under Fed. R. Crim. P. 41(e)[34] for the return of illegally seized or wrongfully detained property.[35] The current view is that claimants cannot bypass administrative remedies or judicial procedures by proceeding under Fed. R. Crim. P. 41(e) in lieu of the specific provisions of the forfeiture statutes.[36] Similarly, a claimant who chooses not to file a claim and a cost bond after receiving notice of an administrative forfeiture, and who pursues only his administrative remedy of petition for remission, may not obtain judicial review of the seizing agency's denial of the petition.[37]

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[32] *See, e.g., United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327, 1330 (5th Cir. 1974); *Simons v. United States*, 497 F.2d 1046, 1049 (9th Cir. 1974); *Doherty v. United States*, 500 F.2d 540, 542 (Ct. Cl. 1974) (stating that 28 U.S.C. § 1491 provides a basis for the recovery of just compensation for property that was allegedly forfeited illegally); *Jaekel v. United States*, 304 F. Supp. 993, 997 (S.D.N.Y. 1969) (in which the court, noting that forfeiture is considered to be a penalty for a criminal offense, specifically ruled that "where taxes, fines, or penalties are unlawfully imposed, an action may be maintained under section 1346(a)(2) [Tucker Act] to recover the money"). To the extent that *Jaekel* views forfeiture as a criminal penalty and not a civil remedial sanction, its reasoning is suspect.

[33] *See United States v. Mitchell*, 463 U.S. 206, 216, 218 (1983); *United States v. Testan*, 424 U.S. 392, 400-402 (1976); *Lark v. United States*, 17 Cl. Ct. 567, 570 (1989). One court held that a Tucker Act suit, though "procedurally irregular," would be treated as a judicial forfeiture proceeding (and not as a Tucker Act claim), in part because the Government agreed to the appellate court's consideration of the merits of the legal arguments presented. *Vance v. United States*, 676 F.2d 183, 187 (5th Cir. 1982).

[34] Rule 41(e) was amended and broadened in 1989 to include motions by persons aggrieved by either "an unlawful search and seizure *or by the deprivation of property*" (italicized portion constitutes 1989 amendment). Prior to the rule change, in *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 569 (1983), the Supreme Court suggested that a claimant may file a Rule 41(e) motion for return of property as a means of asserting his right to a prompt post-seizure hearing.

[35] A motion for relief from judgment under Fed. R. Civ. P. 60(b) will not result in the return of the forfeited property to the movant. *See, e.g., United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356 (5th Cir. 1972).

[36] *See, e.g., United States v. Price*, 914 F.2d 1507 (D.C. Cir. 1990); *United States v. Hernandez*, 911 F.2d 981 (5th Cir. 1990). *See also Shaw v. United States*, 891 F.2d 602 (6th Cir. 1989); *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989) (both citing cases); *In re Harper*, 835 F.2d 1273 (8th Cir. 1988). In *Floyd v. United States*, 860 F.2d 999 (10th Cir. 1988), the Court of Appeals explained that a Rule 41(e) motion should be dismissed if the plaintiff has an adequate legal remedy—*i.e.*, the ability to challenge the forfeiture in a pending administrative or judicial proceeding.

[37] *In re Sixty Seven Thousand Four Hundred Seventy Dollars*, 901 F.2d 1540, 1545 (11th Cir. 1990).

Petitions for Remission
or Mitigation

Chapter 9

Petitions for Remission or Mitigation of Civil or Criminal Forfeiture

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Chapter 9

Petitions for Remission or Mitigation of Civil or Criminal Forfeiture

I. Background

The remission or mitigation of a civil or criminal forfeiture is a remedy designed to ameliorate the harshness of the forfeiture sanction and is an act of pardon by the Executive Branch of the Government. Prior to the enactment of the first statutory innocent owner defense in 1978, remission was the only remedy available to innocent owners of property that had been seized for federal forfeiture.

Petitions for remission or mitigation are ancillary to and independent of judicial forfeiture proceedings. The granting of a petition during the pendency of a forfeiture action advises the court that if the property is ultimately forfeited, the Attorney General has determined to return the property, or a portion thereof, to the petitioner. Courts routinely frame orders to incorporate the granting of petitions prior to forfeiture.

The first federal remission statute was passed in 1790 as part of the Customs laws. The statutory basis for petitions for remission or mitigation was enacted in its present form in the Tariff Act of 1930, at 19 U.S.C. §§ 1613 and 1618. The Federal Bureau of Investigation, the Drug Enforcement Administration, and the Immigration and Naturalization Service share a uniform set of remission regulations found at 28 C.F.R. Part 9. These regulations apply to the Criminal Division of the Department of Justice for petition decisions in judicial forfeiture proceedings. The Secretary of the Treasury transferred to the Attorney General its authority to review remission of forfeiture in cases in which judicial proceedings are instituted.[1] The regulations now provide a vehicle to transfer forfeited assets to victims who lack an ownership interest in the asset, but were nonetheless a victim of the offense underlying the forfeiture.

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[1] *United States v. One 1970 Buick Riviera*, 463 F.2d 1168, 1170 (5th Cir. 1972).

The U.S. Postal Inspection Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms, the U.S. Customs Service, the Immigration and Naturalization Service, and the U.S. Secret Service each have separate regulations for their administrative forfeitures in separate portions of the Code of Federal Regulations.

II. Filing the Petition

A. Content

There is no prescribed form for a petition. However, the petition must contain a sworn affidavit[2] and must relate the facts that are relied upon to justify remission or mitigation, including:

(1) the name, address, and social security number of the person claiming an interest in the seized property;

(2) the name of the seizing agency, the asset identifier, and the date and place of seizure;

(3) a complete description of the property including its address or its make, model, and serial numbers, if any; and

(4) a description of the interest of the petitioner in the property, as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, deeds, mortgages, or other satisfactory documentary evidence.[3]

B. Procedure for Filing

Petitions for administratively seized property should be addressed to either the head of the seizing agency or to the person in charge of the agency's local or regional office, depending upon which agency seized the property.[4] Petitions for judicially forfeited property should be addressed to the Attorney General and submitted to the United States Attorney for

[2] 28 U.S.C. § 1746 and 28 C.F.R. §§ 9.3(c), 9.4(c).

[3] 28 C.F.R. §§ 9.3(c), 9.4(c).

[4] 28 C.F.R. § 9.3(e).

the district where the forfeiture proceedings were brought. A copy must also be sent to the seizing agency.[5]

A petition may be filed by the person applying for remission, by a legal guardian, or by an attorney for the petitioner.[6] As a general rule, petitions are filed individually. With the consent of the ruling official, consolidated petitions may be filed.[7] This may be done by one party who is already entitled to file a petition filing the petition on behalf of other similarly situated potential petitioners. In such cases, the petitioner must demonstrate that it has the authority to file the petition on behalf of the other petitioners in question. This authority may be express, or may be implied by the existence of written authority to file claims or lawsuits related to the course of conduct in question on behalf of the other petitioners.[8]

C. Time Limits

The Department of Justice regulations do not specify a time limit for filing a petition for remission other than prior to the final disposition of the property.[9] "Final disposition" means either selling the property or placing the property into official use by a government agency. The notice of seizure should advise petitioners to file within 30 days after they receive notice, so as not to delay the disposition of the property in the event of its forfeiture. Petitions for restoration of proceeds from property after its disposition must be filed within 90 days of its sale or placement into official use.[10]

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[5] 28 C.F.R. § 9.4(e).

[6] 28 C.F.R. § 9.9(g).

[7] 28 C.F.R. § 9.9(h).

[8] *Id.*

[9] 28 C.F.R. § 9.4(a).

[10] 19 U.S.C. § 1618; 28 C.F.R. §§ 9.3(k), 9.4(l).

III. Eligibility for Remission

A. Criteria for Remission

The criteria for remission differ depending on whether the property is forfeited criminally or civilly. If the petitioner seeks remission of civilly forfeited property, it must establish in accordance with 28 C.F.R. § 9.5(a):

(1) a valid, good faith, and legally cognizable interest in the seized property as owner or lienholder as defined in 28 C.F.R. § 9.2(j) or (l); and

(2) that it is innocent within the meaning of the innocent owner provisions of the applicable civil forfeiture statute. If the applicable civil forfeiture statute contains no innocent owner defense, the innocent owner provisions of 21 U.S.C. § 881(a)(4) shall apply.

In the criminal forfeiture context, the petitioner must establish:

(1) a valid, good faith, and legally cognizable interest in the seized property as owner or lienholder as defined in 28 C.F.R. § 9.2(j) or (l); and

(2) that it is a bona fide purchaser for value without cause to believe that the property was subject to forfeiture at the time of the purchase; or that it is one who holds a legally cognizable interest in the seized property at the time of the violation underlying the forfeiture superior to that of the defendant within the meaning of the applicable criminal forfeiture statute.

B. Criteria for Mitigation

The ruling official may grant mitigation in accordance with 28 C.F.R. § 9.5(b) to a party not involved in the commission of the offense when either:

(1) the petitioner has not met the minimum conditions for remission, but some relief is warranted; or

(2) the petitioner has satisfied the minimum standards for remission, but the overall circumstances are such that complete relief is not warranted.[11]

[11] 28 C.F.R. § 9.5(b)(1)(ii).

Relief may be granted to avoid extreme hardship and when it will promote the interest of justice and will not diminish the deterrent effect of the law. Extenuating circumstances justifying such a finding include those circumstances that reduce the responsibility of the petitioner for knowledge of the illegal activity, knowledge of the criminal record of a user of the property, or failure to take reasonable steps to prevent the illegal use or acquisition by another for some reason, such as reasonable fear of reprisal.[12]

Mitigation may also be granted to a party involved in the commission of the offense when mitigating factors exist. Examples set forth in the regulations include: whether the violation involves drug distribution, manufacturing, or importation; if the violator has taken steps, such as drug treatment, to prevent further criminal conduct; if the violation was minimal and was not part of a larger criminal scheme; if the violator cooperated with federal, state, or local investigations relating to the criminal conduct underlying the forfeiture; or if complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture.[13]

C. Establishing an Ownership Interest

In order to merit remission of forfeited property, a petitioner must establish a valid, good faith interest in the property subject to forfeiture. The petitioner may assert an interest in the forfeiture as an owner of the property or demonstrate a security interest in the property as a lienholder.

The legal principles for tracing an ownership interest in forfeited property for petitions for remission under 28 C.F.R. § 9.5(b) are akin to the requirements for standing imposed on third party claimants judicially contesting the forfeiture of seized assets. A claimant contesting forfeiture in either civil or criminal forfeiture cases must trace a legal interest in the particular property that has been ordered forfeited.[14] The party seeking to challenge forfeiture has the burden of demonstrating a sufficient interest in the property to satisfy the requirements for standing.[15]

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[12] 28 C.F.R. § 9.5(b)(1)(i).

[13] 28 C.F.R. § 9.5(b)(2).

[14] *United States v. Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992).

[15] *United States v. One Rural Lot*, 739 F. Supp. 74, 77 (D.P.R. 1990).

State law generally determines whether a person has a legally cognizable ownership interest in forfeited property.[16] Courts look for some indicia of ownership such as dominion and control over the property, title, possession, and financial stake.[17] A petitioner must do more than assert bare legal title to be eligible for remission as an owner or lienholder. The remission regulations follow case law principles in that a person who holds legal title to property, but who exercised no dominion or control over the property will be denied remission.[18] When ownership of property involves ownership documents or public filing requirements, the petitioner must include with its petition copies of the title documents and proof of compliance with any state filing requirements. In most states, possession of personal property serves as *prima facie* evidence of ownership.

Where the property is not in the physical possession of the petitioner or covered by a certificate of title or other documentation evidencing ownership, it becomes more difficult to establish an ownership interest. Common law principles still apply in many states. For example, the victims of theft or embezzlement have standing in a forfeiture proceeding as long as they can trace their property to the asset subject to forfeiture. This is because title to property taken from the victim without his consent never passes; it remains at all times with the victim. In contrast, where a victim voluntarily transfers property to another individual, even if the transfer was induced by fraud, title to the property passes to the perpetrator and the victim becomes a general, unsecured creditor. The fact that he can trace his interest is irrelevant.[19] The victim is merely a general, unsecured creditor of the defendant (the victim voluntarily transferred title) and he has no greater standing to contest the forfeiture (or seek remission) than any other similarly situated victim, regardless of whether he can trace his

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[16] *See, e.g., United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (state law determines whether the legal interest covered by the federal statute exist; under state law, third parties were bailors who retained legal interest in forfeited property); *United States v. Henry*, 850 F. Supp. 681 (M.D. Tenn. 1994) (defendant's spouse had standing to contest forfeiture of marital residence in which she had a legal interest under state law).

[17] *United States v. One 1945 Douglas C-54 Aircraft*, 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

[18] *See, e.g., United States v. Sokolow*, Crim. No. 93-394-01, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpublished) (bare legal title without exercise of dominion and control is insufficient to establish standing; the defendant cannot protect his property from forfeiture simply by making sure it is titled in his daughter's name before he uses it to commit a crime); *United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996) (defendant's father, son and girlfriend held legal title but exercised no dominion or control); *United States v. One 1990 Chevrolet Corvette*, 37 F.3d 421 (8th Cir. 1994) (title owner lacks standing to contest forfeiture of property over which she exercised no dominion or control); *United States v. Real Property at 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991); *United States v. Premises Known as 526 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1989); *United States v. One 1945 Douglas C-54 Aircraft*, 604 F.2d 27, 28-29 (8th Cir. 1979).

[19] *See, e.g., United States v. $3,000 in Cash and All Monies From Certain Bank Accounts*, 906 F. Supp. 1061 (E.D. Va. 1995) (even though claimant/victim could trace his money to the seized bank account, title passed to the perpetrator making the claimant an unsecured creditor without standing).

interest to the property. When the issue is whether a given remedy is available under a federal statute, federal common law applies in determining the nature of the remedy. Otherwise, application of the same statute would lead to diverse results depending on the jurisdiction.[20]

An alternative basis for establishing an ownership interest involves the theory of constructive trusts. Constructive trusts are discussed in chapter 6, part VIII.D.3, of this manual.

Ownership of currency raises distinct evidentiary problems. A petitioner alleging an ownership interest in seized funds must trace its interest in the specific money forfeited and not simply establish itself as a likely source of the forfeited funds.[21] Actual possession of currency is a strong indicia of ownership.[22] Credible documentation is needed in order to substantiate the link between the source of funds and the actual funds forfeited.[23] Some circuits hold that title to currency passes to the bank upon deposit,[24] and the depositor is merely a general creditor of the bank,[25] while other circuits would impose a constructive trust under the same facts.

D. Establishing Innocence

Once a petitioner establishes a valid, good faith and legally cognizable interest in the forfeited property, the petitioner must also establish that it is innocent within the meaning of

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[20] *See Taylor v. United States*, 495 U.S. 575, 591-92 (1990); *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 761 (10th Cir. 1989) (application of a constructive trust remedy to the liquidation of an insolvent bank), *cert. denied*, 493 U.S. 1070 (1990). *But see Moffit, Zwerling & Kemler, P.C.*, 83 F.3d 660, 670 (1996) (recognizing that state law has traditionally been relied upon to resolve questions of property rights under the forfeiture law).

[21] *United States v. 1990 Chevrolet Silverado Pickup Truck*, 804 F. Supp. 777, 779 (W.D.N.C. 1992).

[22] *United States v. Sanchez*, 781 F. Supp. 835, 839 (D.P.R. 1991) (claiman who had physical possession of currency had standing to contest forfeiture).

[23] *United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars*, 965 F.2d 868 (10th Cir. 1992).

[24] *United States v. B.C.C.I. Holdings (Luxembourg) S.A.*, 73 F.3d 403 (D.C. Cir. 1996).

[25] *Contra United States v. Contents of Account Numbers 208-06070 and 208-06068-1-2*, 847 F. Supp. 329, 332 (S.D.N.Y. 1994) (owner of a bank account has standing to contest forfeiture based on his ownership interest in funds contained in the account); *Morandi, S.A. v. United States*, 747 F. Supp. 667, 669 (S.D. Fla. 1990) (funds in bank account may be owned by the depositor for purposes of standing to contest forfeiture of account).

the innocent owner provisions of the applicable civil forfeiture statute if petitioning for remission of civilly forfeited property.[26] If the applicable civil forfeiture statute contains no innocent owner defense, the innocent owner provisions of 21 U.S.C. § 881(a)(4) apply. Most civil forfeiture statutes, however, contain an innocent owner defense that closely parallels the requirements of 21 U.S.C. § 881(a)(4). Section 881(a)(4)(C) provides that: "no [property] shall be forfeited...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, consent, or willful blindness of the owner." The circuits differ on whether the "knowledge, consent, or willful blindness" requirement should be read conjunctively or disjunctively.[27] Thus, petitioners may assert that, while they had knowledge of the illegal activities, they did not consent to the illegal conduct and, thus, they satisfy the innocent owner defense. The Second Circuit has adopted this approach and allows claimants to meet the innocent owner requirement if they prove lack of knowledge or consent.[28] Consent is inferred if the claimant has knowledge which can be overcome if the claimant can demonstrate that it took all reasonable steps to prevent the illegal use of the property.[29] In contrast, the Ninth Circuit holds that if the claimant either knew or consented to the illegal activities, the innocent owner defense is unavailable.[30] The Asset Forfeiture and Money Laundering Section has generally adopted the view of the Second Circuit which is consistent with the Supreme Court's statement in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In that case, the Supreme Court noted, *in dictum*, that it might be difficult to reject the constitutional claim of an owner whose property has been subject to forfeiture when that owner has proven that he was uninvolved in and unaware of wrongful activity, and has done all that reasonably could be expected to prevent the proscribed use of the property.[31]

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[26] If the petitioner acquired its interest in the property after the time of the violation underlying the forfeiture, the question of whether the petitioner had knowledge of the violation shall be determined as of the point in time when the interest in the property was acquired.

[27] This issue is not present for forfeitures under 18 U.S.C. § 981 because section 981(a)(2) merely requires a claimant to demonstrate lack of knowledge.

[28] *United States v. One Parcel of Property Located at 755 Forest Rd., Northford, Conn.*, 985 F.2d 70 (2d Cir. 1993).

[29] *United States v. Certain Property and Premises, Known as 418 57th Street, Brooklyn, N.Y.*, 922 F.2d 129, 132 (2d Cir. 1990).

[30] *United States v. One Parcel of Land Known as Lot 111-B, Tax Map Key 4-4-03-71(4), Waipouli, Kapoa, Island and County of Kauai, State of Hawaii*, 902 F.2d 1443, 1445 (9th Cir. 1990); *see also United States v. Real Property Located at 10936 Oak Run Circle, Moreno, Cal.*, 9 F.3d 74, 76 (9th Cir. 1993).

[31] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974).

E. Creditors

1. Unsecured Creditors

Unsecured general creditors are not entitled to remission or mitigation since they are unable to directly trace their ownership interest to identifiable assets in the forfeiture pool. The petitioner may have a cause of action against the defendant on the debt, but will have no specific interest in property forfeited.[32] Similarly, trade creditors who have breach of contract actions against the defendant or former employees with claims for employee benefits, have no standing to file petitions for the same reason. The situation is different if the creditor has reduced his claim to a judgment and obtained a judgment lien against specific assets. Tort victims, like general unsecured creditors, have a general interest in the defendant's estate, but have no legal interest in the property forfeited.

The U.S. Marshals Service, or other property custodian of seized property, has authority to pay claims of general creditors of an ongoing business for debts incurred within 30 days before seizure and to pay the ordinary and necessary expenses of the business incurred thereafter, including salaries, payments to third party suppliers, and payments to utilities.[33] Such payments are made by the U.S. Marshals Service, independent of the petition process.

2. Judgment Creditors

A judgment creditor is one who has obtained a judgment against a debtor, but has not yet received full satisfaction of the judgment.[34] A judgment creditor will qualify as a lienholder entitled to remission if: (1) the judgment was duly recorded before the seizure of the property for forfeiture; (2) under local law the judgment attached to the property being forfeited before the seizure of the property for forfeiture; and (3) the creditor had no knowledge of the commission of the offense underlying the forfeiture at the time the judgment became a lien on the property.[35]

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[32] *United States v. $20,193.39 in U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994) (finding that a claimant who made loans to a defendant is only a general creditor of the defendant and lacks an ownership interest in the specific currency and jewelry forfeited from the defendant).

[33] This authority derives from the statutory authority to make payments from the Assets Forfeiture Fund for expenses incurred to safeguard and maintain seized property. *See* 28 U.S.C. § 524(c)(1)(A).

[34] 28 C.F.R. § 9.2(h).

[35] 28 C.F.R. § 9.6(f).

IV. Petition Decisions

An individual or business entity with a sufficient legal interest in the property seized for forfeiture may contest the forfeiture, file a petition for remission or mitigation, or both. The filing of a petition does not waive or suspend any time limits for filing a claim to judicially litigate the forfeiture.

There are no specific time limits established by statute or case law for ruling on petitions for remission, but the agents and officials involved in the investigation and decision should act without unreasonable or undue delay.[36]

A. Investigation

Once a petition for remission or mitigation has been filed, the agency that seized the property is responsible for investigating the merits of the petitioner's allegations and submitting a report on the investigation to the ruling official in administrative forfeitures.[37] In a judicial forfeiture, the U.S. Attorney must submit the petition, the report of the investigation by the seizing agency, and his or her recommendation as to allowance or denial, to the Asset Forfeiture and Money Laundering Section for a final determination.[38]

The ruling official will not consider whether the evidence is sufficient to support the forfeiture, but shall presume for purposes of the petition for remission that the forfeiture is valid. This presumption applies only to the petition process and has no effect on any judicial proceeding. Consequently, challenges to matters such as the admissibility of evidence, the legality of seizure, or the existence of probable cause are misplaced in a petition that is, in essence, requesting an executive pardon.

As the moving party seeking remission, the petitioner's cooperation in the petition investigation is paramount. A petitioner should be advised that failure to cooperate, or to provide requested information or documents, may result in denial of the petition. The regulations explicitly state that no hearing will be held. Where a petitioner chooses to pursue

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[36] *See United States v. VonNeumann*, 474 U.S. 242, 251 (1986) (holding that even if petitioner has a due process right to a prompt decision, a delay of 36 days does not violate that right); *Willis v. United States*, 600 F. Supp. 1407, 1417 (N.D. Ill. 1985) (holding that a delay of four months between the filing of a petition and its disposition was "not so egregious as to amount to a constitutional violation").

[37] 28 C.F.R. § 9.3(f).

[38] 28 C.F.R. § 9.4(f)-(g).

a petition for remission or mitigation in lieu of contesting the forfeiture, a voluntary choice is made to forgo a judicial adjudication of guilt. A petition for remission or mitigation will not resolve the issue of personal culpability, and petitioners will bear the consequences of their choice to avoid a judicial finding of culpability.

B. Notice of Decision and Reconsideration

The Attorney General has delegated to the Chief of the Asset Forfeiture and Money Laundering Section the authority to remit assets judicially forfeited. Notice of a decision is sent to the petitioner, the appropriate United States Attorney, the seizing agency, and to the U.S. Marshals Service or other property custodian.[39] The ruling official in administrative forfeitures varies according to seizing agency.

When a petition is denied, the Asset Forfeiture and Money Laundering Section will advise the petitioner that it will entertain one request for reconsideration. A request for reconsideration must be based on evidence not previously submitted that is material to the basis of the denial, or that clearly demonstrates that the denial was erroneous.[40] If the forfeiture is judicial, the petitioner should file the request for reconsideration with the Asset Forfeiture and Money Laundering Section and should also submit a copy of the request to the United States Attorney for the district in which the forfeiture proceeding took place.

C. Scope of Judicial Review

A decision on a petition for remission is generally not subject to judicial review because remission is a discretionary act by the Attorney General and is considered an act of grace.[41] There are limited exceptions in which judicial review is warranted, such as where Executive Branch officials have arbitrarily refused to act on petitions. A petitioner must allege either that the agency refused to consider a petition, or that the agency had a formalized policy to deny petitions for remission.[42] In such cases, while the court may require the ruling official to decide the petition, it may not review the decision on the merits.[43] Limited judicial review may also be appropriate when the petitioner alleges that the agency violated its own

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[39] 28 C.F.R. § 9.4(i)-(j).

[40] 28 C.F.R. §§ 9.3(j) (administrative forfeitures), 9.4(k) (judicial forfeitures).

[41] *Ivers v. United States*, 581 F.2d 1362, 1371 (9th Cir. 1978).

[42] *One 1977 Volvo 242 DL v. United States,* 650 F.2d 660, 662 (5th Cir. 1981).

[43] *In re Sixty Seven Thousand Four Hundred Seventy Dollars*, 901 F.2d 1540, 1543-44 (11th Cir. 1990).

regulations,[44] when the forfeiture itself was procedurally deficient,[45] or when the petitioner raises a constitutional challenge to the forfeiture.[46]

D. Priority of Payment

Costs incident to the forfeiture, sale, or processing of the petition are deducted from the amount available for remission. Costs may include: court costs, storage costs, brokerage and other sales related costs, the amount of any liens paid by the Government, expenses of trustees, awards, and costs related to the investigation, such as travel and deposition expenses.[47] When property is restored to an owner, only the sales-related costs are routinely deducted; the Government may waive other costs.

Section 9.9 (a) directs that after the deduction of such costs, remission is granted in the following order of priority:

(1) owners;

(2) lienholders;

(3) federal financial institution regulatory agencies (if not entitled to greater priority as owners or lienholders)[48]; and

(4) victims (who are not otherwise eligible as owners or lienholders).[49]

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[44] *Sammons v. Taylor*, 967 F.2d 1533 (11th Cir. 1992).

[45] *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992).

[46] *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1101-02 (9th Cir. 1990).

[47] 28 C.F.R. § 9.9(a).

[48] *See* discussion of transfers to federal financial regulatory institutions in FIRREA cases, pursuant to 18 U.S.C. § 981(e)(3), in chapter 10 of this manual. These remissions implement the Attorney General's independent statutory authority to make such transfers. *See also* discussion of priority of remission in part V.D of this chapter. Section 9.9(e) provides that the ruling official "may direct the transfer of property under 18 U.S.C. § 981(e) to certain federal financial institution regulatory agencies or an entity acting in their behalf, upon receipt of a written request, in lieu of ruling on a petition for remission or mitigation." Other federal agencies have to seek remission or mitigation pursuant to section 9.9(d) if they have an interest in the property recognizable under 28 C.F.R. Part 9.

[49] 28 C.F.R. § 9.9(a).

In exceptional circumstances, a ruling official may alter the priority between petitioners in classes (3) and (4).[50] No petitions may be granted in excess of the total amount forfeited less the deduction of the costs described above.[51]

Section 9.9 (f) gives the Ruling Official authority to decline to grant remission to any petitioner other than an owner or lienholder so that the forfeited assets may be transferred to a foreign government pursuant to 18 U.S.C. § 981(I)(1), 19 U.S.C. § 1616 a (c)(2) or 21 U.S.C.§ 881(e)(I)(E).

V. Transfer of Forfeited Assets to Victims

A. Background

In February 1997, the Department of Justice adopted regulations to govern petitions filed by victims who have cannot demonstrate a legal interest in the forfeited assets. The leading federal criminal forfeiture statutes give the Attorney General broad discretion to "restore forfeited property to victims" and to "take any other action to protect the rights of innocent persons."[52] In contrast, federal civil forfeiture statutes generally do not permit the Attorney General to remit property to victims from forfeited assets.[53] Section 981(e)(6) of Title 18 is currently the only civil forfeiture statute which permits the Attorney General to "restore forfeited property to any victim," and does so only for forfeitures arising under section 981(a)(1)(C). The offenses under section 981(a)(1)(C) include crimes involving financial institutions such as: counterfeiting of coins, currency, stamps, identification and access devices; smuggling; computer crimes; forging of Treasury checks; false statements in connection with federal agricultural loans; and explosives violations.

B. Notification

The Asset Forfeiture and Money Laundering Section should be consulted about an appropriate and efficient mechanism for notifying large numbers of victims. At a minimum,

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[50] *Id.*

[51] 28 C.F.R. § 9.9(b).

[52] 21 U.S.C. § 853(i)(1). *See* 18 U.S.C. § 982(b)(1) (incorporating the provisions of 21 U.S.C. § 853(i)(1)); 18 U.S.C. § 1467(h)(1); 18 U.S.C. § 1963(g)(1).

[53] *See* 18 U.S.C. § 512, 18 U.S.C. § 1955(d), 21 U.S.C. § 881(d).

there should be notice by publication in a newspaper of general circulation in the area where such victims are likely to reside. During the investigation and prosecution of a federal forfeiture action, United States Attorneys and investigative agencies should attempt to identify all victims of the crimes leading to forfeiture and inform them of their eligibility to petition the Department of Justice for remission.

C. Eligibility

1. Owner Victims

Victims who have a present ownership interest in seized property should file petitions just like other owners, and avoid the limitations imposed by 28 C.F.R. § 9.8.[54]

Petitioners having a traceable ownership interest will have certain advantages that non-owner victims filing under 28 C.F.R. § 9.8 lack. For example, it makes no difference whether they have been compensated by insurance or another third-party source for the loss, because the property *belongs* to them and thus they are entitled to it, not the Government.[55] Owner victims do not have to show that they lack an alternative recourse for the same reason. In addition, where an owner-victim assigns his or her legal interest in the forfeited property to another, that assignment of the ownership interest itself will be recognized.[56] This is significant when they are victims of an offense for which there is no explicit statutory authority for remission to victims such as 18 U.S.C. § 981(a)(1)(A). If they are truly owners, their claims will take full priority over other claims, including other non-owner victims.

2. Non-owner Victims

Victims of an offense underlying the forfeiture of property, or of a related offense, who cannot establish an ownership interest in the property, must proceed under 28 C.F.R. § 9.8. Section 9.8 is available only to victims who have suffered a pecuniary loss[57] of a specific amount as demonstrated by documentary evidence, such as invoices or receipts. The

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[54] *See* definition of "owner" at 28 C.F.R. § 9.2(l). A "present ownership interest" may be established by tracing. *Id.*

[55] This principle is consistent with case law which holds that an assignee may have standing as a claimant in a forfeiture action if he or she can show that the assignor had a legitimate ownership interest in the subject property when it was assigned and that the assignment was legally valid as a conveyance of that interest.

[56] 28 C.F.R. § 9.2(v).

[57] 28 C.F.R. § 9.8(a)(1).

amount of the loss is limited to the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss.[58] No allowance is made for interest foregone or collateral expenses. Section 9.8 is not available for persons who suffer physical injuries or property damage.[59]

In addition, section 9.8 is available only to victims who have not received compensation from other sources, such as the wrongdoer himself or an insurance company.[60] Unlike the owner-victim who actually owns the property in question, this victim lacks a present legal right to the property and should not receive double compensation for the loss. Similarly, in order for the petition to be granted, the victim must show that he does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.[61]

A non-owner victim must also establish that he or she "did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, for which forfeiture was ordered."[62] Finally, the pecuniary loss must result from criminal conduct, not from a tort or "lawful acts that were committed in the course of a criminal offense."[63]

The Department does not want to force government attorneys to base charging or case settlement decisions on victim remission considerations. Nor does the Department necessarily want a government attorney to file all available charges, or secure convictions on all available charges, in order for there to be a basis for giving a particular victim or group of victims access to the forfeited assets. Consequently, section 9.8 is available for victims of a related offense which is defined in the regulations as:

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[58] 28 C.F.R. § 9.8(b).

[59] 28 C.F.R. § 9.8(c). The rationale for this limitation is that insurance is almost universally available for those types of events. Even if a victim lacks health insurance to cover medical costs resulting from a physical injury (the criminal violation being a predicate offense for the RICO count underlying the forfeiture), almost all states have state victim compensation funds for this purpose.

[60] 28 C.F.R. § 9.8(a)(4). The regulations also provide that if a victim later receives compensation from any source for the loss, he must reimburse the Assets Forfeiture Fund. *Id.* § 9.8(f).

[61] 28 C.F.R. § 9.8(a)(5).

[62] 28 C.F.R. § 9.8(a)(3).

[63] 28 C.F.R. § 9.8(a)(2).

(1) any predicate offense charged in the RICO count underlying the forfeiture,[64] or

(2) an offense committed as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.[65]

D. Priority of Remission for Section 9.8 Victims

Persons who can establish that they are owners or lienholders will get priority over victim petitioners in the granting of remission petitions.[66] Section 9.8 victims must also yield to the claims of financial institution regulatory agencies in FIRREA cases, as such agencies represent the interests of a larger class of victims.[67]

On the other hand, section 9.8 victims will generally have priority over equitable sharing with domestic law enforcement agencies.[68] Ruling officials, in consultation with senior Department officials, may give priority to requests for sharing from foreign governments, at least in those situations where there would have been no assets to seize and forfeit but for the cooperation of the foreign government.[69]

E. Discretion to Deny Remission to Section 9.8 Victims

The regulations recognize that in certain cases the complications and costs of identifying victims and determining losses may outweigh the value of distributing a limited amount of property. A ruling official has discretion to deny remission where:

(1) there is substantial difficulty in calculating the pecuniary loss incurred by a victim or victims;

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[64] 28 C.F.R. § 9.2(s). As a practical matter, the predicate offense would have to be one for which the victim suffered a pecuniary loss. However, this clause enables a victim of a scheme unrelated to the scheme from which property was recovered, but which is part of the same "pattern of racketeering activity," to seek remission from the forfeited assets.

[65] 28 C.F.R. § 9.2(s).

[66] 28 C.F.R. § 9.9(a).

[67] *See* discussion of handling FIRREA cases in chapter 10, part VI, of this manual.

[68] 28 C.F.R. § 9.9(a).

[69] 28 C.F.R. § 9.9(f).

(2) the amount of any remission would be small in comparison with the expenses incurred by the Government in determining whether to grant remission; or

(3) the total number of victims is so large in relation to the potential amount of remission that granting it would be impractical.[70]

The ruling official generally will grant remission on a pro rata basis where the amount to be distributed is less than the value of the victims' losses. Government attorneys are encouraged to consult the Asset Forfeiture and Money Laundering Section early in a case where victim remission is contemplated so that these issues can be addressed, and unauthorized or premature commitments are not made to potential petitioners.

F. Victims in Civil Forfeiture

Section 9.8 applies only to victims of offenses for which the restoration or remission of forfeited property is authorized by statute. Absent such authorization, remission or mitigation is available only to those with legal interest in the forfeited property. The only major civil forfeiture statute that authorizes the restoration of forfeited property to victims is 18 U.S.C. § 981(a)(1)(C).

Remission pursuant to Section 9.8 is not available to victims in most civil forfeiture cases, including victims in civil money laundering forfeiture cases. Government attorneys need to be aware of this fact when making forfeiture filing decisions. If there is a basis for civilly forfeiting property pursuant to 18 U.S.C. § 981(a)(1)(C) or as part of a criminal prosecution pursuant to 18 U.S.C. § 982(a)(1), those provisions should be considered.

G. Use of Trustees or Other Outsiders in Remission Process

The regulations permit the use of trustees or other non-government personnel to assist in the processing and determination of remission claims, particularly in cases involving large numbers of victims.[71] The decision to use outside assistance will be made by the ruling official after receiving approval from the Asset Forfeiture and Money Laundering Section. If a government attorney believes that he or she needs such assistance, either at the notification or processing stage in a judicial forfeiture case, he or she should advise the Asset Forfeiture

[70] 28 C.F.R. § 9.8(d).

[71] 28 C.F.R. § 9.9(c).

and Money Laundering Section so the necessary arrangements can be made. The actual decision on remission, however, cannot be delegated to a trustee or other outsider.

Disposition of Forfeited Property

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Chapter 10

Disposition of Forfeited Property

I. In General

The disposition of forfeited property plays an integral part in fulfilling the goals of the Department of Justice Asset Forfeiture Program. Indeed, the integrity of the entire forfeiture program depends upon the faithful stewardship of forfeited property and proceeds.

As a general matter, the disposition of federally forfeited property is governed by the statute pursuant to which the forfeiture was achieved.[1] The most frequently used forfeiture statutes are largely consistent in conferring broad discretion upon the Attorney General to determine the methods and procedures by which such property is to be disposed.[2] These statutes authorize the Attorney General to sell forfeited property and deposit the proceeds into the Department of Justice Assets Forfeiture Fund; to return all or part of the property to owners, lienholders, or victims; to retain the property for federal use; and to transfer the property to international, state, or local law enforcement agencies which participated in the law enforcement efforts leading to forfeiture.[3]

Pursuant to the authority conferred by Congress, the Attorney General has established procedures and conditions for the disposition of property forfeited under laws administered by the Department of Justice. The most global statement of departmental policy may be found in *The Attorney General's Guidelines on Seized and Forfeited Property* [hereinafter

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[1] *See, e.g.*, 21 U.S.C. § 881(e); 18 U.S.C. § 981(e); 18 U.S.C. § 1963(g). *But see, e.g.*, 18 U.S.C. § 492 (providing forfeiture for counterfeit paraphernalia) and 18 U.S.C. § 545 (providing forfeiture for smuggled contraband), which provide essentially no guidance regarding the disposition of forfeited assets.

[2] *Id. See also* 21 U.S.C. § 853; 18 U.S.C. § 982.

[3] Like most forfeiture policy questions confronting Justice personnel, determinations of the proper mode of property disposition should be made in light of the three primary goals of the Asset Forfeiture Program: (1) to deter criminal activity by depriving criminals of property used in or acquired through illegal activities; (2) to enhance cooperation among foreign, federal, state, and local law enforcement agencies; and, as a by-product; and (3) to strengthen law enforcement through the use of forfeiture proceeds. *The Attorney General's Guidelines on Seized and Forfeited Property* [hereinafter *Attorney General's Guidelines*] (July 1990): 1.

Attorney General's Guidelines]. The *Attorney General's Guidelines* set forth procedures for the sale of forfeited property; the retention of forfeited property for official use; the equitable transfer of forfeited property to state, local, and international law enforcement agencies; and the use of monies deposited into the Assets Forfeiture Fund.

The treatment of equitable sharing of forfeited assets with state and local law enforcement agencies by the *Attorney General's Guidelines* was supplemented in March 1994 with the publication of *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies* [hereinafter *A Guide To Equitable Sharing*]. This guide details the ways a state or local agency can participate in the equitable sharing program, the types of forfeitures that are eligible for sharing, how to calculate an equitable share, and permissible uses of shared property. As its title suggests, *A Guide to Equitable Sharing* applies solely to requests for equitable sharing by domestic law enforcement agencies.[4]

II. Sale of Forfeited Property

A. Overview

The Attorney General generally has authority to dispose of forfeited property "by sale or any other commercially feasible means."[5] Upon the successful completion of a forfeiture action and if the property is not subject to official use by the Department of Justice or transfer to another agency, the property shall be promptly sold.[6] All proceeds of sale of forfeited property must be deposited into the Department of Justice Assets Forfeiture Fund.[7]

The Attorney General's authority to sell forfeited property has been delegated to the U.S. marshal.[8] Investigative bureaus and United States Attorneys must promptly notify the U.S.

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[4] International equitable sharing is discussed in detail in chapter 11, part IV, of this manual.

[5] 21 U.S.C. § 853(h). *See* 21 U.S.C. § 881(e)(1)(B); 18 U.S.C. § 1963(f), (g); Memorandum, entitled "Disposition of Forfeited Property," Directive 94-5, issued by the Office of the Deputy Attorney General on June 1, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. III, at p. 5 — 4].

[6] *Attorney General's Guidelines* at 12.

[7] *See* 21 U.S.C. § 881(e)(2); 28 U.S.C. § 524(c)(4); *Attorney General's Guidelines* at 12.

[8] 28 C.F.R. §§ 0.111(i), 0.156. *See* Memorandum, entitled "Disposition of Forfeited Property," Directive 94-5 at 5, issued by the Office of the Deputy Attorney General on June 1, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. III, at p. 5 — 4].

Marshals Service of all relevant facts that may affect the property to be sold.[9] Relevant facts might include: (1) outstanding bills, invoices, and orders of mitigation and remission of forfeiture; (2) orders of transfer to foreign, federal, state or local agencies; (3) orders of designation for official use by federal agencies; and (4) appraisals.[10]

In exercising her authority to sell forfeited property, the Attorney General has been authorized to pay the costs of maintaining and selling property, including any valid liens.[11] The Department of Justice pays outstanding state and local tax obligations incurred in connection with forfeited properties.[12] The Department of Justice will pay interest, but not penalties, on overdue taxes.[13]

B. Pre-forfeiture Sales

Under limited circumstances and where authorized by statute, the Department of Justice may sell seized assets prior to forfeiture.[14] As a general rule, property may be sold prior to

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[9] *Attorney General's Guidelines* at 12.

[10] *Id.*

[11] 28 U.S.C. § 524(c)(1). For a discussion of the payment of asset management expenses, *see* part VII.C.1, *infra*.

[12] Memorandum, entitled "Forfeiture Policies," Directive 90-4, issued by the Office of the Deputy Attorney General on July 3, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 7, Sec. I, at p. 7 — 1]. Much confusion has arisen with respect to whether the Department of Justice will pay taxes levied after ownership of the property shifts to the United States, normally the date of the commission of the offense giving rise to forfeiture. In civil cases, the Department of Justice will pay state and local taxes levied for the period of time between the commission of the offense and the issuance of a final order of forfeiture if the taxing authority establishes its innocent owner status. Memorandum, entitled "Liability of the United States for State and Local Taxes on Seized and Forfeited Property," Directive 93-6, issued by the Office of the Deputy Attorney General on November 4, 1993 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. I.A, at p. 4 — 1]. Given the unique nature of the interest of taxing authorities, the Department of Justice will presume innocence in the absence of exceptional circumstances. *Id.* Prior to April 1994, the Department of Justice did not pay state or local tax liens accruing after the commission of the offense on criminally forfeited real property because state or local tax lien-holders are not *bona fide* purchasers for value within applicable statutory definitions. *Id.* As of April 29, 1994, the Department of Justice has treated payment of state or local taxes on criminally forfeited real property in the same manner as civilly forfeited real property. Memorandum, entitled "State and Local Real Property Taxes in Criminal Forfeiture Cases," Directive 94-4, issued by the Office of the Deputy Attorney General on April 29, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. I.B, at p. 4 — 2].

[13] Memorandum, entitled "Interest and Penalties on Forfeited Realty," Directive 94-9 at 1-2, issued by the Office of the Deputy Attorney General on November 23, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 4, Sec. I.C, at p. 4 — 3].

[14] Where an interlocutory sale occurs, the proceeds of sale are treated as a substitute res in lieu of the property sold. *See A Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale* (November 1990).

forfeiture in two circumstances: a stipulated sale and an interlocutory sale.[15] A stipulated sale may occur where all interested parties agree to the terms of sale and a district court approves the transaction.[16] An interlocutory sale does not require agreement by all interested parties, but is justified by the inordinate expense or difficulty of maintaining certain types of seized property.[17] Department of Justice policy prohibits a pre-forfeiture sale if the property in question may be relied upon as evidence, if any of the federal seizing agencies are requesting the property for official use, or if other agencies are seeking its transfer.[18]

Determining whether a pre-forfeiture sale is permissible requires analysis of the statute pursuant to which the property has been seized and may be forfeited. For example, 21 U.S.C. § 881(d) and 18 U.S.C. § 981(d) incorporate the provisions of the customs laws with respect to the disposition of "*seizures and forfeitures* incurred, or alleged to have been incurred, under any of the provisions of this subchapter" (emphasis added). The Customs laws, in turn, allow seized property to be sold if "it appears to the U.S. Customs Service that [property] seized under the Customs laws is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof."[19] The criminal forfeiture provision for drug enforcement, 21 U.S.C. § 853, incorporates by reference the provisions of 21 U.S.C. § 881(d).[20] By contrast, the Racketeer Influenced and Corrupt Organizations Act (RICO) incorporates the provisions of the Customs laws only with respect to forfeitures and not seizures.[21] A court may nonetheless order a pre-forfeiture sale under RICO based on the broad authority granted by section 1963(d)(1), upon application of the United States, to enter a restraining order, require

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[15] *See A Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale* (November 1990) at 1.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 2.

[19] 19 U.S.C. § 1612(a).

[20] *See* 21 U.S.C. § 853(j).

[21] 18 U.S.C. § 1963(h). The forfeiture provisions of the obscenity statute, 18 U.S.C. § 1467(h)(4), and the child exploitation statute, 18 U.S.C. § 2253(h)(4), also incorporate the Customs laws only with respect to forfeitures and not seizures.

execution of a satisfactory performance bond, "or *take any other action to preserve the availability of property* described in subsection (a). ..."[22]

No court order is required if the property in question is worth less than $500,000, is contraband, is a conveyance involved in transporting any controlled substance, or is a monetary instrument as defined by 31 U.S.C. § 5312(a)(3).[23] The pre-forfeiture sale of other property requires a court order which shall be granted "if the ends of justice require it."[24]

III. Recognition of Property Interests Through Settlement

For a discussion of recognition of interests in property subject to forfeiture through settlement and the Department of Justice's expedited settlement policy, *see* chapter 7 of this manual.

IV. Remission of Forfeited Property by the Department of Justice to Owners, Lienholders, or Victims

The Attorney General has authority to grant petitions for remission or mitigation of forfeited property submitted by owners or lienholders and, under certain statutes, by victims. This subject is discussed in chapter 9 of this manual.

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[22] The obscenity statute and child exploitation statute provide the same authority. *See* 18 U.S.C. § 1467(c)(1) (obscenity) and 18 U.S.C. 2253(c)(1) (child exploitation). (Emphasis added).

[23] 19 U.S.C. § 1612(a) (incorporating 19 U.S.C. § 1607(a)).

[24] 19 U.S.C. § 1612(a). Procedures for the sale of real or personal property resulting from a court order are governed by 28 U.S.C. §§ 2001-2004. These procedures are inapplicable to property sold after the issuance of a final order or declaration of forfeiture. *See* Memorandum, entitled "Disposition of Forfeited Property," Directive 94-5, issued by the Office of the Deputy Attorney General on June 1, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. III, at p. 5 — 4]. Title to such property has formally vested in the United States, and no court order is needed by the Government to sell what is undisputedly its own property. *Id.*

V. Federal Retention and Use of Forfeited Property

The leading forfeiture statutes explicitly permit the Federal Government to retain and use forfeited property.[25] The *Attorney General's Guidelines* establishes procedures and criteria governing the Department of Justice's official use policy.[26]

A. Property Subject to Federal Official Use

With the exception of currency or proceeds from the sale of forfeited property, forfeited property may be retained for official use by the Department of Justice or transferred to any other federal agency for official use.[27] Neither cash nor proceeds from the sale of forfeited property may be transferred to or retained by any federal agency.[28] Cash and proceeds must be deposited into the Assets Forfeiture Fund.[29] Real property may be retained and used by Justice components only if consistent with a law enforcement purpose.[30] Transfers of real property to other federal agencies will be considered if such transfers will serve a significant and continuing federal purpose.[31]

Where the forfeiture of seized property is pending, that property may not be utilized for any reason by Justice personnel, including for official use, until such time as the final decree or court order of forfeiture is issued.[32] Likewise, Justice personnel may not make such property available for use by others, including person(s) acting in the capacity of a substitute custodian, for any purpose prior to completion of the forfeiture.[33] However, exceptions may be granted by the U.S. Marshals Service in situations such as the seizure of a ranch or

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[25] *See, e.g.*, 21 U.S.C. § 881(e)(1) ("whenever property is civilly or criminally forfeited under this subchapter, the Attorney General may—(A) retain the property for official use or...transfer the property to any federal agency").

[26] *Attorney General's Guidelines* at 3-7.

[27] *Id.* at 4.

[28] *Id.*

[29] *Id.* at 12, 27; 28 U.S.C. § 524(c)(4).

[30] *Attorney General's Guidelines* at 3.

[31] *Id.*

[32] Memorandum, entitled "Use of Property Under Seizure," Directive 91-5, issued by the Office of the Deputy Attorney General on April 9, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. III, at p. 5 — 2].

[33] *Id.*

business where continued operation of the enterprise is necessary to maintain the value of the property.[34]

B. Federal Agencies Eligible to Use Forfeited Property and Priorities

Seizing agencies may place forfeited property into official use.[35] Seizing agencies have priority in the event of competing requests by other agencies.[36] If the seizing agency does not place property into official use, other federal investigative bureaus taking part in the seizure of the property—whether or not a part of the Department of Justice—have priority over non-investigative components of the Department of Justice or other agencies.[37] Federal agencies outside of the Department of Justice that have not participated in the seizure may request and obtain forfeited property for official use only in exceptional circumstances.[38]

C. Decisionmaking Authority

1. Real Property

The Attorney General has not delegated her authority to place real property into official use by federal agencies.[39]

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[34] Memorandum, entitled "Use of Property Under Seizure," Directive 91-5 at 1, issued by the Office of the Deputy Attorney General on April 9, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. III, at p. 5 — 2]. Department of Justice employees are generally prohibited from purchasing property that has been forfeited to the Government and is being sold by the Department or its agents. Memorandum, entitled "Forfeiture Policies," Directive 90-4, part B, issued by the Office of the Deputy Attorney General on July 3, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 7, Sec. III, at p. 7 — 1]. This policy is intended to ensure that there is no actual or apparent use of inside information by employees wishing to purchase such property and to protect the integrity of the Asset Forfeiture Program.

[35] *Attorney General's Guidelines* at 4.

[36] *Id.*

[37] *Id.* at 4-7.

[38] *Id.* at 5. Thus, there is no requirement that federal agencies participate in the efforts leading to forfeiture in order to receive property for official use. *Id.* at 4-5. An agency outside the Department of Justice receiving forfeited property must pay expenses incurred by the Department in connection with the forfeiture and transfer of the property.

[39] *Attorney General's Guidelines* at 3.

2. Personal Property

The head of the seizing investigative bureau may determine whether to place forfeited personal property into official use.[40] The seizing agency must provide written notice to the Chief of the Asset Forfeiture and Money Laundering Section if personal property valued at $50,000 or greater is placed into official use.[41] Where personal property is not used for equitable sharing or by the seizing agency, other departmental components and non-Justice federal agencies may obtain the property for official use through a written request to the Director of the U.S. Marshals Service.[42] The Chief of the Asset Forfeiture and Money Laundering Section must approve requests for the use of personal property valued in excess of $25,000 by federal agencies that did not participate in the investigation and must decide those cases where more than one departmental component has requested to place property into official use.[43]

D. Competing Requests for Official Use and Equitable Sharing

When the head of an investigative bureau seeks to place forfeited property into official use and a state or local law enforcement agency has filed a request for an equitable share, the seizing agency must consider the equities of the various requests before making a determination, but a decision to override equitable sharing and retain the property is permitted.[44] Requests for equitable sharing normally will have priority over requests to place the property into official use by federal agencies other than seizing investigative bureaus.

In determining whether to retain property or apply it to equitable sharing, the head of a seizing agency must consider: (1) the relative needs of the respective agencies; (2) the unique nature of the property and the likelihood of securing similar property; (3) the relative degrees of participation of the requesting agencies in the underlying forfeiture, as well as all

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[40] *Id.* at 4. Each investigative agency and Justice component must promulgate internal guidelines consistent with the *Attorney General's Guidelines* governing the placement of property into official use. *Id.* at 5.

[41] *Attorney General's Guidelines* at 5.

[42] *Id.* at 4-5. Each investigative agency and the Justice component must promulgate internal guidelines consistent with the *Attorney General's Guidelines* governing the placement of property into official use. *Id.* at 5. The U.S. Marshals Service must consult with the investigative agency responsible for the investigation which led to the forfeiture. *Id.* at 5. Careful consideration should be given to the value of the property, its potential benefit to the United States for law enforcement purposes, and the impact of the transfer on the Assets Forfeiture Fund. *Id.*

[43] *Attorney General's Guidelines* at 5.

[44] *Id.* at 6.

other factors relevant to equitable sharing; (4) the likelihood that equitable sharing will occur with respect to other property; (5) the impact that a decision to place the property into official use might have on federal, state and local relations in the district; and (6) the number and value of past equitable transfers to the federal, state or local agency.[45]

E. Payment of Liens on Personal Property Placed into Federal Official Use

Liens on personal property placed into official use by departmental investigative bureaus or the U.S. Marshals Service may be paid by the Assets Forfeiture Fund if: (1) the property is intended for official use for at least two years; (2) the amount is less than one-third of the appraised value of the property; and (3) the liens are less than $25,000.[46] These limitations may be waived by the Chief of the Asset Forfeiture and Money Laundering Section.[47] Mortgages and other liens on real property placed into federal official use or transferred to a state or local agency are not payable from the Fund unless expressly approved by the Chief of the Asset Forfeiture and Money Laundering Section.[48]

VI. Equitable Sharing with Participating State and Local Law Enforcement Agencies

A. General Overview

The Attorney General has broad authority to share forfeited property and cash with state and local agencies participating directly in law enforcement efforts leading to a federal forfeiture.[49] Although forfeiture statutes providing for equitable sharing vary in their

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[45] *Id.* at 6-7.

[46] *Id.* at 7.

[47] *Id.*

[48] *Attorney General's Guidelines* at 18.

[49] *See* 21 U.S.C. § 881(e); 18 U.S.C. § 981(e); 18 U.S.C. § 1963(g).

respective applications,[50] the Attorney General largely is unfettered in determining what conditions, if any, are necessary to achieve the aims of the legislation from which her authority is derived.[51]

As noted above, the methods by which the Department of Justice reviews and approves equitable sharing requests by state and local law enforcement agencies, as well as the limitations imposed upon the use of equitable sharing proceeds, are set forth in *A Guide to Equitable Sharing*. This guide states that the underlying purposes of the equitable sharing program are to: (1) "deter crime by depriving criminals of the profits and proceeds of their illegal activities and to weaken criminal enterprises by removing the instrumentalities of crime"; and (2) "enhance cooperation among federal state and local law enforcement agencies through the equitable sharing of federal forfeiture proceeds."[52]

B. Eligibility Requirements

Any state or local law enforcement agency that directly participates in an investigation or prosecution resulting in a federal forfeiture may request an equitable share of the proceeds of the forfeiture.[53] State and local law enforcement agencies may participate in a seizure or forfeiture in one of two ways.[54] First, the state or local agency may work with a Justice investigative agency in a joint investigation or, if more formally assembled, a joint task force. And second, a state or local agency may seize property without federal assistance and subsequently provide the property to a departmental investigative bureau in order to forfeit the property federally.[55]

This second method, known as an "adoptive forfeiture," is appropriate in circumstances where the conduct giving rise to the seizure is in violation of federal law and federal law

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[50] Equitable sharing is authorized for a great variety of property, including property obtained under the following statutes: the transportation of gambling devices (15 U.S.C. § 1177); illegal gambling businesses (18 U.S.C. § 1955); the interception of wire and oral communications (18 U.S.C. § 2513); copyright infringement (17 U.S.C. § 509); child exploitation (18 U.S.C. §§ 2253 and 2254); motor vehicle theft (18 U.S.C. § 512); improper marking of prison-made goods (18 U.S.C. § 1762); the exportation of war materials (22 U.S.C. § 401); the transportation and harboring of undocumented aliens (8 U.S.C. § 1324); and all violations covered by the general criminal law forfeiture statutes (18 U.S.C. §§ 981, 982).

[51] *Id.*

[52] *A Guide to Equitable Sharing* at 1.

[53] *Id.* at 2.

[54] *Id.* at 3.

[55] *Id.*

provides for forfeiture.[56] The Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the U.S. Postal Inspection Service adopt seizures for federal forfeitures under the Department of Justice Asset Forfeiture Program.[57]

The Department of Justice permits sharing forfeited assets with state and local prosecutors' offices. *A Guide to Equitable Sharing* lists four examples of ways prosecutors may qualify for equitable sharing:

(1) Providing assistance in the preparation of search and seizure warrants and other documents relating to a forfeiture investigation. (Sharing will normally be based on hours expended.)

(2) Providing a key informant or substantially assisting throughout an investigation leading to a federal forfeiture. (Sharing will normally be based on hours expended.)

(3) Cross-designating an attorney to handle a federal forfeiture or related proceedings in federal court. Typically, this cross-designation would occur in an adoptive case. (The Department of Justice will authorize transferring up to 5 percent of the Federal Government's share of the net forfeiture proceeds with cooperating local prosecutors who cross-designate attorneys in adoptive cases.)

(4) Prosecuting criminal cases under state law directly related to a federal forfeiture. (The sharing percentage will be determined on a case-by-case basis.)

C. Minimum Monetary Thresholds for Adoptive Forfeitures

Seizures are not generally adopted for federal forfeiture unless the equity in the seized property exceeds the following thresholds:

[56] A request for federal adoption must be submitted within 30 days of the date the property was seized. *A Guide to Equitable Sharing* at 3.

[57] *A Guide to Equitable Sharing* at 2, 3.

Conveyances	
Vehicles	$ 2,500
Vessels	$ 5,000
Aircraft	$ 5,000
Real Estate	
Land and any improvements	$10,000 or 20 percent of the appraised value, whichever is greater[58]
All Other Property	
Currency, Bank Accounts, Monetary Instruments, Jewelry, etc.[59]	$1,000

Just as law enforcement priorities and resources vary from district to district, United States Attorneys may determine that their districts require different monetary thresholds for adoptive forfeitures. Therefore, United States Attorneys are authorized to institute higher or lower district-wide thresholds for judicial forfeiture cases. In deviating from the above thresholds, United States Attorneys should assess any potential benefits to law enforcement efforts in their districts as well as possible increases in administrative and managerial burdens. When setting these thresholds, United States Attorneys are encouraged to consult with state and local law enforcement agencies, federal investigative agencies and representatives of the U.S. Marshals Service within their districts.

In some circumstances, overriding law enforcement concerns will require the seizure of an asset that does not meet the above thresholds or the district-wide thresholds instituted by the United States Attorney. In individual cases, thresholds may be waived where forfeiture will serve a compelling law enforcement interest, *e.g.*, forfeiture of a crack house, of a conveyance with hidden compartments, or of a vehicle seized at an international border for alien smuggling. Any downward departure from the monetary thresholds must be approved in writing by a supervisory level official and an explanation of the reason for the departure

[58] The Department of Justice does not adopt contaminated real properties. *See* Memorandum entitled, "Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances," Directive 90-3, issued by the Office of the Deputy Attorney General on June 29, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. IV, at p. 1 — 28].

[59] Firearms are forfeited without regard to value.

noted in the case file. The fact that the owner or person in possession of the property has been arrested or will be criminally prosecuted is an appropriate basis for a downward departure.

D. How State and Local Agencies May Apply for an Equitable Share

State and local agencies may apply for an equitable share by submitting to the lead Justice investigative agency a Form DAG-71, Application for Transfer of Federally Forfeited Property.[60] No sharing request may be considered unless it is submitted within 60 calendar days of the seizure or adoption of the property.[61] The 60-day rule may be waived by the federal seizing agency in exceptional circumstances upon written justification provided by the state or local agency.[62] A separate DAG-71 must be submitted with respect to each asset requested.[63]

E. Calculating Sharing Percentages

Equitable sharing is based on the net proceeds from the sale of forfeited property.[64] Net proceeds are derived by deducting applicable expenses from gross receipts.[65]

In a joint operation, the equitable share provided to a state or local law enforcement agency depends upon the extent to which that agency participated in the effort leading to forfeiture of the property.[66] Normally, an agency's degree of participation is determined by comparing the number of hours expended by the agents or prosecutors involved. In addition to a comparison of hours, the Department of Justice may also take into consideration certain qualitative factors including, but not limited to, whether the requesting agency: (1) initiated the investigation; (2) provided unique and indispensable assistance; or (3) elected to

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[60] *A Guide to Equitable Sharing* at 5.

[61] *Id.* at 6.

[62] *Id.*

[63] *Id.* at 5.

[64] *A Guide to Equitable Sharing* at 6.

[65] *Id.* Expenses might include: payment of valid liens and mortgages, federal case-related expenses, awards to informants, and property management costs.

[66] *A Guide to Equitable Sharing* at 7.

cooperate with federal authorities even though the property in question could have been forfeited under state law.[67]

In adoptive cases, where state or local officials typically perform all pre-seizure activities, the federal share is a flat rate of 20 percent.

The minimum federal share in any case is 20 percent.

F. The Decisionmakers

In administrative forfeiture cases where the value of the forfeited property is less than $1,000,000, the head of the lead seizing agency determines the amount of any equitable shares.

In judicial forfeiture cases, either civil or criminal, where the value of the forfeited property is less than $1,000,000, the United States Attorney determines the amount of any equitable shares.

In administrative and judicial forfeiture cases, in where the value of the property is $1,000,000 or more, in multi-district cases, and in cases involving the transfer of real property, the Office of the Deputy Attorney General determines the amount of equitable shares. The Office of the Deputy Attorney General receives guidance from the Asset Forfeiture and Money Laundering Section, from the seizing agency, and the United States Attorney's Office, which provide their recommendations on the Form DAG-72.

In order to resolve administrative cases above $1,000,000 more quickly, the Assistant Attorney General for the Criminal Division may decide the equitable share amount if all interested agencies or offices are in agreement.

No requested or recommended share, including shares negotiated in task force or other agreements, is guaranteed until approved by the decisionmaker.

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[67] The federal decisionmaker's most critical action is to apportion equitable shares to federal, state, and local law enforcement agencies based on the relative time each devoted to the investigation. Consequently, it is important that the Form DAG-71, Application for Transfer of Federally Forfeited Property, or Form DAG-72, Decision Form for Transfer of Federally Forfeited Property, reflect the number of hours devoted to a particular investigation by all participating agencies, including any federal agents that worked on the matter. The decisionmaker, then, must decide whether this apportionment should be adjusted because the nature of a particular agency's contribution to the forfeiture was such that a strict time apportionment does not adequately reflect the true relative value of the contribution.

G. Use of Shared Property

Equitably shared property must be used for the purposes specified in the Form DAG-71 submitted by the recipient agency.[68] If shared cash or property is not used for the purposes stated in the DAG-71, the recipient must obtain written approval for the change in use from the original decision-maker or the Asset Forfeiture and Money Laundering Section.[69]

Although not intended to be exhaustive, *A Guide to Equitable Sharing* identifies categories of pre-approved uses of shared property. These uses include activities calculated to increase or improve future investigations, law enforcement training, detention facilities, investigation facilities and equipment, drug education and awareness programs, and the cost of tracking and accounting for shared property.[70] Equitable sharing proceeds must be used to increase the resources of the recipient agency.[71] Sharing may not supplant state or local funding for the law enforcement agency that participated in the forfeiture.[72]

Impermissible applications of equitable sharing proceeds include payment of salaries for existing positions,[73] expenditures by non-law enforcement personnel for non-law enforcement business, payment of non-law enforcement expenses, uses not specified in the Form DAG-71, uses contrary to law, nonofficial government use and extravagant expenditures.[74]

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[68] *A Guide to Equitable Sharing* at 12, Appendix A.

[69] *A Guide to Equitable Sharing* at 12.

[70] *Id.* at 10, 11.

[71] *Id.* at 14.

[72] *Id.*

[73] However, the Department permits the payment of first-year salaries for new, temporary, or not to exceed one-year positions. Equitable sharing funds may also be used to pay the salaries of officers who are hired to replace other officers assigned to multi-jurisdictional task forces and whose primary duties do not include the seizure of assets or narcotics law enforcement.

[74] *A Guide to Equitable Sharing* at 12-13.

As a general matter, forfeited personal property transferred to a state or local agency for official use must be used for law enforcement purposes only.[75] Forfeited luxury automobiles, bearing a wholesale value in excess of $40,000, may be placed into official use only for undercover law enforcement purposes. At the discretion of the Deputy Attorney General, forfeited real property may be transferred to a state or local law enforcement agency participating in the efforts leading to a forfeiture if a compelling law enforcement purpose can be demonstrated.[76]

In cases where real or personal property is transferred to a state or local law enforcement agency, the value of the transferred property shall be charged against that agency's equitable share of assets in the case.[77] If there are insufficient other assets against which to charge the agency's share, the recipient must pay the Assets Forfeiture Fund a sufficient amount to cover the federal equitable share and any costs incurred.[78] To the extent the requesting agency is unable to pay the federal share and costs, the property shall be sold and the proceeds equitably distributed.[79]

Generally, recipient agencies may not transfer equitable sharing proceeds to other governmental agencies. However, recipients may transfer a portion of their equitable sharing proceeds to another law enforcement agency to be used exclusively for law enforcement purposes.[80] In addition, recipients may retransfer shared property to other government agencies or to non-profit organizations in order to support community-based programs as follows:

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[75] Vehicles and other tangible property transferred for official law enforcement use must be used for at least two years. *A Guide to Equitable Sharing* at 16. However, if such property becomes unsuitable for the stated purpose before the end of the two-year period, it may be sold. *Id.*

[76] Under the Controlled Substances Act, 21 U.S.C. § 881(e)(4)(A)-(B), forfeited real property can be transferred to a State for recreational or historic purposes or for the preservation of natural conditions. *A Guide to Equitable Sharing* at 15.

[77] *A Guide to Equitable Sharing* at 16.

[78] *Id.*

[79] Exceptions to this requirement may be granted in three situations: (1) the property will be transferred by the recipient state or local law enforcement agency to another governmental agency to support community-based programs; (2) the property will be transferred by the recipient state or local law enforcement agency to a private nonprofit organization to support community-based programs; and (3) the requesting state or local law enforcement agency lacks funds or authority to make such payments, and the forfeited property will fill a demonstrable need of the requesting agency. *A Guide to Equitable Sharing* at 16. In no event, however, may property be transferred to state or local law enforcement agencies unless the recipient agency reimburses the Assets Forfeiture Fund for the amount of any liens paid by the Department of Justice. *Id.*

[80] Such expenditures are subject to the no supplantation rule described above.

(1) recipients may use not more than 15 percent of their shared monies for the costs associated with non-profit community-based programs or activities which are formally approved by the chief law enforcement officer as being supportive of and consistent with a law enforcement effort, policy and/or initiative[81];

(2) in "windfall" situations, where federal sharing money represents over 25 percent of a state or local agency's annual budget, recipient law enforcement agencies may transfer any amount over the 25 percent level; and

(3) recipients may transfer forfeited personal and real property to other governmental agencies and nonprofit groups to support community-based services.[82]

H. Sharing in Task Force and Other Multi-agency Cases

Many task forces involving federal, state, or local law enforcement agencies have pre-agreed equitable sharing distribution arrangements based upon personnel and other contributions to the task force operation. Such distribution arrangements will be honored in two instances. First, these arrangements are honored by the Department of Justice when the task force is a legal entity entitled to receive and spend money.[83] Second, even when the task force is not a legal entity entitled to receive and spend money, previously agreed percentages will be honored when: (1) the sharing agreement is in writing; (2) the decisionmaker is satisfied that the percentages agreed upon continue to reflect the true overall agency contributions to the task force; (3) the task force has a well-defined and specific subject area

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[81] *See* Memorandum, entitled "Guidelines for Administering the Permissible Use Policy," Directive 98-1, issued by the Asset Forfeiture and Money Laundering Section, Criminal Division, on March 9, 1998. To obtain a copy of this directive, contact the Asset Forfeiture and Money Laundering Section.

[82] *A Guide to Equitable Sharing* at 13-15. The transfer of real property to community-based organizations is through the Department of Justice's Weed and Seed Initiative and is governed by the Memorandum, entitled "Weed and Seed Initiative; Transfers of Real Property," Directive 92-5, issued by the Office of the Deputy Attorney General on May 26, 1992 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. V, at p. 6 — 12]. Title to any real property transferred under the Weed and Seed Initiative must contain a reverter clause to return title to the United States should the property cease to be used for the stipulated purpose. *Id.*; A *Guide to Equitable Sharing* at 15. Such transfers must be approved by the Deputy Attorney General. Recipient state or local agencies or community-based non-profit organizations are responsible for payment of any outstanding taxes or liens. *A Guide to Equitable Sharing* at 16; Memorandum, entitled "Weed and Seed Initiative; Transfers of Real Property," Directive 92-5, issued by the Office of the Deputy Attorney General on May 26, 1992 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. V, at p. 6 — 12].

[83] *A Guide to Equitable Sharing* at 17. Single checks will be issued to the task force and/or its constituent members pursuant to their internally set sharing percentages, if the percentages fairly reflect overall agency contributions to the task force. The National Crime Information Center number of the task force must be indicated on the DAG-71.

or organization target as its focus; and (4) the specific seizures subject to sharing are part of the much broader, overall investigation.[84]

I. Processing Applications for Equitable Sharing

Upon receiving an application for equitable sharing (the Form DAG-71 submitted by a state or local agency), the relevant field office of the lead Justice investigative agency must complete part I of the Form DAG-72. The field office must ensure that the recommended share bears a reasonable relationship to the degree of direct participation of the requesting agency.

Once the DAG-72 has been completed, it should be attached to the DAG-71 and forwarded to the appropriate investigative agency headquarters in Washington, D.C. As noted above, if the property in question has been administratively forfeited and has an appraised value of less than $1,000,000, the head of the seizing investigative agency shall decide how the property will be equitably distributed. After doing so, the head of the agency is to send the completed DAG-72 and an accompanying declaration of forfeiture to the appropriate office of the U.S. Marshals Service.

If the property is subject to administrative forfeiture and has an appraised value in excess of $1,000,000, the property is subject to judicial forfeiture, or the equitable sharing request involves the transfer of real property, the head of the seizing investigative agency must review the DAG-71 request and make a recommendation on the DAG-72 form. The Forms DAG-71 and DAG-72 are then forwarded to the relevant United States Attorney's Office.

If the property is subject to judicial forfeiture and has an appraised value of less than $1,000,000, the United States Attorney is responsible for deciding equitable shares. The DAG-72 must be completed and returned, along with the DAG-71, to the Asset Forfeiture and Money Laundering Section.

If the property forfeited has an appraised value of $1,000,000 or greater, if it is a multi-district case, or if it involves the transfer of real property, the United States Attorney must review the DAG-71 and DAG-72 and make a recommendation in addition to that of the lead investigative agency. The entire sharing package is then sent to the Asset Forfeiture and Money Laundering Section, which also makes a recommendation. Where the seizing agency, United States Attorney, and the Asset Forfeiture and Money Laundering Section agree on the shares to be distributed, the recommendation is then forwarded to the Assistant Attorney

[84] *A Guide to Equitable Sharing* at 17-18.

General of the Criminal Division for a final decision. If there is not complete agreement among all the parties making a recommendation, the Asset Forfeiture and Money Laundering Section's recommendation is forwarded through the Deputy Attorney General of the Criminal Division for a final decision. The Deputy Attorney General's decision is returned to the Asset Forfeiture and Money Laundering Section.

After a final sharing decision is made, the sharing documents are sent to the U.S. Marshals Service so checks can be issued or steps may be taken to transfer real or personal property. In administrative forfeiture cases, the check is sent to the investigative agency for distribution. In judicial cases, it is sent to the Law Enforcement Coordinating Committee Coordinator in the pertinent United States Attorney's Office.[85]

J. Monitoring Uses of Shared Assets

1. Accounting for Shared Cash, Proceeds, and Tangible Property

To ensure integrity in the use of sharing proceeds, all participating state and local law enforcement agencies must implement standard accounting procedures and develop internal control mechanisms (*e.g.*, tracking share requests and receipts, depositing shares into a separate revenue account, restrictively endorsing checks upon receipt) to track equitably shared monies and tangible property. Under no circumstances may sharing checks be made payable to individuals. In addition, state and local law enforcement agencies may be subject to certain audit requirements.[86]

2. Reporting Requirements

Any state and local law enforcement agency that received property, cash, or proceeds as a result of a federal forfeiture shall submit the following reporting requirements set forth in *A Guide to Equitable Sharing*: (1) the Federal Equitable Sharing Agreement—due triennially; (2) the Federal Annual Certification Report—due 60 days after the close of the agency's fiscal year; (3) if appropriate, an Annual Audit Report conducted, as provided by the Single Audit Act Amendments of 1996 and Office of Management and Budget (OMB) Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." Noncompliance of the reporting requirements may result in the denial of a sharing request.

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[85] *See* Memorandum, entitled "Equitable Sharing Protocol," Directive 90-8, issued by the Office of the Deputy General on September 25, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. III, at p. 6 — 7].

[86] *See A Guide to Equitable Sharing* at 18.

The Federal Equitable Sharing Agreement and the Federal Annual Certification Report must be submitted to *both* the Asset Forfeiture and Money Laundering Section, Criminal Division, and the Executive Office for Asset Forfeiture, Department of the Treasury, *with* a copy provided to the United States Attorney in the district in which the requesting law enforcement agency is located. This requirement also applies to any agency that had any unspent sharing proceeds in a forfeiture fund account at any time during a fiscal year.

3. Sanctions for Noncompliance

Noncompliance with the policies contained in *A Guide to Equitable Sharing* may subject the recipient agency to one or more of the following sanctions: (1) debarment, temporarily or permanently, from further participation in the sharing program; (2) offsets against future sharing in an amount equal to any impermissible uses; (3) civil court action to recover misspent equitable sharing proceeds; or (4) where warranted, federal criminal prosecution for false statements under 18 U.S.C. § 1001, fraud involving theft of federal program funds under 18 U.S.C. § 666, or other violations of the criminal code.

VII. Department of Justice Assets Forfeiture Fund

A. Composition and Management

As part of the Comprehensive Crime Control Act of 1984, Congress established the Department of Justice Assets Forfeiture Fund, into which forfeited cash and proceeds from the sale of forfeited property are to be deposited.[87] Congress has authorized the Department of Justice to pay from the Assets Forfeiture Fund expenses related to the management and disposition of forfeited property, equitable sharing distributions, awards for information, and other law enforcement costs.[88] Management and oversight of the Assets Forfeiture Fund has been assigned to the Asset Forfeiture Management Staff of the Justice Management Division. Administration of the Assets Forfeiture Fund has been delegated by the Attorney General to the U.S. Marshals Service under the supervision of the Deputy Attorney General.[89]

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[87] 28 U.S.C. §§ 524(c)(1), (4); 21 U.S.C. § 881(e)(2)(B).

[88] 28 U.S.C. § 524(c)(1).

[89] *Attorney General's Guidelines* at 13. *See* the U.S. Marshals Service's *Seized Asset Management Handbook* (Oct. 1990) for detailed procedures concerning the disposition of property.

B. Deposits into the Assets Forfeiture Fund

All cash and the proceeds of sale of all real and personal property forfeited under any law administered by a Justice agency are to be deposited into the Assets Forfeiture Fund.[90]

Seized cash, except if used as evidence, is to be deposited promptly into a separate account known as the Seized Asset Deposit Fund, and such cash shall be held there pending forfeiture.[91] If only a portion of seized cash has evidentiary value, only that portion should be retained.[92] The Chief of the Asset Forfeiture and Money Laundering Section may grant exceptions to this policy in extraordinary situations.[93] Transfer of cash to the U.S. Marshals Service should occur within 60 days of seizure or ten days of indictment.[94]

In the case of either a consent judgment or a default judgment, the U.S. Marshals Service immediately transfers any forfeited cash to the Assets Forfeiture Fund, unless the United States Attorney determines that execution of the judgment should be delayed.[95] In the case of a judgment after trial or upon summary judgment, there is an automatic stay of execution of the judgment of ten working days.[96] If the United States Attorney's Office indicates that no motions or requests for additional stays have been filed, then any forfeited cash will be transferred to the Assets Forfeiture Fund on the eleventh working day following a summary judgment or a judgment after trial.[97]

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[90] 28 U.S.C. § 524(c)(4).

[91] *Attorney General's Guidelines* at 27; Memorandum, entitled "Seized Cash Management Policy," Directive 91-9, issued by the Office of the Deputy General on June 6, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 1, Sec. VI, at p. 1 — 38]. If the amount of seized cash to be retained for evidentiary purposes is less than $5,000, permission to retain the cash must be granted at a supervisory level within the relevant United States Attorney's Office. If the amount is $5,000 or more, a request for approval must be submitted to the Chief of the Asset Forfeiture and Money Laundering Section.

[92] *Attorney General's Guidelines* at 2.

[93] *Id.* at 1.

[94] *Id.*

[95] Memorandum, entitled "Forfeiture Policies," Directive 90-4, part D, issued by the Office of the Deputy Attorney General on July 3, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 7, Sec. I, at p. 7 — 1].

[96] *Id.*

[97] *Id.*

Proceeds of the sale of forfeited property must be deposited promptly into the Assets Forfeiture Fund.[98]

C. Permissible Uses of the Assets Forfeiture Fund

Payments and reimbursements from the Assets Forfeiture Fund are governed by 28 U.S.C. § 524(c)(1). Generally, payments from the Fund are permitted in six categories.[99] Annual allocations in these categories are given to agencies participating in the Department of Justice Asset Forfeiture Program. These agencies include: United States Attorneys' Offices, the Federal Bureau of Investigation, the Drug Enforcement Administration, the U.S. Immigration and Naturalization Service, the U.S. Park Police, the U.S. Marshals Service, the Criminal Division, and the U.S. Postal Inspection Service. The categories, listed in order of their priority, are shown below:

1. Asset Management Expense

These expenses are costs incurred in connection with the seizure, inventory, appraisal, storage, maintenance, security, and disposition of forfeited property.[100] Asset management expenses include payments for the employment of outside contractors to care for, operate or manage properties.[101] If the asset is an on-going business, the normal expenses of operating the business would be considered an asset management expense, but only to the extent that the expenses are not covered by the income of the seized business.[102]

2. Case-related Expenses

Case-related expenses are costs incurred in connection with normal proceedings undertaken to perfect the United States' interest in seized property.[103] These expenses include the costs of advertising notice of pending forfeiture, court and deposition reporting

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[98] *A Guide to Equitable Sharing* at 12.

[99] *Attorney General's Guidelines* at 13-18. As noted above, other agencies are eligible to receive forfeited property for official use and to participate in equitable sharing. Treasury law enforcement agencies are entitled to have their expenses reimbursed from the Assets Forfeiture Fund when supporting Justice forfeiture investigations and litigation. 28 U.S.C. § 524(c)(11).

[100] *Attorney General's Guidelines* at 13.

[101] *Id.*

[102] *Id.*

[103] *Id.*

costs, expert witness fees, employment of attorneys proficient in state real estate law, and travel and subsistence. The Assets Forfeiture Fund may also, with the approval of the Chief of the Asset Forfeiture and Money Laundering Section, pay awards ordered under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in cases involving a forfeiture proceeding or seizure for forfeiture, unless the agency or prosecutorial component involved acted in bad faith or disregarded applicable law or Department of Justice policy.[104]

3. Payment of Qualified Third-party Interests

These are expenses incurred in the payment of valid liens, secured mortgages, and debts owed to qualified creditors pursuant to a court order or a favorable ruling on a petition for remission or mitigation of the forfeiture.[105] This includes restoration of proceeds of sale pursuant to a court order or administrative action.

4. Equitable Sharing Payments

See part VI of this chapter, *supra*.

5. Program Management Expenses

Program management expenses are costs incurred in conducting forfeiture program responsibilities that are not connected to any specific asset or forfeiture.[106] Authorized program-related expenses include the purchase or lease of automated data processing

[104] Copies of EAJA orders should be sent to the Asset Forfeiture and Money Laundering Section within five days of the orders being signed, and advance notice should be given to the Section of any proposed settlement involving an EAJA award. For a more detailed discussion of EAJA payments from the Assets Forfeiture Fund, *see* Memorandum, entitled "Payment of Costs and Attorney's Fees From the Assets Forfeiture Fund—Limited Authority," Directive 93-7, issued by the Office of the Deputy General on December 10, 1993 [*Asset Forfeiture Policy Manual* (1996), Chap. 9, Sec. I, at p. 9 — 2].

[105] *Attorney General's Guidelines* at 14.

[106] *Id.* at 15.

equipment;[107] contracting for services directly related to the processing, data entry, and accounting for forfeiture cases[108]; printing and graphic services reasonably necessary to effectuate forfeiture program goals; training of Justice components in all aspects of asset seizure and forfeiture; and payments for services of experts and consultants to assist in carrying out asset seizure and forfeiture duties.[109]

6. Investigative Expenses

Investigative expenses are normally incurred in the identification, location, and seizure of property subject to forfeiture.[110] These expenses include such items as awards for information concerning violations of criminal drug laws; awards for information leading to forfeitures; purchase of drug violation evidence; contract services to identify potentially forfeitable property; the equipping of conveyances for drug law enforcement functions; and the storage, protection, and destruction of controlled substances.[111]

D. Distribution of Surplus Funds

The Asset Forfeiture Program has often generated more in revenues than was needed to fund the above categories of expenses during a particular fiscal year. The disposition of this end-of-year surplus is directed by statute. Since the inception of the Assets Forfeiture Fund, the statutory treatment of the surplus has been changed several times.

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[107] Automated data processing equipment purchased with Assets Forfeiture Fund monies must be used a majority of the time for asset forfeiture work and shall retain any statutory conditions or limitations on its use until: (1) the equipment fails or suffers serious performance degradation and it is economically impractical to invest in equipment repair; *or* (2) the equipment is rendered functionally obsolete for forfeiture program purposes of the using office, *and* no other agency participating in the Department of Justice Assets Forfeiture Fund within a reasonable geographical radius can use the equipment for forfeiture program purposes, *and* (3) the Asset Forfeiture and Money Laundering Section is provided 30 days written notice of the intent to put the equipment to a use not involving asset forfeiture. *See* Memorandum, entitled "Disposition of ADP Equipment Purchased with Assets Forfeiture Fund Allocations," Directive 91-1, issued by the Office of the Deputy General on February 11, 1991 [*Asset Forfeiture Policy Manual* (1996), Chap. 7, Sec. III, at p. 7 — 8].

[108] *See* Memorandum, entitled "Policy Regarding Work with Dyncorp Contract Employees," Directive 94-1, issued by the Office of the Deputy General on January 10, 1994 [*Asset Forfeiture Policy Manual* (1996), Chap. 9, Sec. VII, at p. 9 — 64], for a detailed discussion on proper and improper use of contract employees.

[109] *Id.*

[110] *Attorney General's Guidelines* at 17-18.

[111] *Id.* For detailed treatment of payment of awards, equipping conveyances and purchasing evidence, *see id.* at 23-25.

At present, the first priority for use of any end-of-year surplus is to retain sufficient funds to ensure that initial costs for the next fiscal year can be paid. Congress has not placed a cap on the amount the Department of Justice may retain to pay for initial expenses incurred during the following year. The Department of Justice has generally tried to retain about $15 million for this purpose.

Once immediate needs are covered, the Department of Justice may transfer a statutorily limited amount in surplus funds to the Special Forfeiture Fund, which was established by section 6073 of the Anti-Drug Abuse Act of 1988.[112] Administered by the Office of National Drug Control Policy, the Special Forfeiture Fund was created to provide a source of funds to implement national drug control strategy, including education, treatment, and law enforcement. Congress has limited the amount that may be transferred from the Assets Forfeiture Fund to the Special Forfeiture Fund to $100,000,000 per fiscal year.[113]

To the extent additional surplus monies remain available, Congress has empowered the Attorney General, without fiscal year limitation, to use these funds for any law enforcement, litigative/prosecutorial, correctional, or any other authorized purpose.[114] These funds are available until expended.

E. Limitations on the Use of the Assets Forfeiture Fund

The following items generally are not payable from the Assets Forfeiture Fund:

(1) personnel expenses (*e.g.*, salaries, overtime and benefits) of federal employees;

(2) expenses of non-departmental components if the proceeds of sale of the property will be deposited in a fund other than the Assets Forfeiture Fund;

(3) purchase costs of real property or any interest therein except to acquire full title to or to satisfy liens or mortgages on forfeited property;

(4) payments to equip property transferred to federal agencies (other than investigative agencies or the U.S. Marshals Service) or state or local agencies;

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[112] 28 U.S.C. § 524(c)(9).

[113] 28 U.S.C. § 524(c)(9)(B)-(C).

[114] 28 U.S.C. § 524(c)(9)(E).

(5) expenses incurred in connection with the seizure, detention and disposition of property where the seizure was effected for debt collection or other non-forfeiture purposes; and

(6) reception and representation expenses (*e.g.*, refreshments, meals, gifts, or entertainment).[115]

All transfers from the Assets Forfeiture Fund shall be based upon certification of actual expenditures by the requesting agency.[116] Transfers shall not be made based upon estimated obligations.[117] If a payment requested is in excess of funds available, the U.S. Marshals Service will not process the request and, instead, will advise the requesting agency of the reason.[118]

VIII. Department of the Treasury Forfeiture Fund

Effective October 1, 1993, the U.S. Customs Forfeiture Fund became the Department of the Treasury Forfeiture Fund.[119] The Department of the Treasury Forfeiture Fund serves essentially the same purposes as the Justice Assets Forfeiture Fund and is subject to most of the same restrictions. The Treasury Forfeiture Fund may be used to pay the expenses of: seizing, maintaining and disposing of forfeited property; compensating informants and otherwise purchasing evidence; satisfying valid liens; granting petitions for remission or mitigation; hiring experts or consultants when necessary; transferring forfeiture proceeds for

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[115] *Attorney General's Guidelines* at 19. As noted in part VI, *supra*, asset management expenses incurred by the U.S. Marshals Service are deducted from equitable sharing transfers in calculating net proceeds to be distributed. Thus, to the extent forfeited property is equitably shared, the U.S. Marshals Service's expenses are not paid from the Assets Forfeiture Fund.

[116] *Attorney General's Guidelines* at 20-21.

[117] However, each fiscal year, any participating agency that anticipates requesting reimbursement for expenses from the Assets Forfeiture Fund must submit to the Director of the Asset Forfeiture Management Staff of the Justice Management Division, an estimate of the amount they will seek for the following fiscal year. *Attorney General's Guidelines* at 21. These submissions are used for budgetary purposes only and do not constitute specific requests for reimbursement of expenses actually incurred. To the extent possible, the Asset Forfeiture Management Staff prepares a budget of expenses prior to the beginning of the fiscal year. *Id.* at 22.

[118] *Attorney General's Guidelines* at 22.

[119] 31 U.S.C. § 9703(a).

equitable sharing; paying for equipping law enforcement conveyances; and paying expenses of state and local law enforcement agencies working in joint task forces.[120]

Participants in the Treasury Forfeiture Fund include: the U.S. Customs Service; the U.S. Secret Service; the Bureau of Alcohol, Tobacco and Firearms; the Internal Revenue Service; the Federal Law Enforcement Training Center; the Financial Crimes Enforcement Network; and the U.S. Coast Guard.[121] Just as Treasury agencies may be reimbursed from the Justice Assets Forfeiture Fund for expenses incurred while supporting investigations initiated by Justice agencies, so too may Justice agencies be compensated by the Department of the Treasury Forfeiture Fund for costs accrued in support of Treasury cases.[122]

As of fiscal year 1994, cash and the proceeds of sale of real and personal property forfeited under any law administered by the Department of the Treasury or the U.S. Coast Guard are deposited into the Department of the Treasury Forfeiture Fund.[123]

IX. U.S. Postal Service Fund

The U.S. Postal Service maintains a fund for the proceeds of property administratively forfeited by the U.S. Postal Inspection Service. Pursuant to a Memorandum of Understanding, the Postal Fund receives 80 percent of the net proceeds of any judicial forfeiture from the Department of Justice Assets Forfeiture Fund when the U.S. Postal Inspection Service is the exclusive investigative agency. When the U.S. Postal Inspection Service participates in an investigation with other agencies, it receives a proportional amount—up to 80 percent—of the net proceeds reflecting its degree of participation in the effort leading to forfeiture. These shares are offset against annual allocations to the U.S. Postal Inspection Service that would otherwise be made from the Assets Forfeiture Fund.

Requests for inter-fund transfers are processed like equitable sharing requests, using Forms DAG-71 and DAG-72. Transfer decisions are made by the official that would render an equitable sharing decision in that case. Deposits into the Postal Fund are used to support U.S. Postal Inspection Service operations.

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[120] 31 U.S.C. § 9703(a).

[121] 31 U.S.C. § 9703(p)(1).

[122] 31 U.S.C. § 9703(n).

[123] 31 U.S.C. § 9703(d)(2).

X. Special Problems in Disposing of Forfeited Property

A. Warranting Title to Transferred Property

Under section 2002 of the Crime Control Act of 1990, codified at 28 U.S.C. § 524(c)(10), the Attorney General has the authority to warrant clear title to any subsequent purchaser or transferee of forfeited property. The Department of Justice has set out procedures regarding the warranting of clear title.[124] The Department's general policy is that quitclaim deeds are to be used whenever practical. These deeds are executed by the U.S. Marshals Service. However, the Department of Justice recognizes that a quitclaim deed will prove insufficient for a title company to insure title where:

(1) the owner of the defendant property is a fugitive and the Government cannot prove the fugitive was served in the forfeiture action;

(2) the owner of the defendant property is a fugitive and title to the property is held by a constructive trustee;

(3) one of the owners of the defendant property is a fugitive who holds title to the property in a cotenancy with innocent owners;

(4) the owner of the defendant property dies before or during the forfeiture process and there is some question of proper service or substitution of the successors or representatives of the deceased party;

(5) the owner of the defendant property is a domestic or foreign corporation and the United States cannot prove that the corporation was properly served in the forfeiture action;

(6) the forfeiture is subject to a pending appeal; or

(7) such other situations in which a special warranty deed with certain indemnification provisions or a separate indemnification agreement is appropriate.

[124] Memorandum, entitled "Departmental Policy on Attorney General's Authority to Warrant Title," Directive 92-1, issued by the Office of the Deputy Attorney General on February 12, 1992 [*Asset Forfeiture Policy Manual* (1996), Chap. 5, Sec. IV, at p. 5 — 15].

If special circumstances exist, the U.S. marshal of the district, in consultation with the United States Attorney and with approval from the Seized Assets Division of the U.S. Marshals Service, may: (a) execute a special warranty deed warranting against claims arising from the applicable circumstances as enumerated in (1) through (7) above; (b) provide the buyer with an indemnification agreement in order to obtain title insurance; or (c) execute a general warranty deed under certain conditions and limitations provided in the Department of Justice's policy directive.[125] Government attorneys should review this directive when confronted with situations where potential buyers will not accept quitclaim deeds or where it is anticipated that title insurance cannot be obtained without special procedures.

B. Disposition of Forfeited Property in FIRREA Cases

Disposition of property forfeited pursuant to violations of the Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) of 1989, whether forfeited civilly or criminally under FIRREA, are governed by 18 U.S.C. §§ 981(a)(1)(C)-(D) and 981(e).[126] Section 981(e) provides that the Attorney General may retain such forfeited property for official use by the Department of Justice or transfer it to any other federal agency; any state or local law enforcement agency that participated directly in the acts which led to the forfeiture; any federal financial institution regulatory agency to reimburse victims of the underlying offense; any victimized financial institution as restitution; any other victims as restitution; or the Resolution Trust Corporation or the Federal Deposit Insurance Corporation.

On August 1, 1994, the Department of Justice, the Department of the Treasury, and federal financial institution regulatory agencies entered into a Memorandum of Understanding with respect to disposition of assets forfeited in FIRREA cases. As used in the Memorandum of Understanding, the term "FIRREA forfeiture" means forfeiture of any property, real or personal which (1) is forfeitable under 18 U.S.C. § 981(a)(1)(D) or (2) is forfeitable under 18 U.S.C. § 981(a)(1)(C) as proceeds traceable to a federal financial institution fraud violation, where the financial institution affected by the underlying violation

[125] *See* 31 U.S.C. § 9703(d)(2). The U.S. Marshals Service has the authority to take any of these three steps by virtue of 28 C.F.R. § 0.156.

[126] *See* chapter 1, part V.C, and chapter 5, part VIII, respectively, for a discussion of civil and criminal judicial forfeiture of property in FIRREA cases. *See* chapter 2, part II.B.6, for a discussion of pre-seizure planning in FIRREA cases.

has been under the supervision of a regulatory agency[127] in a receivership, conservatorship, liquidating agency, or corporate purchaser capacity. This definition includes forfeiture of property which is forfeitable under 18 U.S.C. § 981(a)(1)(C) or (D), regardless of whether forfeiture is actually sought or obtained under that provision or under some other statute, as long as such designation is made before the property is forfeited.[128]

Under the Memorandum of Understanding, there will be no equitable sharing in FIRREA cases. Financial regulatory agencies participating in the matter are entitled to a proportional share of net proceeds pursuant to the provisions of 18 U.S.C. § 981(e)(5). The decision to make such a transfer pursuant to 18 U.S.C. § 981(e)(5) is to be made by the official entitled to make transfer decisions for equitable sharing purposes, or at such higher level as may be required by the Asset Forfeiture and Money Laundering Section or by the Department of the Treasury's Executive Office for Asset Forfeiture. Requests for such transfers must be made in writing to the appropriate official, and decisions granting or denying such requests will also be made in writing.

In disposing of forfeited property in FIRREA forfeiture cases, property will be distributed in the following order of priority, unless compelling circumstances dictate otherwise:

(1) as provided by any order of forfeiture or any order granting a petition for remission or mitigation that specifies the disposition of assets or the distribution of proceeds;

(2) to any federal agency (including regulatory agencies) that incurred expenses incident to the seizure, forfeiture, or sale of the property;

(3) to any regulatory agency that acted or is acting as receiver, conservator, liquidating agent, or corporate purchaser of the financial institution affected by the underlying violation, in order to reimburse the agency for payments to claimants or creditors of

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[127] Under the Memorandum of Understanding, the term "regulatory agency" means a federal financial institution regulatory agency, *i.e.*, the Board of Governors of the Federal Reserve System, the Farm Credit Administration, the Farm Credit System Insurance Corporation, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, or the Resolution Trust Corporation.

[128] In administrative forfeitures under other statutory authority, *e.g.*, 18 U.S.C. § 981(a)(1)(A) (forfeiture of property "involved in" money laundering offenses), the agency conducting the forfeiture will determine if the forfeiture is a "FIRREA forfeiture." In judicial forfeitures under other statutory authority, that determination will be made by the United States Attorney's Office conducting the forfeiture (or, where appropriate, by the Fraud Section of the Criminal Division). The Asset Forfeiture and Money Laundering Section of the Criminal Division or the Department of the Treasury's Executive Office for Asset Forfeiture will resolve any challenges to these determinations by other entities.

the institution and to reimburse the appropriate insurance fund for losses suffered by the fund as a result of the receivership or liquidation;

(4) to a financial institution as restitution for losses caused by the underlying wrongdoing, provided that a financial institution regulatory agency has ordered such restitution; and

(5) to the extent that there are any proceeds remaining after disposition of such proceeds has been made by the regulatory agency in accordance with the provisions of 18 U.S.C. § 981(e)(3), (4), or (7), such proceeds may be distributed to victims pursuant to section 981(e)(6), and then to the Department of Justice Assets Forfeiture Fund or the Department of the Treasury Forfeiture Fund.

In cases involving property forfeitable under 18 U.S.C. § 981(a)(1)(C) but not classified as FIRREA forfeiture cases,[129] a regulatory agency may be entitled to remission or mitigation of forfeited assets because of an interest that is recognizable under the regulations governing petitions for remission or mitigation. Similarly, in non-FIRREA cases arising under section 981, a regulatory agency may be eligible for transfer of property as a victim pursuant to 18 U.S.C. § 981(e)(6).

[129] *E.g.*, cases involving a financial institution that has *not* been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity.

Chapter 11

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Chapter 11

Policies and Practices of International Forfeiture

I. General Overview

The chapters in this manual on civil and criminal forfeiture focus generally on procedures to forfeit assets found in the United States that were used in or derived from illegal activities undertaken in this country. Criminals, however, do not necessarily keep their ill-gotten gains in the country where those monies were generated. Instead, criminals often attempt to hide and protect their illegal profits by depositing or investing them in foreign countries. This chapter discusses methods of identifying, immobilizing, and forfeiting criminal assets derived from violation of U.S. law that are located abroad, and foreign criminal assets that are located in this country.

II. Forfeitable Assets in Foreign Countries

Because of the potency of U.S. forfeiture laws, criminals who generate potentially forfeitable profits in this country often transfer them elsewhere in an effort to put them beyond the reach of the confiscatory authority of the United States. Such transfers, in fact, present the United States with substantial difficulties in our efforts to deprive wrongdoers of the fruits of their criminal conduct.

A. Investigation and Assistance

One of the first steps to be undertaken in the forfeiture process is to identify and locate forfeitable assets. In the past, the United States was frequently hampered in its attempts to obtain information about potentially forfeitable assets that had been transferred abroad

because of the reluctance of some countries to provide official or judicial assistance in the enforcement of foreign criminal laws.[1]

To overcome this problem and to facilitate the exchange of drug-related and other judicial cooperation, the United States has signed and ratified mutual legal assistance treaties that provide for forfeiture-related assistance with 21 foreign jurisdictions: Anguilla, Argentina, the Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Italy, Jamaica, Mexico, Morocco, Montserrat, the Netherlands, Panama, the Philippines, Spain, Switzerland, Thailand, Turkey, the Turks and Caicos Islands, the United Kingdom, and Uruguay.[2]

The United States also has entered into executive agreements with Hong Kong,[3] the Netherlands, Russia, and the United Kingdom. Executive agreements are narrower in subject matter than mutual legal assistance treaties (*i.e.*, the agreement with Hong Kong provides the basis for making drug-related forfeiture requests; the agreement with the United Kingdom only applies to drug-related requests including forfeiture assistance; the Netherlands provides the basis for forfeiture assistance and sharing in general)[4]; and the one with Russia is an agreement on the cooperation in criminal law matters, which includes forfeiture proceedings. Furthermore, the United States, along with over 115 other countries, is a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), which requires member countries to assist one another in narcotics and related money laundering cases, including forfeiture matters.[5]

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[1] *Restatement (Second) of Foreign Relations Law of the United States* § 341 (1965). *See Brokaw v. U.K. Ltd.*, 2 Q.B. 476 (1971) (refusal to seize property of American citizens in English port for Internal Revenue Code violation based on the principle of international law that courts of one country are generally prohibited from aiding in the enforcement of the penal or revenue laws of another).

[2] The forfeiture provision of the Italian treaty, however, is not in force at this time.

[3] The United States-Hong Kong Drug Forfeiture Agreement elapsed on June 30, 1997, but requests continue to be made by the United States under Hong Kong domestic law (*i.e.*, Drug Trafficking Recovery of Proceeds Ordinance).

[4] Unlike a treaty, an executive agreement does not require U.S. Senate ratification, although the State Department consults with the appropriate congressional committees before an executive agreement is reached with another country.

[5] The United States also has entered into reciprocal sharing agreements with Canada (supplementing the United States-Canada Mutual Legal Assistance Treaty) and Ecuador, and has exchanged diplomatic notes with Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands providing for reciprocal asset sharing. We also have entered into non-reciprocal sharing agreements with Colombia and Mexico that provide for the United States to transfer assets to those countries in cases where they assist the United States in securing the forfeiture of assets under our laws.

Mutual legal assistance treaties and other international agreements addressing forfeiture usually contain a general provision relating to the seizure and forfeiture of assets at the request of the treaty/agreement partner. These agreements generally allow the parties to obtain documentary evidence and other forms of reciprocal assistance such as facilitating depositions in connection with investigations, trials, and ancillary proceedings in the requesting country. To ensure that the forfeited property does not dissipate during the course of the proceedings, one party to the mutual legal assistance treaty or executive agreement usually may request that the other immediately freeze or seize the property in question.[6]

If no bilateral or multilateral agreement exists with a given country, forfeiture-related assistance may be sought from that country through letters rogatory, which is a request from the judicial authority of one country to its foreign counterpart for assistance in connection with a case or investigation ongoing in the requesting country.[7] It should be noted, however, that, unlike requests made under a treaty or an executive agreement, there is no obligation on the part of the country to which letters rogatory are issued to provide assistance. Moreover, letters rogatory typically are more time consuming than mutual legal assistance treaty and executive agreement requests because they are made through diplomatic channels, rather than through direct communications between the Department of Justice and its foreign counterpart.[8]

Before a freeze request is transmitted—whether through a treaty, executive agreement, or letter rogatory request—the prosecutor making the request must confirm that there is a basis for forfeiture under U.S. law and that forfeiture will be sought in the indictment or, alternatively, that a civil complaint for forfeiture against the property will be filed. If the indictment does not contain a forfeiture count, it is important to determine whether the United States Attorney intends to supersede the indictment or will file a civil forfeiture action against the property. Moreover, if the freeze is sought pursuant to an extradition request, it is particularly important to ensure that the forfeiture has been charged. Otherwise, we risk

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[6] In the event that the prosecutor determines that there is insufficient evidence to maintain the foreign freeze or seizure, the federal prosecutor should inform the Criminal Division's Office of International Affairs as soon as possible so that they can advise the relevant foreign authorities. Otherwise, the United States may be held liable for costs, including attorney's fees, if the foreign government maintains a freeze or restraint on property on our behalf without there being a sufficient evidentiary or legal basis for doing so.

[7] *See* 28 U.S.C. §§ 1781-1782; Fed R. Civ. P. 28(b).

[8] The Office of International Affairs is the central authority for the United States under these treaties and agreements. Foreign Justice Ministries often serve as the counterpart central authorities.

specialty problems when attempting to supersede the indictment once the defendant is returned.[9]

B. Civil Forfeiture Actions

Once forfeitable assets derived from criminal activities committed in violation of U.S. law have been located in another country, we must determine whether it is possible to institute forfeiture proceedings against such property. Civil forfeiture may be an option.

1. 28 U.S.C. 1355(b)(2)

Since civil forfeiture is an *in rem* proceeding against the property itself,[10] the jurisdictional authority of the district court to enter a civil forfeiture order depends upon the actual or constructive control of the property by the court hearing the civil forfeiture case.[11] However, although the court does not have actual physical control over the property, a civil forfeiture action against property located outside the United States may be brought under 28 U.S.C. § 1355(b)(2)[12] in the District of Columbia, in the district in which any of the acts giving rise to the forfeiture occurred, or in any other district where venue is specially authorized by statute.[13]

In *United States v. All Funds on Deposit in Any Accounts Maintained in the Names of Heriberto Castro Meza or Esperanza Rodriguez de Castro, etc.,* [hereinafter *Meza*], 63 F.3d

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[9] Generally, the rule of specialty requires that an extradited defendant be tried only for crimes for which his or her extradition was granted.

[10] *Pelham v. Rose*, 76 U.S. (9 Wall.) 103, 106 (1869); Supplemental Rule C(2), (3); 28 U.S.C. § 1395(b), (c).

[11] *See United States v. Certain Funds in Accounts Nos. 600-306211-006*, 96 F.3d 20 (2d Cir. 1996) *cert. denied sub nom. Ko v. United States*, ___ U.S. ___, 117 S. Ct. 954 (1997); *United States v. Certain Funds*, No. 91-647-CIV-J-16 (M.D. Fla. Feb. 5, 1992) (unpublished opinion) (allowed the default forfeiture of certain foreign bank accounts where the account holder was a fugitive in related criminal proceedings); *but see United States v. U.S. Funds in the Amount of $3,035,648.50*, No. CIV-91-217E (W.D.N.Y. Nov. 4, 1991) (unpublished).

[12] 28 U.S.C. § 1355(b)(2) provides: "Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia."

[13] The United States may not need to file a section 1355(b)(2) action if the foreign country where the property is located agrees to transfer control of the property to the United States to allow the civil forfeiture action to occur here.

148 (2d Cir. 1995), the Second Circuit found that, while 28 U.S.C. § 1355(a)[14] provides subject matter jurisdiction and section 1355(b)(2) establishes venue for civil forfeiture cases involving overseas assets, *in rem* jurisdiction is met only if the foreign country where the *res* is found takes the necessary action to bring the property in question within the constructive control of the U.S. court.[15]

As pointed out in *Meza*, there is little value in filing a complaint based on section 1355(b)(2) against property located in another country if that country cannot—or will not—restrain or seize the property, and ultimately enforce the civil forfeiture order, either by registering it under domestic law or repatriating the funds to the United States.[16] If the requested country is unable or unwilling to cooperate with the United States, the U.S. Civil Forfeiture Order may well turn out to be a "useless judgment," calling into question whether the U.S. court ever had jurisdiction at the time that the complaint was filed.[17]

Therefore, the first step in obtaining the civil forfeiture of assets located outside the United States is to determine whether the requested country will take specific measures on our behalf. To that end, the Office of International Affairs should be notified at least ten days before a civil forfeiture action based on section 1355(b)(2) is filed.[18] Within that ten-day period, the Office of International Affairs, working with the Asset Forfeiture and Money Laundering Section, will determine—if it is not already known—whether the host country

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[14] 28 U.S.C. § 1355(a) provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

[15] While finding that section 1355(b)(2) "streamlines" civil forfeiture actions against property located abroad, the Second Circuit found that Congress did not dispense with fundamental concepts of *in rem* jurisdiction by enacting section 1355(b)(2). *United States v. Meza*, 63 F.3d 148, 152 (2d Cir. 1995). In discussing those fundamental concepts, the *Meza* court relied on language from two Supreme Court decisions, citing *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), quoting *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815), "in order to institute and perfect proceedings *in rem* ... the thing should be actually or constructively within the reach of the Court;" and *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992), "the Court must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated."

[16] The district court in *Meza* had determined that it had *in rem* jurisdiction over the accounts in question, which were on deposit in London banks, because the British authorities restrained the property, and such actions satisfied the "traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property." *United States v. All Funds on Deposit in any Accounts Maintained in Names of Meza or De Castro*, 856 F. Supp. 759, 763 (E.D.N.Y. 1994).

[17] *See Republic National Bank of Miami v. United States*, 506 U.S. 80, 89 (1992).

[18] *See United States Attorneys' Manual* § 9-13.526.

will seize or restrain the property in question, and ultimately give effect to the U.S. forfeiture order.

In those cases where *in rem* jurisdiction is satisfied, civil forfeiture of property located abroad nevertheless raises a number of practical issues including how to serve process on the subject property, give notice to potential claimants residing outside the United States, and publish an advisement of the pending forfeiture action in a newspaper or journal with wide circulation in the host jurisdiction.

2. Service of Process

Rule C(3) of the Supplemental Rules of Admiralty and Maritime Claims, requires that "in actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property. ..." In cases where the property is located abroad, the U.S. district court should *not* be asked to instruct the U.S. marshal, or any other U.S. officer, to execute process against the foreign based property. In such cases, assuming that the foreign country agrees to cooperate, the warrant should instruct the Attorney General, or her duly authorized representative, to request the authorities of the host country to take such action on behalf of the United States as is necessary to arrest and post the property until further order of the court. Because Supplemental Rule C(3) allows for service of process by, *inter alia*, "a person authorized to enforce it," presumably the warrant may be served by a foreign official of the country where the property is found.

3. Personal Notice

Although the Supplemental Rules do not so provide, personal notice of a pending civil forfeiture action should be served upon all persons, including lienholders, whose identities and addresses are known or reasonably ascertainable and whose rights and interest in the property will be affected by the lawsuit. This requirement also applies where the potential claimants are known or thought to be abroad. Federal Rule of Civil Procedure 4(i) sets forth provisions for effecting service in a foreign country, including service by any form of mail. When documents are mailed abroad, however, it may not always be possible to obtain a signed receipt or proof that the delivery was rejected by the addressee. Accordingly, alternatives to regular mail service should be explored that provide for a receipt or affidavit describing the mail service company's unsuccessful efforts to deliver an envelope or package.

If the country where the person to be served is located agrees to assist, it may be preferable to request the host country to effect personal service for us, rather than sending the

documents by mail. In such cases, the United States may formally request the local authorities to serve process and to execute an affidavit detailing proof of service.

4. Publication Abroad

Rule C(4) of the Supplemental Rules requires notice by publication. When the *res* is located outside the United States, it is prudent to publish both where the action is filed and where the property is located. Dual publication is particularly important in cases involving non-liquid assets. In non-cash cases, potential claimants, such as lienholders and other secured creditors, are more likely to be found where the property is located than where the forfeiture happens to take place. Also, proof of foreign publication may later be useful in convincing a U.S. district court to enter a default judgment on the basis that the United States took all reasonable steps to provide notice to all potential claimants.

The degree of difficulty in publishing abroad will depend on whether the host country will help. While some countries, such as Switzerland, have requested that we do *not* provide notice of forfeiture in their newspapers, other countries, such as the territory of Hong Kong, in drug-related forfeiture matters, arrange to publish notice in both English and Mandarin Chinese newspapers. In other countries, the authorities may recommend that we publish in a particular local newspaper, but will not arrange for publication. In such cases, the U.S. authorities should contact the foreign newspaper directly or ask an U.S. representative in the host country (*i.e.*, the Drug Enforcement Administration attache or the Federal Bureau of Investigation legate) to arrange for publication. If no suitable local newspaper exists, a newspaper with international circulation, such as the *International Herald Tribune*, should be considered as another, albeit much more expensive, option.

5. Civil Forfeiture Under Foreign Law

The deposit of proceeds derived in violation of U.S. law in a foreign jurisdiction may also violate the law of that country. Thus, it may be possible for foreign governments to use their own forfeiture laws to confiscate these assets connected to U.S. crimes, particularly in cases involving drug offenses. Switzerland and Canada, for example, have laws which, under certain circumstances, allow the forfeiture of such assets. Swiss law allows for *drug-related* property to be forfeited without the conviction of the owner in Switzerland. Canadian "Proceeds of Crime" legislation proscribes possessing or controlling assets known to be derived from the commission of a Canadian or foreign crime. Forfeiture under this law, however, requires conviction of the defendant in Canada.

C. Criminal Forfeiture Actions

Criminal forfeiture cases are *in personam* actions, brought against the criminal defendant rather than against his property. Once the defendant is convicted, all of the named assets may be included in the forfeiture order, regardless of where the assets are located.[19] Accordingly, the primary challenge to the United States in criminally forfeiting foreign assets is not the ability to obtain a judgment, but the ability to obtain the enforcement of that judgment.

As noted earlier, a basic principle of international law is that nations will generally refuse to give effect to the penal or revenue laws of other countries, except as specifically provided by a treaty, international agreement, or as authorized by the requested country's domestic laws.[20] Historically, forfeiture orders fell within this basic proscription because they were considered to be criminal and fiscal penalties. However, in growing numbers, countries, such as the Cayman Islands, Denmark, Hong Kong, Luxembourg, the Netherlands, Switzerland, and the United Kingdom, will directly enforce U.S. forfeiture judgments. Other jurisdictions, such as Australia, Austria, the Bahamas, France, Germany, Japan, Portugal, and Singapore have enacted, or are expected soon to enact, such foreign judgment enforcement measures, but have not yet enforced a U.S. forfeiture order.[21]

1. Repatriation Orders

Other methods may be used to accomplish a forfeiture in the United States without having to ask a foreign court to enforce a U.S. penal judgment. One approach is to require the defendant to repatriate the forfeitable or forfeited assets pursuant to a restraining order. Although there is little case law precedent,[22] there is statutory language that implicitly supports a U.S. court's authority to require a defendant to repatriate foreign assets. In addition to the entry of restraining orders, injunctions, and performance bonds, the court is authorized to "take any other action to preserve the availability of property" that is forfeitable.

This language, combined with the jurisdictional statute that permits courts to enter such orders "without regard to the location of any property which may be subject to forfeiture,"

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[19] *See, e.g.*, 18 U.S.C. § 1963(j); 21 U.S.C. § 853(1).

[20] *Restatement (Second) of Foreign Relations Law of the United States* § 341 (1965).

[21] However, some jurisdictions will only enforce foreign *criminal* forfeiture judgments, while others (such as the United Kingdom, Hong Kong, and Switzerland) will enforce both civil and criminal orders.

[22] 18 U.S.C. §§ 982(b)(1), 1963(d)(1); 21 U.S.C. § 853(e)(1).

appears to support the issuance of orders requiring the defendant to repatriate any of his or her foreign assets that are subject to forfeiture.[23] One method for accomplishing such repatriation is to have the defendant execute a power-of-attorney to his lawyer or other representative, who can then withdraw or liquidate the assets in the foreign country and transfer the monies or proceeds back to the United States.

2. Plea Agreements

Plea agreements may also be used to require the defendant to liquidate his or her foreign property and surrender the proceeds to the United States by actually signing over the deed,[24] ownership papers, or stock certificates to the United States. The plea should provide that the defendant consent to the forfeiture of the funds and provide whatever cooperation is requested by United States *or* foreign authorities to achieve such result. In proceeds cases, the defendant should, whenever appropriate, explicitly admit in the plea agreement that the funds or other property abroad represent criminal proceeds. Such admission may enable the foreign authorities to forfeit the funds under their own laws if for some reason the United States is unable to do so.

Once the United States holds title to the foreign assets or is listed as the owner of shares in a corporation with foreign assets, it may be able to retain local counsel to oversee or liquidate its property interest in the country where the assets are located. Similarly, once the United States is vested with title through a forfeiture judgment, private counsel may be hired to dispose of the foreign property in accordance with the laws of the country where it is located. The Office of Foreign Litigation of the Civil Division can provide assistance by identifying foreign counsel who are authorized to represent the United States in such matters.

In sum, the approach to be taken in obtaining the forfeiture of assets located abroad will depend on a number of variables, including whether the United States and the country where the assets are located have entered into a treaty or executive agreement providing for mutual forfeiture cooperation; the legal system and requirements of the country where the assets are found; and the willingness or ability of the defendant/owner to repatriate forfeitable property

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[23] 18 U.S.C. §§ 982(b)(1), 1963(j), 21 U.S.C. § 853(1); *United States v. Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (court issued restraining order directing the defendant to repatriate funds from the Cayman Islands); *United States v. Lopez*, 688 F. Supp. 93 (E.D.N.Y. 1988) (defendants ordered to execute a release and transfer of foreign funds subject to forfeiture).

[24] No U.S. law prohibits the United States from owning real property directly overseas. Moreover, a majority of nations allow foreign governments to own realty in fee simple. However, other countries have laws restricting the transfer of property or view the acquisition of significant realty by the United States or any other country as a threat to their sovereignty.

to the United States. Government attorneys attempting to reach forfeitable assets that have been transferred to, or invested in, foreign countries should, in the first instance, consult with the Asset Forfeiture and Money Laundering Section, which will closely work with the Office of International Affairs in such matters.

III. Foreign Criminal Assets in the United States

Foreign criminals, no less than their United States counterparts, often attempt to remove their illegally-obtained profits from the reach of their own countries' laws by transferring them elsewhere, sometimes to the United States. In enacting 18 U.S.C. § 981(a)(1)(B) in 1986, Congress authorized the seizure and forfeiture of assets within our borders that represent the proceeds of foreign drug-related crimes. The United States has also expanded the scope of the money laundering statute to provide for the forfeiture of the proceeds of a number of foreign offenses when the proceeds are laundered here.[25] Additionally, the Attorney General or the Secretary of the Treasury is authorized, with the concurrence of the Secretary of State, to share forfeited property with foreign countries that have assisted the United States in forfeiture cases that yielded such property.[26]

A. Forfeiture under 18 U.S.C. § 981(a)(1)(B)

Section 981(a)(1)(B) provides for the forfeitability of property found within the territorial jurisdiction of the United States that represents the proceeds of a violation of a foreign drug law.[27] The offense must be one that would be a felony drug violation under U.S. law if the offense had occurred within the jurisdiction of the United States.[28] Although the Department of Justice has proposed an amendment, the provision does not currently authorize the seizure and forfeiture of instrumentalities, *i.e.*, non-proceeds property that was used or intended to be used in the violation of a foreign drug law.

The procedures for seizure and forfeiture under 18 U.S.C. § 981(a)(1)(B) are, with a few minor exceptions, identical to the civil forfeiture provisions codified at 21 U.S.C. § 881.

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[25] *See* 18 U.S.C. § 1956(c)(7) and discussion in part III.B, of this chapter, *infra*.

[26] *See* 18 U.S.C. § 981(i)(1).

[27] The foreign drug law must involve the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined by the Controlled Substances Act) and be punishable in the foreign country by death or imprisonment for a term exceeding one year.

[28] *Cf.* 21 U.S.C. § 853(a)(1).

However, certain statutory presumptions and rules of admissibility relating to foreign forfeiture orders and judgments of conviction are found at 18 U.S.C. § 981(i)(3)-(4). These evidentiary rules greatly enhance the ability of the United States to use foreign orders and judgments to prove its domestic forfeiture case.

Specifically, pursuant to section 981(i)(3), a certified copy of a foreign forfeiture order or judgment encompassing the subject property is admissible and "shall constitute probable cause" in the civil forfeiture action brought under section 981(a)(1)(B). Section 981(i)(3) is particularly helpful in cases where the owner or claimant is a fugitive. In such situations, the government attorney may attach a certified copy of the foreign forfeiture order to the civil forfeiture complaint. If a claim and answer are not filed within the requisite period after the filing of the complaint and effective service of process upon the fugitive, the United States may then file a motion for a default judgment.

Under section 981(i)(4), a foreign narcotics conviction can be used as evidence against property that is the subject of a related section 981(a)(1)(B) action. Specifically, 18 U.S.C. § 981(i)(4) provides that a certified copy of the foreign order or judgment of conviction and any certified recordings or transcripts of testimony taken shall be admissible in evidence in the U.S. forfeiture proceeding and creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under section 981(a)(1)(B) has occurred.

Before filing a complaint *in rem* under section 981(a)(1)(B), the prosecutor must be satisfied that there is sufficient evidence to show probable cause to believe that the property in question is drug proceeds and that the current owners of the property are not "innocent owners" of the property who can defeat the forfeiture action. In order to facilitate a determination by the appropriate U.S. authorities whether to file a civil forfeiture action under 18 U.S.C. § 981(a)(1)(B),[29] the requesting State should provide the following at the time it makes its request:

(1) a complete description of the property, including its location and estimated value (if it is a bank account provide the name of the bank and branch, account number, and the identity of the signatory);

(2) an affidavit by the officer who investigated the foreign drug offense containing a synopsis of the investigation;

[29] Generally, foreign jurisdictions transmit their requests for confiscation of drug proceeds in the United States to the Office of International Affairs. The Office of International Affairs, after consulting with the Asset Forfeiture and Money Laundering Section to determine whether there is sufficient information to warrant further review, sends such requests to the appropriate United States Attorney's Office for prosecutive review and handling.

(3) an affidavit from the competent legal authorities of the requesting State attesting that the underlying drug offense is a crime under the laws of the requesting State punishable by more than a year's imprisonment or death, or a certified copy of such law;

(4) where available, a certified copy of the order or judgment of forfeiture issued by a court of competent jurisdiction of the requesting State concerning the property in question and certified recordings or transcripts of testimony taken in any such proceeding in connection with such an order or judgment; and

(5) where available, a certified order or judgment of conviction by a court of competent jurisdiction of the requesting country concerning an unlawful drug activity that gives rise to the request for forfeiture under section 981(a)(1)(B) and any certified recordings or transcripts of testimony taken in any such proceeding concerning such order or judgment of conviction.[30]

Additionally, cases brought under section 981(a)(1)(B) often involve costs that would not arise in purely domestic forfeiture cases. For example, the action may require foreign travel, translation of documents, interpretation of foreign language testimony, and retention of an expert on the forfeiture/criminal laws of the particular country involved. It is important to anticipate these costs and address, at the outset, how they will be paid.

A successful section 981(a)(1)(B) action will result in a judgment of forfeiture in favor of the United States. In most cases, it will be appropriate to share the forfeited funds with the foreign country as authorized under section 981(i)(1) because section 981(a)(1)(B) cases, as already discussed, are usually heavily dependent on foreign evidence and assistance. Sharing recommendations (including a memorandum detailing the foreign participation, a suggestion of how much should be shared, and a copy of the forfeiture order) should be sent to Asset Forfeiture and Money Laundering Section.[31]

B. Forfeiture under 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1)

The commission of a foreign offense involving the manufacture, sale, importation, or distribution of a controlled substance has been a predicate offense (specified unlawful activity) for a violation of the money laundering laws, 18 U.S.C. §§ 1956 and 1957, since

[30] Attorneys for the U.S. Government must also comply with Fed. R. Civ. P. 44. 1, which requires that a party give notice to the court of its intent to rely upon foreign law.

[31] *See* discussion at part IV, of this chapter, *infra*.

these statutes were enacted in 1986.[32] Effective October 28, 1992, the list of predicate offenses was expanded to include a number of additional foreign crimes. The statutes now permit money laundering prosecutions involving the proceeds of foreign fraud committed by or against a foreign bank, kidnaping, robbery, and extortion. Additionally, any property—whether proceeds or instrumentalities—involved in such a money laundering transaction or attempted transaction, including the proceeds of the underlying foreign offense, is subject to civil or criminal forfeiture under 18 U.S.C. § 981 or 982, respectively. In all such cases, while the underlying offense may have violated only foreign law, the laundering offense must be shown to have occurred, at least in part, in the United States or to have involved an U.S. citizen.[33]

C. Forfeitability of Proceeds of Foreign Fraud Violations

There is a basis through which the United States may seek to confiscate the laundered proceeds derived from violations of foreign fraud statutes. This statutory scheme relies on a linkage of 18 U.S.C. § 2314 or 2315 (interstate transportation of stolen property); 18 U.S.C. § 1961 (RICO); 18 U.S.C. § 1956 (money laundering); and 18 U.S.C. §§ 981 and 982. Section 2314 proscribes transporting, transmitting, or transferring "in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud."[34] Moreover, like section 2314, 18 U.S.C. § 2315 is listed as a "specified unlawful activity." Section 2315 prohibits receiving, possessing, concealing, storing, bartering, selling, or disposing of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more" which have crossed a State or U.S. boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken." The RICO statute, 18 U.S.C. § 1961(1), lists section 2314 and 2315 violations as predicate offenses.

The money laundering statute (at 18 U.S.C. § 1956(c)(7)(A)) makes nearly all of the RICO predicate offenses, including sections 2314 and 2315, "specified unlawful activities." In turn, 18 U.S.C. § 1956(a)(1)-(3) prohibits engaging in certain financial transactions, *i.e.*,

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[32] *See* 18 U.S.C. § 1956(c)(7)(B).

[33] *See* 18 U.S.C. § 1956(f).

[34] *United States v. Braverman*, 376 F.2d 249, 251 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967), held that federal courts have jurisdiction over section 2314 offenses wholly committed outside the United States if the foreign acts were intended to have an effect in the United States. *See also United States v. Goldberg*, 830 F.2d 459, 463 (2d Cir. 1987). A strong argument can be made that importing foreign fraud proceeds into the United States, to be laundered in our domestic financial institutions, would have a detrimental effect in the United States. Therefore, it is logical that Congress intended to prohibit the importation of such foreign fraud proceeds under section 2314. *Cf. United States v. Ken International Co., Ltd.*, 184 B.R. 102 (D. Nev. 1995).

money laundering activities, with the proceeds of specified unlawful activities. Thus, it is a violation of United States criminal law to launder the proceeds of a foreign fraud or theft offense, when such proceeds are brought into the United States. These proceeds are subject to civil and criminal forfeiture under 19 U.S.C. §§ 981 and 982, respectively.

IV. International Sharing of Forfeited Assets

It is Department of Justice policy, in accordance with U.S. law and established procedures, to share the proceeds of successful forfeiture actions with countries that facilitate the forfeiture of assets under U.S. law. International asset sharing is premised on the realization that such transfers provide an incentive for further international cooperation, particularly in the fight against drug trafficking. There are three statutory provisions authorizing the Attorney General and/or the Secretary of the Treasury, with the concurrence of the Secretary of State, to transfer forfeited property to a foreign country: 18 U.S.C. § 981(i)(1); 21 U.S.C. § 881(e)(1)(E); and 31 U.S.C. § 9703(h)(2).

Section 981(i)(1) of Title 18 authorizes the Attorney General or the Secretary of the Treasury to transfer property forfeited under 18 U.S.C. § 981 or 982 to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.[35] Section 881(e)(1)(E) of Title 21 authorizes the Attorney General to transfer forfeited property to a foreign country that participated directly or indirectly in the seizure or forfeiture of drug-related property under 21 U.S.C. §§ 801-971. Section 9703(h)(2) of Title 31 authorizes the Secretary of the Treasury to transfer property forfeited under any law enforced or administered by the Department of the Treasury to a foreign country that participated directly or indirectly in the seizure or forfeiture of such property.

All three statutes condition such a transfer upon: (1) approval by the Attorney General or the Secretary of the Treasury; (2) approval by the Secretary of State; (3) authorization for such a transfer in an international agreement between the United States and the foreign country to which the property would be transferred[36]; and (4) if applicable, certification of the

[35] Section 981 contains subsections, providing, *inter alia*, for the forfeiture of: (a) assets traceable to, or involved in, money laundering violations; (b) proceeds of foreign drug felonies; and under subsections; and (c) and (d) property constituting, or derived from, proceeds traceable to a violation of various fraud statutes, mostly affecting financial institutions.

[36] Such an agreement may be contained in a mutual legal assistance treaty, an executive agreement, or a case-specific agreement to share proceeds.

foreign country in question under 22 U.S.C. § 2291(h) (section 481(h) of the Foreign Assistance Act of 1961).[37]

There are a number of key policy aspects to the international sharing program:

(1) International sharing has priority over domestic sharing. Once international sharing payments are deducted, domestic sharing is calculated based upon the remaining balance. The effect of prioritizing international payments can best be seen through an example. Assume that the net forfeited amount in a case is $200,000 and that a foreign country is entitled to a 50 percent share. Assume further that the contribution of two domestic law enforcement agencies to the federal forfeiture effort merits each a 25 percent share. The practice of the Department of Justice would be to share $100,000 with the foreign government, *i.e.*, 50 percent of the $200,000. The Department of Justice then would provide $25,000 to each of the two domestic agencies involved, representing 25 percent of the remaining $100,000 in each case. The Department of Justice Assets Forfeiture Fund would retain $50,000.

(2) Representatives of foreign governments, in contrast to domestic law enforcement agencies, are not required to submit a sharing request, *i.e.*, Form DAG-71, Application for Transfer of Federally Forfeited Property. Foreign governments may directly request to share in assets forfeited under U.S. law through applicable mutual legal assistance treaties, executive agreements, or diplomatic channels. Whether or not a foreign government has made such a request, the United States Attorney's Office prosecuting the case or the lead agency that investigated the matter should initiate the international sharing process by providing Asset Forfeiture and Money Laundering Section with a memorandum detailing the foreign assistance provided by the foreign authorities, recommending the amount to be transferred, and, if available, transmitting a copy of the forfeiture order or judgment.[38] The Department of Justice and the Department of the Treasury have entered into a Memorandum of Understanding, which is found at the end of this section, establishing guidelines and

[37] Generally, 22 U.S.C. § 2291(h)(1) provides for withholding United States economic assistance to "each major illicit drug producing country or major drug-transit country" unless the President, under section 2291(h)(2), determines and certifies to the Congress that the country in question has taken adequate steps to combat drug production, drug exports into the United States, money laundering, and drug-related public corruption. In March 1997, the President denied certification to Afghanistan, Burma, Colombia, Iran, Nigeria, and Syria.

[38] *See* Memorandum, entitled "Repatriation of Foreign Assets and International Sharing of Forfeiture Proceeds," Directive 90-6, issued by the Executive Office for Asset Forfeiture, dated September 7, 1990 [*Asset Forfeiture Policy Manual* (1996), Chap. 6, Sec. IV, at p. 6 — 11].

criteria for evaluating international assistance for purposes of determining the appropriate sharing percentage range.

(3) International asset sharing authority is statutorily vested with the Attorney General or the Secretary of the Treasury and the Secretary of State. This is true even in administrative forfeiture cases. Therefore, until an international sharing agreement and transfer commitment have been approved by the Department of Justice and the State Department, or the Department of the Treasury and the State Department, no commitment should be made to share forfeited or forfeitable proceeds with a foreign government.

(5) Unlike equitable sharing in domestic cases, there is no general requirement that shared property be allocated by the foreign country for any specific purpose, including law enforcement. Such a requirement, however, may be inserted in a sharing agreement governing a specific transfer.

A special mention of Switzerland in connection with international sharing is warranted. Switzerland is perhaps our most important forfeiture partner in terms of the number of cases and the value of the assets in question. In the typical case, the United States requests the Swiss to freeze assets on deposit in Swiss banks and maintain the freeze until we have secured the cooperation of a defendant or witness in order to repatriate the funds to the United States. Because of the recurring nature of the bilateral cooperation in Swiss-U.S. cases, we have an understanding with the Swiss to recommend that the Attorney General or Secretary of the Treasury authorize a transfer of 50 percent of the net forfeited proceeds in all such cases. A sharing of 50 percent is justified because Switzerland, in effect, sacrifices its own domestic proceeding so that the U.S. case can go forward, and the Swiss restraint on the assets (usually bank deposits) preserves the property for forfeiture under U.S. law. In order to maintain our excellent forfeiture relationship with Switzerland, it is imperative that this sharing understanding be honored.

The United States encourages foreign jurisdictions that confiscate assets under their laws with our assistance to recognize the United States contribution through asset sharing. The law governing the Department of Justice Assets Forfeiture Fund permits the deposit into the Assets Forfeiture Fund of such shared foreign proceeds.[39] As of March 1997, Canada, the Channel Islands, Switzerland, and the United Kingdom have shared forfeited assets with the United States.

[39] *See* 28 U.S.C. § 524(c)(4)(B).

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF THE TREASURY ESTABLISHING INTERNATIONAL ASSET SHARING GUIDELINES

I. STATEMENT OF PURPOSE

This memorandum is designed to provide consistent sharing guidelines for the Department of Justice and the Department of the Treasury to use in the implementation of the statutes governing transfers of property forfeited under United States law, or the proceeds from the sale thereof, to foreign government. See 18 U.S.C. § 981 (i), 21 U.S.C. § 881 (e)(1)(E), and U.S.C. § 1616 (c)(2). These sharing guidelines set out, by way illustration, the types of forfeiture assistance that a foreign country may provide to the United States, and suggest percentages to be shared as a result of such assistance. These guidelines are not to be intended to deprive or curtail the exercise of discretion by the Departmental decision makers in determining the amount to be shared in specific cases. Nor are they intended to supersede, but rather to complement, the April 1992 Memorandum of Understanding signed by the Departments of Justice, State, and Treasury concerning transfers of forfeited property to foreign countries. In reaching sharing decisions, the Departments of Justice and Treasury will take into consideration the views of all federal agencies and offices that participated in the underlying case in which forfeited proceeds are

sought to be transferred to a foreign government. The intent of this MOU is to promote general consistency so that foreign countries providing the same kind and degree of assistance to different United States law enforcement agencies will not have cause to believe that they are being treated unfairly.

The types of foreign assistance warranting sharing are described in a three-tier framework. The first tier illustrates assistance that is essential for the forfeiture of the property under United States law, such as where the foreign country in question foregoes its opportunity to forfeit the property in order for the United States to proceed under its own statutes. The second tier encompasses cases where the foreign country enforces United States forfeiture judgements and returns the forfeited property or proceeds or where the foreign country expends substantial time and money to provide investigative or legal aid. The third tier covers assistance that facilitates a forfeiture action in United States, such as furnishing investigative leads, producing documents for trial, enabling the interview or deposition of witnesses.

The level or amount of sharing will ultimately be tied to the importance and degree of the foreign cooperation. Assistance falling within the first tier will, absent strong countervailing factors, warrant the highest degree of sharing. It is suggested that for assistance falling within the first category, the United States transfer between fifty (50) to eighty (80) percent or the net proceeds of the forfeiture to the foreign country in question.

Forth (40) to fifty (50) percent should be transferred for assistance described in the second category, and up to forty (40) percent should be shared in cases covered within the third tier.

The main objective of international asset sharing is to promote forfeiture assistance among countries. In some instances, a departure from the guidelines may facilitate that goal, for example, in cases where the United States and the foreign country to enter into an official understanding regarding the distribution of assets. However, where there is a substantial departure from these sharing guidelines, the Department should justify the departure in the memorandum seeking authorization to transfer assets to the foreign government.

II. GUIDELINES FOR INTERNATIONAL ASSET FORFEITURE SHARING

First Tier (50-80%). This category illustrates instances of international cooperation where the foreign country provides assistance that is essential to the forfeiture of assets under United States law. This assistance will frequently reflect the willingness of a foreign country to forego its own domestic legal remedies or to take innovative steps to assist the United States. Such assistance by the foreign country includes:

1. Repatriation of forfeitable assets to the United States without the cooperation of a signatory authority or property owner.

2. Relinquishing or waiving the option of proceeding against the defendant and/or his or her property in order to allow the United States to forfeit the assets.

3. Defending in litigation brought by owners, claimants, and third parties who attempt to impede the foreign government's efforts to assist the United States.

4. Providing the United States with all, or substantially all, the evidence needed to prevail in a domestic forfeiture action against property deposited in the United States, e.g., providing evidence to support actions based upon 18 U.S.C. § 981 (a)(1)(B) (foreign drug felonies) or 18 U.S.C. §§ 981 (b) and 982 (money laundering offense where the predicate was a foreign violation as defined by 18 U.S.C. § 1956 (c)(7)(B)).

Second Tier (40-50%). This category describes types of international cooperation where the foreign country provides assistance that is important, but not necessarily essential, to the successful forfeiture action in the United States. Such assistance includes:

1. Enforcing a United States forfeiture order and subsequently repatriating the assets.

2. Freezing forfeiture assets at the request of the United States, and then lifting the freeze to enable a cooperating witness or defendant to repatriate the assets to the United States.

3. Returning property for forfeiture pursuant to an extradition request.

4. Expending substantial law enforcement resources to assist the United States, including the dedication of quantifiable and verifiable work hours.

5. Engaging in law enforcement activity which places foreign law enforcement personnel in physical danger.

Third Tier (up to 40%). This category contains examples of foreign assistance that substantially facilitates a forfeiture under United States law. The types of assistance covered here include more than routine production of witnesses and information. A greater percentage should be transferred when the foreign country in question shows uncommon initiative in assisting the United States or provides particularly helpful assistance. Such assistance includes:

1. Providing information which leads to a United States investigation resulting in a successful forfeiture action under United States law.

2. Providing bank or there financial records which allow the United States to determine the location and extent of forfeitable wealth.

3. Supporting efforts of the United States to persuade foreign banks to take steps (e.g., freezing and repatriating assets) that facilitate the forfeiture of account proceeds in the United States.

4. Assisting in the service of process or in conducting discovery, such as in interviewing foreign-based witnesses and obtaining banking and other documentary evidence.

5. Permitting foreign law enforcement officials to testify at United States forfeiture proceedings.

6. Allowing foreign territory to be used in an undercover operation involving United States law enforcement officials that ultimately leads to the seizure and forfeiture of assets.

/signed/	/signed/
Ronald K. Noble Under Secretary (Enforcement) Department of Treasury	Jamie S. Gorelick Deputy Attorney General Department of Justice
Date: 4 May 95	Date: April 20, 1995

Chapter 12

Challenges to Forfeiture Enforcement under the Excessive Fines Clause of the Eighth Amendment

I. Interim Notice . . . . . 12 — 1

Chapter 12

Challenges to Forfeiture Enforcement under the Excessive Fines Clause of the Eighth Amendment

I. Interim Notice

In 1993, the Supreme Court determined that civil and criminal forfeitures may be subject to limitation under the Excessive Fines Clause of the Eighth Amendment.[1] The Court, however, expressly declined to set a standard under which "excessiveness" challenges to forfeiture were to be adjudicated. Based upon a few "hints" given in *Alexander* and *Austin* and prior Eighth Amendment case law, the Department of Justice published a monograph titled *Government Response to Forfeiture Challenges to Under the Excessive Fines Clause in Light of Austin/Alexander* (January 1994).[2] The purpose of this monograph was to provide federal attorneys with an advocacy position for responding to "excessiveness" challenges to forfeiture.

A majority of circuits have now adopted a standard or standards. The outline at the end of this chapter sets out these standards. The only uniform rule to emerge from this case law is that forfeiture of the "proceeds of crime" should never be considered constitutionally "excessive." As to other kinds of properties, the circuits have adopted either an "instrumentality" standard, a "proportionality" standard, or some combination of the two.

The Supreme Court will again address the Excessive Fines Clause and the standard to be applied thereunder when it decides *United States v. Bajakajian*, No. 96-1487, ___ U.S. ___, 117 S. Ct. 1841 (1997) (petition for certiorari granted) (reported below: 84 F.3d 334 (9th Cir. 1996)), later this term. Copies of the Government's briefs in *Bajakajian* are located at the

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[1] *See Alexander v. United States*, 509 U.S. 544 (1993) (criminal forfeiture); *Austin v. United States*, 509 U.S. 602 (1993) (civil forfeiture).

[2] This publication is available from the Asset Forfeiture and Money Laundering Section.

end of this chapter. *The positions taken in these briefs now constitute the "official positions" of the Department of Justice on all issues involving the Excessive Fines Clause and forfeiture.* The aforementioned monograph, and any advocacy positions taken in the attached outline, should be viewed as having been superseded by the Government's briefs in *Bajakajian*.

Government attorneys are now advised to frame their arguments on the Excessive Fines Clause in accordance with the Government's positions in *Bajakajian*. To the extent controlling circuit court case law conflicts with the positions taken in *Bajakajian*, counsel should:

(1) argue the case in accordance with the controlling circuit court law;

(2) note the points (if any) on which the positions taken in *Bajakajian* conflict with circuit law; and

(3) indicate that the Government respectfully disagrees with circuit law on these points and is advocating a different position in a case to be decided by the Supreme Court later this term.

The brief should succinctly summarize the Government's position on any and all points of conflict. This approach should suffice to preserve all issues for further review, if warranted, after the Supreme Court decides *Bajakajian*.

Once *Bajakajian* is decided, a new chapter 12 will be published and distributed for inclusion in this manual. In the interim, any questions, comments, or updates concerning this notice or the *Bajakajian* case should be addressed to the Asset Forfeiture and Money Laundering Section.

The following excerpt is from a presentation given by Assistant Chief Harry Harbin, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, at the Basic Money Laundering and Asset Forfeiture Seminar, Ft. Lauderdale, Florida, on October 21-23, 1997.

I. Forfeiture and the Eighth Amendment

A. Eighth Amendment

Excessive bail shall not be required,
nor excessive fines imposed,
nor cruel and unusual punishment inflicted.

1. Supreme Court Cases

Alexander v. United States, 509 U.S. 544 (1993)
Austin v. United States, 509 U.S. 602 (1993)

Forfeiture is subject to the limitations of Excessive Fines Clause

Pending:

United States v. Bajakajian, No. 96-1487, 117 S. Ct. 1841 (May 27, 1997) (petition for certiorari granted)

B. "Proceeds" and "Corpus Delicti" Property v. Other Kinds of Property

1. "Proceeds" Property

Forfeiture of the *proceeds of crime, or property traceable to such proceeds*, should *never* be considered constitutionally excessive. This position was substantially bolstered by the recent Supreme Court decision in *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135 (1996). Although the case was decided under the Double Jeopardy Clause of the Fifth Amendment which the majority was careful to distinguish from the Excessive Fines Clause of the Eighth Amendment, the majority observed that "proceeds" forfeitures serve the remedial "goal of ensuring that persons do not profit

from their illegal acts." *United States v. Ursery*, 518 U.S. 267 (1996). Justice Stevens, the lone dissenter on other issues, readily concurred with the majority on this point. *United States v. Ursery*, 518 U.S. 267 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part). The emphatic and unanimous view of the Court that forfeiting the proceeds of crime is entirely a remedial, non-punitive undertaking virtually dictates that such forfeitures should never be found to be constitutionally "excessive" under the Eighth Amendment.

3rd Circuit: *U.S. v. Various Computers*, 82 F.3d 582 (3d Cir.), *cert. denied sub nom. Lundis v. United States*, ___ U.S. ___, 117 S. Ct. 406 (1996).

4th Circuit: *U.S. v. Wild*, 47 F.3d 669 (4th Cir.), *cert. denied sub nom. Greenfield v. United States*, ___ U.S. ___, 116 S. Ct. 128 (1995).

5th Circuit: *U.S. v. Buchanan*, 70 F.3d 818 (5th Cir. 1995), *cert. denied*, 517 U.S. 1114 (1996).

8th Circuit: *U.S. v. Twenty One Thousand Two Hundred Eighty Two Dollars*, 47 F.3d 972 (8th Cir. 1995) (civil forfeiture); *U.S. v. Alexander*, 32 F.3d 1231 (8th Cir. 1994) (criminal forfeiture).

9th Circuit: Issue undecided. However, in *U.S. v. $405,089.23 U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997), the majority did not reach the "excessive fines" issue because it found that the evidence was insufficient to justify granting summary judgment based on probable cause. It accordingly remanded the case to the district court for further proceedings. The Government's singular theory of forfeiture was that the defendant properties were traceable to the proceeds of drug trafficking and hence forfeitable under 21 U.S.C. § 881(a)(6). Judge

Reinhardt, separately concurring and dissenting, said that he would have reached the "excessive fines" issue and, somewhat surprisingly, concluded his opinion by stating "I might just note for the record that it appears to me that were we to reach the Eighth Amendment claims we would be required to reject it."

2. "Corpus Delicti" Property

The same is true of what may be described as *"corpus delicti" property* (*e.g.*, the corpus of tainted money laundered in a money laundering or the unreported currency in a currency-transaction reporting offense (18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1)); obscene materials (18 U.S.C. § 1467(a)(1)); child pornography (18 U.S.C. §§ 2253(a)(1) and 2254(a)(1)); and illegal controlled substances (21 U.S.C. §§ 881(a)(1) and (f)(1)).

1st Circuit: *U.S. v. Hurley*, 63 F.3d 1 (1st Cir. 1995) ($136 million laundered for Cali Cartel ordered forfeited), *cert. denied sub nom. Saccoccia v. United States*, ___ U.S. ___, 116 S. Ct. 1322 (1996).

2d Circuit: *U.S. v. United States Currency in the Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars ($145,139.00)*, 18 F.3d 73 (2d Cir.) (currency involved in CMIR violation), *cert. denied sub nom. Etim v. U.S.*, 513 U.S. 815 (1994).

3d Circuit: *United States v. $196,601.00 in United States Currency*, No. 93-5326, *slip op.* (3d Cir. Dec. 20, 1993) (unpublished) (rejecting double jeopardy challenge to civil forfeiture of currency involved in CMIR reporting violation on "instrumentality" theory; a copy is available from the Asset Forfeiture and Money Laundering Section).

No. 96-1487

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 982(a)(1) violates the Excessive Fines Clause of the Eighth Amendment insofar as it subjects to criminal forfeiture currency that is about to be transported out of the United States without the filing of the currency report required by 31 U.S.C. 5316.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 84 F.3d 334.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. A petition for rehearing was denied on November 18, 1996. On February 7, 1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 18, 1997. A petition for a writ of certiorari was filed on March 18, 1997, and it was granted on May 27, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included in an appendix to the brief.

STATEMENT

On his plea of guilty in the United States District Court for the Central District of California, respondent was convicted on one count of willfully failing to report the transportation of $357,144 out of the United States, in violation of 31 U.S.C. 5316(a) and 5322(a). The district court held that, although 18 U.S.C. 982(a)(1) required the court to order respondent to forfeit the unreported currency to the United States, the imposition of a forfeiture greater than $15,000 would violate the Excessive Fines Clause of the Eighth Amendment. The court thus ordered a forfeiture in the latter amount. Pet. App. 16a-19a. The court of appeals affirmed, holding that the forfeiture of any of the unreported currency as a sanction for a reporting violation is unconstitutional. *Id.* at 1a-14a.

1. a. With certain limited exceptions, Title 31, Section 5316 requires a person who "transports, is about to transport, or has transported, monetary instruments of more than $10,000" outside the country to file a report with the Secretary of the Treasury. The report (Customs Form 4790) asks for the person's name and address, the kind of currency transported, the value of the currency, and, if the person is acting on someone else's behalf, the name and address of that person. Congress imposed the currency reporting requirement after concluding that such a report has "a high degree of usefulness in criminal,

tax, or regulatory investigations or proceedings." 31 U.S.C. 5311.

The House Report to the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, discusses the circumstances that led to the enactment of Section 5316. The Report notes that "[f]or years American criminal elements ha[d] been taking or sending currency out of the United States either in furtherance of a criminal activity or for deposit in a secret foreign haven." H.R. Rep. No. 975, 91st Cong., 2d Sess. 13 (1970). The money had come from "criminal activities, skim money from gambling operations and the like." *Ibid.* In addition, "many Americans ha[d] used couriers to send money to foreign jurisdictions with secrecy laws for the purpose of evading taxes and otherwise hiding assets." *Ibid.*

Those secretive activities produced "debilitating effects * * * on Americans and on the American economy." H.R. Rep. No. 975, supra, at 12. "[H]undreds of millions in tax revenues [were] lost." *Ibid.* "[U]nwanted credit" was "pumped into our markets." *Ibid.* Corporate officers "enriched themselves" and "endangered the financial soundness of their companies to the detriment of their stockholders." *Ibid.* And "[c]riminals engaged in illegal gambling, skimming, and narcotics traffic [were] operating their financial affairs with an impunity that approach[ed] statutory exemption." *Ibid.*

Investigators of those activities were "in an impossible position." H.R. Rep. No. 975, supra, at 12. They were required to "subject themselves to a time consuming and oftentimes fruitless foreign legal process," and "[e]ven when procedural obstacles [were] overcome, the foreign jurisdictions rigidly enforce[d] their secrecy

laws against their own domestic institutions and employees." *Ibid.* By enacting Section 5316 and other requirements, Congress sought to close that "serious investigative loophole." *Id.* at 13.

b. To ensure compliance with Section 5316's reporting requirement, Congress devised a series of complementary civil and criminal enforcement mechanisms. On the civil side, Congress provided that, "[i]f a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government." 31 U.S.C. 5317(c). Congress also authorized civil forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section [5316], or any property traceable to such property." *Ibid.* (referring to violation of 31 U.S.C. 5324(b), which in turn incorporates a failure to file a report required by Section 5316). In addition, "[t]he Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5216." 31 U.S.C. 5321(a)(2). The amount of the fine "may not be more than the amount of the monetary instrument for which the report was required," and "is reduced by an amount forfeited under section 5317." *Ibid.*

On the criminal side, a person who "willfully" violates the currency reporting requirement is guilty of a felony, and "shall be fined not more than $250,000, or imprisoned for not more than five years, or both." 31 U.S.C. 5322(a). Under 18 U.S.C. 982(a)(1), the provision

at issue here, "[t]he court,in imposing sentence on a person convicted of an offense in violation of [the currency reporting requirement], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." Property "involved in [the] offense" includes the money that is not reported, any commissions or fees paid to the person transporting the money, and property used to facilitate the offense. See 134 Cong. Rec. 517,365 (daily ed. Nov. 10, 1988) (interpreting the language in 18 U.S.C. 982(a)(1) before Section 5316 was added to the list of offenses leading to criminal forfeiture); 136 Cong. Rec. 11,197-11,198 (1990) (explaining that amendment adding Section 5316 offenses to the list of offenses subject to criminal forfeiture is intended to parallel the criminal forfeiture sanctions for the other offenses listed in 18 U.S.C. 982(a)(1)).

Under the statutory scheme, a district court does not have discretion to reduce the amount of a civil or criminal forfeiture. Congress entrusted to the Secretary of the Treasury and to the Attorney General the responsibility to decide the circumstances under which such a reduction would be warranted. The Secretary of the Treasury has authority to "remit any part of a [civil] forfeiture," 31 U.S.C. 5321(c), and the Attorney General is authorized to "grant petitions for mitigation or remission of [criminal] forfeiture." 21 U.S.C. 853(i)(1) (applicable to forfeitures under 18 U.S.C. 982(a)(1) by virtue of 18 U.S.C. 982(b)(1)).

2. a. On June 9, 1994, respondent Hosep Bajakajian was in Los Angeles International Airport, waiting to board a

flight to Syria. With the assistance of a canine, U.S. Customs inspectors located approximately $140,000 concealed in respondent's checked luggage and another$90,000 in a false bottom of one of his bags. An inspector then approached respondent and his family in the airport and informed them that they were required to report all money in their possession and in their luggage that exceeded $10,000. Respondent told the inspector that he had $8,000 and that his wife had $7,000. Pet. App. 2a-3a; Plea Agreement 7 (Oct. 27, 1994) (Stipulated Statement of Facts).

Customs inspectors eventually discovered $357,144 concealed by respondent and his wife. After respondent was advised of his rights, he admitted to Customs agents that he knowingly and willfully failed to report the cash. Pet. App. 3a.

b. On July 8, 1994, respondent was indicted in the United States District Court for the Central District of California. He was charged with one count of failing to report the export of currency in excess of $10,000, in violation of 31 U.S.C. 5316(a)(1)(A) and 5322(a); one count of making a false material statement to the United States Customs Service, in violation of 18 U.S.C. 1001; and one count of criminal forfeiture of the undeclared funds under 18 U.S.C. 982(a)(1). Pet. App. 3a.

On October 27, 1994, respondent pleaded guilty to the exporting unreported currency count and agreed to a bench trial on the forfeiture count. The government agreed to dismiss the false statement count at sentencing. Pet. App. 3a.

At the bench trial on the forfeiture count, the parties proffered evidence that respondent had given three

different explanations about the source of the funds he had concealed. Respondent first told Customs agents that a friend named Abe Ajemian had lent him approximately $200,000, that approximately $28,000 was his own, and that various friends and relatives had lent him the remaining $130,000. Gov't Trial Mem. 5 (filed Nov. 28, 1994). Ajemian told Customs agents, however, that, he had not lent respondent $200,000. *Id.* at 5-6. Respondent then claimed that Saeed Faroutan lent him $170,000. *Id.* at 6. Faroutan, however, told Customs agents that he had made no such loan and that respondent had asked him to lie about it. *Ibid.* Respondent finally claimed that Ajemian and six others had provided $185,000 and that the rest belonged to him. Def. Trial Mem. 2-3 (filed Dec. 15, 1994). Respondent also claimed that he owed money to his cousin and that he had intended to travel to Cyprus to deliver the money to his cousin. *Id.* at 3.

Following the bench trial, the district court found that the entire $357,144 discovered by Customs agents was involved in respondent's offense, and that those funds were therefore subject to forfeiture under 18 U.S.C. 982(a)(1). Pet. App. 16a. At sentencing, however, the court ordered respondent to forfeit only $15,000, ruling that forfeiture of more than that amount would be "grossly disproportionate" to respondent's culpability and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment. *Id.* at 17a-18a. The court stated:

I do believe that the United States currency was in the suitcase and in the carry-on luggage for reasons that were not illegal.I do believe that, even though it's a somewhat suspicious and confused story, documented in

the poorest way, and replete with past misrepresentation, that the funds were * * * borrowed funds.

* * * * *

And I think the evidence has developed that [respondent's] state of mind * * * grew out of * * * distrust for the Government. * * * So, the amount of forfeiture will be modest, and will be very minor, because in truth, and, in fact, I think none should be forfeited.

Ibid. The court also sentenced respondent to three years' probation and fined him $5,000. *Id.* at 18a-19a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court applied a two-part test under which a forfeiture is constitutional under the Excessive Fines Clause only if "(1) the property forfeited is an 'instrumentality' of the crime committed, and (2) the value of the property is proportional to the culpability of the owner." *Id.* at 5a. The court held that the money concealed by respondent failed to satisfy the instrumentality component of that test. The court reasoned that money involved in a violation of Section 5316 can never be an instrumentality of that offense, because "[t]he crime is the withholding of information not the possession or the transportation of the money." *Id.* at 6a.

The court concluded that its holding did not conflict with this Court's decision in *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam), which, in rejecting a double jeopardy claim, upheld as remedial the civil forfeiture of gems that had not been declared when the owner brought them into the country. Pet. App. 7a-8a. The court believed that the smuggled gems in *One Lot Emerald Cut Stones* were "contraband," but that the money involved in a currency reporting violation is not.

Id. at 8a. The court further stated that the "key difference," is that "a violation of § 5316 merely deprives the government of information, whereas the smuggling of goods across the border deprives the government of revenue." *Ibid.*

Having concluded that a forfeiture constitutes an excessive fine unless the forfeited property was an instrumentality of an offense, and that money involved in a violation of Section 5316 is not an instrumentality of that offense, the court held that "[f]orfeiture of any amount" of respondent's undeclared money "would be unconstitutionally excessive under * * * [the] Excessive Fines Clause." Pet. App. 9a. The court affirmed the judgment of the district court ordering the forfeiture of $15,000 only because respondent had failed to cross appeal and therefore could not challenge the district court's judgment. *Id.* at 9a-10a.

Judge Wallace concurred in the judgment of affirmance, but disagreed with the majority's Eighth Amendment analysis. Pet. App. 10a-14a. Judge Wallace concluded that money involved in a violation of Section 5316 is an instrumentality of that offense, because "without the currency, there can be no offense." *Id.* at 13a. In ruling otherwise, Judge Wallace emphasized, "the majority strikes down a portion of 18 U.S.C. 982(a)(1), thereby unduly limiting the government's forfeiture powers." *Id.* at 10a. Judge Wallace nonetheless voted to affirm the district court's judgment, because he concluded that the district court did not commit clear error in finding that a $15,000 forfeiture was proportional to respondent's culpability. *Id.* at 18a-14a.

The government's petition for rehearing and suggestion

for rehearing en banc were denied. Judge Wallace voted to grant both the petition for rehearing and the suggestion for rehearing en banc. Pet. App. 15a.

SUMMARY OF ARGUMENT

Respondent was convicted and sentenced for the felony of willfully failing to file a required currency report as he was about to leave the United States with $357,144 in cash. The court of appeals concluded that the forfeiture of that undeclared cash—or of any cash involved in a failure-to-report violation—constitutes an excessive fine, in violation of the Eighth Amendment. That holding is incorrect. The criminal forfeiture of currency that is not declared as required by federal law is not an "excessive fine" within the meaning of the Eighth Amendment.

A. Throughout this nation's history, Congress has provided for forfeiture as a sanction for the improper use of property in the commission of offenses. The First Congress provided for enforcement of the customs laws by authorizing the forfeiture of property imported without proper declaration. Later forfeiture laws reached a variety of forms of property used or involved in a criminal offense. This Court has consistently rejected constitutional challenges to such forfeitures, and the long history of such statutes provides strong support for the proposition that they are not "excessive" fines.

The forfeiture of such instrumentalities of crime (*i.e.*, property used or involved in the commission of an offense) is a proportionate sanction because, apart from any punitive purpose such forfeitures might serve, they serve important remedial aims. They encourage property owners to take care that their property does not become

involved in crime; they prevent further use of the property in crime; and they impose an economic sanction that renders crime less profitable. In view of those purposes, the forfeiture of the instrumentalities of crime, whether in a civil or criminal proceeding, is a proportionate remedy. It is the property's involvement in the offense that justifies such a remedial forfeiture; the Eighth Amendment does not require an additional inquiry into the culpability of the owner or the property's economic value.

The forfeiture of the undeclared currency involved in a reporting offense is justified on that basis. The currency is an indispensable instrumentality of the failure-to-report offense. The offense requires proof that cash is being transported (or is about to be transported); without the involvement of the cash, there is no offense. Forfeiture of the cash also serves the traditional remedial goals of instrumentality forfeitures. The remedy prevents the use of unreported cash to conceal or further criminal activity, and it encourages travelers to report information that is critical in the investigation of domestic and international crime. Finally, the sanction is precisely tailored to the magnitude of the violation; the greater the amount of cash that is transported without declaration, the greater the potential harm posed by the unlawful activity.

B. The forfeiture of the undeclared cash as part of a criminal sentence for a failure-to-report offense is also justified as serving punitive purposes.

Forfeiture of the property used by a criminal in carrying out his offense is an inherently fitting penalty for a serious crime. The defendant, in such a case, has effectively set his own "fine" by electing to employ his property in furthering a criminal venture. No further analysis of a defendant's

culpability (or of the value of his property) is needed to uphold the proportionality of such a criminal forfeiture.

Even if criminal forfeiture were applied to property that is not significantly tied to the offense, the sanction would not automatically be excessive. The question in such a case would be the same as in an excessive fines challenge to a monetary sanction: whether the amount of the financial penalty is excessive in relation to the seriousness of the offense. The answer to that question, as with other Eighth Amendment questions, must give deference to the legislature's assessment of the seriousness of the crime and appropriate penalties.

Here, Congress's judgment to impose criminal forfeiture on the undeclared cash does not transgress constitutional bounds. The circulation of unreported cash throughout the world facilitates money laundering, tax evasion, and other illicit conduct. To address such serious harms, Congress has made it a felony for a person willfully to fail to report cash that is about to be exported, and has authorized a sentence of up to five years' imprisonment and a $250,000 fine. Including in the sentence the forfeiture of the very cash involved in the offense is not an excessive fine. Far from being excessively punitive, such a forfeiture is perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed.

ARGUMENT
THE CRIMINAL FORFEITURE OF CURRENCY THAT IS ABOUT TO BE TRANSPORTED OUT OF THE UNITED STATES WITHOUT THE FILING OF A REQUIRED CURRENCY REPORT IS NOT AN EXCESSIVE FINE

The Eighth Amendment to the Constitution prohibits the imposition of "excessive fines." This Court has held that both *in personam* criminal forfeitures and civil *in rem* forfeitures are "fines" within the meaning of the Excessive Fines Clause. *Alexander v. United States*, 509 U.S. 544, 558 (1993) (*in personam* criminal forfeitures); *Austin v. United States*, 509 U.S. 602, 618-622 (1998) (civil *in rem* forfeitures). The Court has not, however, established a standard for determining when such forfeitures become constitutionally "excessive." *Alexander*, 509 U.S. at 559 (remanding for consideration of that issue); *Austin*, 509 U.S. at 622-623 (same).

The court of appeals in this case held that a forfeiture is constitutionally excessive unless it satisfies two conditions: (1) the property forfeited must be an instrumentality of the crime committed, *i.e.* the forfeited property must have a sufficient relationship to the illegal activity; and (2) the forfeiture must not be grossly disproportionate to the culpability of the owner. Pet. App. 5a; *United States v. 6830 Little Canyon Road*, 59 F.3d 974, 982 (9th Cir. 1995). The Ninth Circuit applies that same test to both criminal and civil forfeitures. Pet. App. 5a (criminal); *6830 Little Canyon Road*, 59 F.3d at 982 (civil).

In our view, compliance with the Eighth Amendment does not require satisfaction of both conditions

set forth by the court of appeals. Instead, as a general matter, a criminal forfeiture complies with the Eighth Amendment as long as it satisfies either. Under the correct constitutional standard, the forfeiture of the currency involved in this case is not excessive.[1]

[1] While the courts of appeals have differed somewhat in the way they have framed the legal analysis, they have almost uniformly rejected excessive fines challenges to forfeitures of property involved in federal criminal offenses. See *United States v. Tencer*, 107 F.3d 1120,1135 n.7 (5th Cir. 1997); *United States v. One Parcel Property*, 106 F.3d 336, 338-339 (10th Cir. 1997) (per curiam); *United States v. 829 Calle De Madero*, 100 F.3d 734, 736-739 (10th Cir. 1996); *United States v. One Parcel Property Located at Lot 85,* 100 F.3d 740, 744 (10th Cir. 1996), cert. denied, No. 96-1736, 1997 WL 220039 (June 2, 1997); *United States v. Elder*, 90 F.3d 1110,1132-1133 (6th Cir.), cert. denied, 117 S. Ct. 529 (1996), 117 S. Ct. 993 (1997); *United States v. One 1970 36.9' Columbia Sailing Boat*, 91 F.3d 1053, 1057-1058 (8th Cir. 1996); *United States v. All Right, Title and Interest in Real Property and Appurtenances*, 77 F.3d 648, 658-659 (2d Cir.), cert. denied, 117 S. Ct. 67 (1996); *United States v. 427 and 429 Hall Street*, 74 F.3d 1165, 1170-1173 (11th Cir. 1996); *United States v. 11869 Westshore Drive*, 70 F.3d 923, 926-930 (6th Cir. 1995), cert. denied, 117 S. Ct. 57 (1996); *United States v. Buchanan*, 70 F.3d 818, 830-831 n.12 (5th Cir.), cert. denied, 116 S. Ct. 1340-1341, 1366. (1996); *United States v. Bieri*, 68 F.3d 232, 235-238 (8th Cir. 1995), cert. denied, 116 S. Ct. 1876 (1996); *United States v. Milbrand*, 58 F.3d 841, 845-848 (2d Cir. 1995), cert. denied, 116 S. Ct. 1284 (1996); *United States v. 429 South Main Street*, 52 F.3d 1416, 1421-1422 (6th Cir. 1995); *United States v. Plescia*, 48 F.3d 1452,1462 (7th Cir.), cert. denied, 116 S. Ct. 114, 329, 351, 556 (1995); *United States v. Chandler*, 36 F.3d 358, 362-366 (4th Cir. 1994), cert. denied, 514 U.S. 1082 (1995); *United States v. Myers*, 21 F.3d 826, 830-831 (8th Cir. 1994), cert. denied, 513 U.S. 1086 (1995). But see, *e.g., United States v. 18755 North Bay Road*, 13 F.3d 1493,1498-1499 (11th Cir. 1994).

A. The Criminal Forfeiture Of Unreported Currency Is Not Excessive Because Unreported Currency Is An Essential Instrumentality Of An Unreported Currency-Transportation Offense

1. a. Since the First Congress, this nation's laws have provided for the forfeiture of property involved in certain offenses. The First Congress enacted customs laws that provided for the forfeiture of goods entered by false statements, goods unloaded at night or without a permit, concealed goods on which duties had not been paid, and relanded goods entitled to a drawback. Act of July 31, 1789, ch. 5, §§12, 23, 24, 34, 1 Stat. 39, 43, 46. The early customs laws also provided for the forfeiture of vessels involved in customs offenses. §§12, 40, 1 Stat. 39, 49. Under the early customs statutes, forfeiture did not depend on the value of the property or the culpability of the property owner; the property's involvement in the offense was sufficient.

"The historical importance of the enactment of [those] customs statute[s] by the same Congress which proposed the [Eighth] Amendment is manifest." *United States v. Ramsey*, 431 U.S. 606, 616-617 (1977) (applying that analysis in upholding border searches under the Fourth Amendment). The necessary premise of the early customs laws is that the forfeiture of property involved in an offense is not an excessive fine. Those laws and the view of the Eighth Amendment they reflect are "contemporaneous and weighty evidence of [the Eighth Amendment's] true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); see also *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986); *Marsh v. Chambers*, 463 U.S. 783, 790-791 (1983).

b. Congress has subsequently enacted numerous laws authorizing civil forfeiture of property involved in criminal offenses, and "contemporary federal * * * forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 603, 683 (1974). In a long line of decisions, this Court has rejected Due Process and Double Jeopardy Clause challenges to the validity of such forfeitures. The Court has upheld the forfeiture of a variety of forms of property involved in offenses, including: vessels involved in piracy (*The Palmyra*, 25 U.S. (12 wheat.) 1,13 (1827); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233-234 (1844)); a distillery and associated real and personal property when alcohol taxes were not paid (*Dobbins's Distillery v. United States*, 96 U.S. 395, 400-401(1878)); an automobile used to transport liquor on which taxes had not been paid (*J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 508, 510-512 (1921)); undeclared imported gems (*One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)); unlicensed firearms (*United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364-366 (1984)); and real property used for growing marijuana (*United States v. Ursery*, 116 S. Ct. 2135, 2138-2139 (1996)).

As was true with the first customs laws, the forfeitures in later statutes were "fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant." *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment); see,

e.g., *The Palmyra,* 25 U.S. (12 Wheat.) at 14 ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing"); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) at 23. ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."); *Dobbins's Distillery*, 96 U.S. at 401 ("the offense is attached primarily to the distillery and the real and personal property used in connection with the same, without any regard whatsoever the personal misconduct or responsibility of the owner"); *Goldsmith-Grant Co.*, 254 U.S. at 513 ("It is the illegal use that is the material consideration, that which works the forfeiture, the guilt innocence of its owner being accidental."). Congress's 200-year practice of providing for the forfeiture of instrumentalities without a separate inquiry into the value of the property involved in the offense or the culpability of the owner "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936).[2]

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[2] The early forfeiture cases do not employ the test "instrumentality" to describe the property involved in offense. That term, however, fairly characterizes the range property whose forfeiture is authorized because of the use involvement of the property in a direct and substantial within the offense (*i.e.*, conveyances used to transport contraband real property used to carry out unlawful activity, property imported without proper declaration). See *United States v. Buena Vista Avenue*, 507 U.S. 111, 119-121(1993) (plural opinion).

c. The cases cited above, though addressing Due Process and Double Jeopardy claims, illuminate why Congress has never viewed instrumentality forfeitures as excessive fines. As those cases explain, the forfeiture of property involved in an offense, "while perhaps having certain punitive aspects, serves important nonpunitive goals." *Ursery*, 116 S. Ct. at 2148. Such a forfeiture both "encourages property owners to take care in managing their property," *Ibid.*, and "prevent[s] further illicit use of the [property]," *Bennis v. Michigan*, 116 s. et. 994,1000 (1996). See also *Calero-Toledo*, 416 U.S. at 687 (forfeiture of wrongfully used property "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable"); *89 Firearms*, 465 U.S. at 363 (forfeiture of unlicensed firearms discourages unregulated commerce and removes firearms intended for use outside regulated channels). Those "broad remedial aims," *Ursery*, 116 S. Ct. at 2142, are served by a forfeiture of property involved in an offense, regardless of the value of the property or the culpability of the owner.[3]

Because instrumentality forfeitures serve important remedial goals in a direct and material way, Congress has always viewed them as fair and appropriate sanctions, not "excessive fines." That considered judgment by Congress

[3] Forfeitures of instrumentalities of an offense can also serve as a reasonable form of liquidated damages to defray the government's costs of enforcement and the societal harms created by the activity in which the property is involved. See *One Lot Emerald Cut Stones*, 409 U.S. at 237. That purpose is implicated regardless of the culpability of the owner.

is reasonable and therefore entitled to deference. Cf. *Harmelin v. Michigan*, 501 U.S. 957, 998-999 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

2. For the reasons discussed above—the persuasive force of the views of the First Congress, the weight of 200 years of congressional practice, and the reasonableness of Congress's judgment that instrumentality forfeitures represent appropriate remedial sanctions—traditional instrumentality forfeitures are not "excessive fines" within the meaning of the Eighth Amendment. Accordingly, in such cases, there is ordinarily no requirement of a separate inquiry into the value of the property or the culpability of the owner.[4]

a. The forfeiture of unreported currency involved in an offense is justifiable on an instrumentality theory. Section 5316 makes it unlawful to transport currency of more than $10,000 outside of the Unite States without filing a report with the Secretary of the Treasury. 31 U.S.C. 5316. A person who "willfully" violates that requirement commits a criminal offense, 31 U.S.C. 5322(a), and the undeclared

[4] It is, however, appropriate to inquire into the degree relationship that the property bears to the offense. An incidental or remote relationship between the property and the offense would not accord with the traditional applications forfeiture doctrine described above. Such a relationship would therefore justify further analysis under the Excessive Fines Clause. See, e.g., *Bennis*, 116 S. Ct. at 1000 (forfeiture of ocean liner because of the activities of one of its passenger). *Austin*, 509 U.S. at 627-628 (Scalia, J., concurring in part and concurring in the judgment) (forfeiture of a building in which an isolated drug deal happens to occur). Absent a sufficient connection between the property and the offense as traditionally understood, the property may not fairly be described as "instrumentality" of the offense.

currency is subject to mandatory forfeiture, 18 U.S.C. 982(a)(1). Such a forfeiture satisfies constitutional requirements, because the undeclared currency is an essential instrumentality of the offense. The currency that is transported in a reporting violation is "the very sine qua non of the crime." *United States v. United States Currency in the Amount of $145,139*, 18 F.3d 73, 75 (2d Cir.), cert. denied, 513 U.S. 815 (1994). For "without the currency, there can be no offense." Pet. App. 13a (Wallace, J., concurring in the judgment). Thus, unreported cash that is about to be exported does not merely facilitate a violation of law; there would be no violation at all without the exportation (or attempted exportation) of the cash. Accordingly, as the Second Circuit explained in *United States Currency in the Amount of $145,139*:

> Clearly, it is much more accurate to describe the currency as the means by which the crime was committed than it would be to so describe a house from which drugs had been sold or an automobile in which they had been transported. If, as we have held, a house can be considered an instrumentality of the crime, * * * we would be blinking reality if we held that the money in the instant case was any less an instrumentality.

18 F.3d at 75.

b. As with traditional instrumentality forfeitures, the forfeiture of undeclared currency also serves important remedial purposes. The government has an overriding sovereign interest in controlling what property leaves and enters this country. See *Ramsey*, 431 U.S. at 616-619.

Reporting requirements are an essential means of serving that vital interest. The reporting requirement at issue here serves a particularly important function in deterring and investigating crime. Before the reporting requirement was imposed, criminal enterprises had been able to send money secretly out of the country either in furtherance of their criminal activities or for deposit in countries with secrecy laws, and thus were able to operate their financial affairs "with an impunity that approache[d] statutory exemption." H.R. Rep. No. 975, supra, at 12. Many other persons had sent money to foreign jurisdictions with secrecy laws for the purpose of evading taxes, leading to hundreds of millions of dollars in lost tax revenues. *Id.* at 12-1 And some corporate officials had enriched themselves at the expense of their companies and stockholder *Id.* at 12. The reporting requirement not only deters illicit movements of cash, it also gives the government valuable information to investigate and detect criminal activities associated with that cash. By "singl[ing] out transactions found to have the greatest potential" for "[circumventing] the enforcement of the laws of the United States," see *Califonia Bankers Ass'n v. Shultz*, 416 U.S. 21, 63 (1974). The reporting requirement provides the government with information that has "a high degree of usefulness in criminal, tax, or regulatory investigations of proceedings." 31 U.S.C. 5311.

The forfeiture of undeclared currency plays an important role in supporting the remedial purposes of the reporting requirement. It both encourages persons to inform the government that they are transporting more than $10,000 in cash outside the country and prevents such money from being used in circumvention of requirements in the future. A forfeiture of all the money involved in a reporting

violation is precisely tailored to the remedial purposes of the reporting requirement. The dangers created by money that is secretly exported increase as the amount of money secretly exported increases: The greater the amount of money that is laundered hidden overseas, the greater the potential harm to the people and the economy of this country. Thus, it is a fair and reasonable remedy to subject to forfeiture the cash that a person attempts secretly and unlawfully to export.

c. The forfeiture of currency involved in an undeclared currency violation also has deep historical roots. As noted above, since the First Congress, this nation's laws have provided for the forfeiture of goods involved in customs offenses. Those laws reflect the view that when property is imported without compliance with declaration and reporting requirements, it is a reasonable remedy to confiscate the property unlawfully imported.

In *One Lot Emerald Cut Stones,* supra, this Court held, in rejecting a claim under the Double Jeopardy Clause, that the civil forfeiture of such undeclared goods serves legitimate remedial ends. In that case, "defendant who entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring was acquitted of criminal smuggling charges." 409 U.S. at 232-233. Following the acquittal, the government instituted a civil forfeiture proceeding against the stones and ring under a statute that authorized forfeiture of any article not included in a declaration prior to inspection. *Id.* at 233 & n.2. This Court held that the Double Jeopardy Clause did not bar the forfeiture proceeding, noting that the civil forfeiture served remedial rather than punitive purposes. *Id.* at 235-237. The Court explained that the

forfeiture of undeclared property "prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provides and serves to reimburse the Government for investigation and enforcement expenses." *Id.* at 237. "[S]uch purposes," the Court noted, "characterize remedial rather than punitive sanctions." *Ibid.*

This Court has made clear that the remedial characterization of such customs forfeitures applies equally under the Excessive Fines Clause. In *Austin*, the Court cited *One Lot Emerald Cut Stones* as an example of a remedial forfeiture, stating that "forfeitures of goods involved in customs violations are justified as a remedial sanction and therefore are not excessive fines. *Austin*, 509 U.S. at 621.

The forfeiture of money involved in a reporting violation bears important similarities to the forfeiture of undeclared goods. Both actions reflect the government's sovereign interest in controlling what property leaves and enters this country. Both also encourage the reporting of information required for an important regulatory function: when goods are declared, the information determines their exposure to duties and their admissibility into the United States; when currency is reported, the information may be used to investigate and detect circumvention of our drug, tax, and other laws. Both kinds of forfeitures prevent circumvention of requirements in the future, and both "provide a reasonable form of liquidated damages for violation of the inspection provisions and serve to reimburse the Government for investigation and enforcement expenses." *One Lot Emerald Cut Stones*, 409

U.S. at 237. Finally, like undeclared goods, undeclared currency is that very item hidden from the government and is therefore the central instrumentality of the offense. The forfeiture of undeclared currency therefore comes within the tradition in this country of remedial customs forfeitures.

d. The court of appeals sought to distinguish forfeiture of undeclared currency from forfeiture of undeclared goods on the ground that Section 5316(a) does not make unlawful "the illegal possession, transportation, or smuggling of dutiable items," but only "the failure to provide information." Pet. App. 7a-8a. That description of the offense is incomplete. The offense is not merely the failure to report, but the willful failure to file a report when "transport[ing] monetary instruments of more than $10,000 at one time * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1); 5322(a). The essence of the offense is therefore smuggling money out of the country, not simply failing to provide information.

The court of appeals also believed that undeclared goods may be characterized as contraband, while undeclared currency cannot be. Pet. App. 8a. Undeclared currency and undeclared goods, however, cannot be distinguished on that ground. Both are generally lawful to possess; both become subject to seizure and forfeiture when an attempt is made to smuggle them unlawfully across the border. The Ninth Circuit found it significant that the failure to declare goods deprives the government of revenue in the form of duties, while the failure to report currency information deprives the government only of information. Pet. App. 8a. The harm to the government

from reporting violations, however, though not always quantifiable, is considerable. Money is often secretly exported in order to evade the payment of taxes. Such violations can lead to an incalculable lose in tax revenue. And, the economic power of much criminal activity depends on money laundering that secretly moves cash in and out of the country. Tracing the flow of currency plays a vital role in attacking global criminal activity. Given the major drain on the economy of such illicit financial activities, crimes that allow unreported dollars to circulate throughout the world inflict significant harm. Thus money that is secretly exported out of this country produces "debilitating effects * * * on Americans and the American economy." H.R. Rep. No. 975, *supra*, at 12.

3. The currency in this case was subject to forfeiture in a criminal *in personam* proceeding rather than a civil *in rem* proceeding. That circumstance however, does not alter the conclusion that the currency is an instrumentality whose forfeiture is justifiable as a reasonable remedial measure. Criminal sanctions are usually intended primarily to inflict punishment. But "nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of civil form of proceeding." *Helvering v. Mitchell*, 303 U.S. 391, 402 n. (1938). For example, an order requiring a person convicted of a crime to provide restitution to his victim serves the remedial goal of making the victim whole, regardless of whether the order is imposed in civil or a criminal proceeding. See 18 U.S.C. 3663. Similarly, whether imposed in a civil or criminal proceeding, a forfeiture of the proceeds of an offense serves the remedial purpose "of ensuring that persons do not profit from their illegal acts," *Ursery*, 116 S. Ct. at

2152 (Stevens, J., concurring in the judgment in part and dissenting in part). The same reasoning applies to forfeitures of instrumentalities. Such forfeitures can serve the same remedial goals in criminal proceedings that they had in civil *in rem* proceedings.

The text of Section 982(a)(1) shows that Congress intended to rely on remedial as well as punitive goals when it mandated the criminal forfeiture of the currency at issue here. Section 982(a)(1) provides that, in imposing sentence for a reporting violation, the court shall order forfeiture of "any property, real or personal, involved in such offense." 18 U.S.C. 982(a)(1). As a general matter, property "involved in [the] offense" is a shorthand description for the kind of property historically subject to forfeiture in a civil *in rem* proceeding. See 134 Cong. Rec. 517,365 (daily ed. Nov. 10, 1988) (property involved in the offense includes the money involved in the offense, any commissions or fees paid to the person transporting the money, and property used to facilitate the offense). Indeed, the provision authorizing civil *in rem* forfeiture for reporting violations uses the same "involved in" language to identify the kind of property subject to forfeiture. 31 U.S.C. 5317(c) (referring to violation of 31 U.S.C. 5324(b), which in turn incorporates a failure to file a report required by Section 5316). By generally limiting the property subject to forfeiture to property that has traditionally been subject to forfeiture in civil *in rem* proceedings, Congress manifested its intent to further, among other things, traditional remedial ends.

In sum, the currency involved in an undeclared currency violation is subject to forfeiture as an instrumentality of the offense. Such a forfeiture is

justifiable by remedial purposes, regardless of whether the forfeiture occurs in a civil or a criminal proceeding. In view of the remedial goals served by this traditional form of forfeiture, the forfeiture of the unreported currency in this case is not an excessive fine.

B. The Criminal Forfeiture Of Unreported Currency Is Not Excessive Because Such A Forfeiture Is Commensurate With The Seriousness Of An Unreported Currency Offense

Quite apart from the instrumentality analysis described above, the forfeiture of unreported currency as a criminal sanction for a failure to report transportation of that currency is not an excessive fine. Although criminal forfeitures often may serve remedial purposes, they need not be justified solely in those terms. Such forfeitures may also be independently justified as punishment, so long as the punishment is not excessive in relation to the offense. Given respondent's decision to involve his money in a crime and' the serious nature of the offense, the forfeiture of the currency involved in this case is not a disproportionate punishment.

1.a. The background of the Excessive Fine Clause shows that its principal concern was with the imposition of excessive monetary fines for punitive purposes. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-267 (1989) The Excessive Fines Clause was modelled on a provision of the Virginia Declaration of Rights, which in turn was based on a provision of the English Bill of Rights. *Id.* at 266. The English version was intended to curb the excesses of English judges under the reign of James II. *Id.* at 267.

During the reigns of the Stuarts, the King's judges imposed heavy fines on the King's enemies, and later, the use of fines became even more excessive and partisan, forcing some opponents of the King to remain in prison because they could not pay the huge monetary penalties assessed. *Ibid.* Given that background of the Eighth Amendment, when Congress authorizes the imposition of a monetary fine solely as punishment, the most relevant constitutional inquiry is whether the value of the fine is excessive when compared to the seriousness of the offense. *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment).

The criminal forfeiture of property that the defendant has used or involved in a serious offense is a distinctive "fine," and will virtually always constitute a proportionate punishment. That is because the defendant, through his own actions, has put his property in the service of crime, and thereby has set the size of his own financial penalty. Confiscation of that property as part of his sentence is inherently proportionate to the violation.

b. But even if criminal forfeiture were authorized of property that had not been substantially or significantly devoted to the commission of the offense, such a "fine" would not automatically be excessive. When such a forfeiture is imposed as an *in personam* punishment for a criminal offense, it is "no different, for Eighth Amendment purposes, from a traditional [monetary] 'fine.'" *Alexander*, 509 U.S. at 558. Such a punitive forfeiture operates as an "in-kind" assessment. *Austin*, 509 U.S. at 624 (Scalia, J., concurring in part and concurring in the judgment). The appropriate inquiry would then be whether the value of the property is excessive when

compared to the seriousness of the offense. *Id.* at 627; see *Alexander*, 509 U.S. at 558. Because the property in such a forfeiture may be seen as equivalent to an ordinary monetary fine, there is no constitutional requirement that it have any particular relationship to the offense.

In such a case, a court has a limited role in determining whether a punitive forfeiture is constitutionally excessive. In this context, as in applying the Cruel and Unusual Punishment Clause, the Eighth) Amendment "does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Instead, it forbids only those fine that are "grossly disproportionate" to the seriousness of the offense. *Solem v. Helm*, 463 U.S. 277-288 (1983). In conducting that inquiry, substantial deference must be given to Congress' judgment concerning the seriousness of the offense. *Harmelin*, 501 U.S. at 998-999 (Kennedy, J., concurring in part and concurring in the judgment). A court "should not substitute its judgment as to seriousness for that of legislature, which is 'far better equipped to perform the task and [is] likewise more responsive to change in attitude and more amenable to the recognition and correction of their misperceptions in this respect.'" *Blanton v. City of North Las Vegas*, 489 U.S. 538, 54: 542 (1989).

2.a. Under the correct standard, the criminal forfeiture mandated in this case is not excessively punitive. First, the property subjected to forfeiture is the very money that respondent involved in his offense. Such a punishment thus fairly fits the crime without further inquiry into the value of the forfeiture property. Second, to the extent that the value of the property bears on the excessiveness 30

question, to "fine" here is proportionate.

Forfeiture of the undeclared cash is perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed. *United States v. United States Currency in the Amount of $145,139*, 803 F. Supp. 592, 600 (E.D.N.Y. 1992), aff'd, 18 F.3d 73 (2d Cir.), cert. denied, 513 U.S. 815 (1994). And the offense itself is a serious one. Respondent was convicted of a willful violation of the reporting requirement. Respondent's conviction rests on an admission that he knew that it was unlawful to export more than $10,000 without filing a report and decided not to file such a report anyway. Congress authorized significant penalties for such a willful violation. In addition to mandating criminal forfeiture of the currency, Congress authorized as additional punishment a $250,000 fine and/or a five-year term of imprisonment. 31 U.S.C. 5322(a). Those authorized penalties are the best indication of Congress's view of the seriousness of the offense. See *Blanton*, 489 U.S. at 541, 542 ("In fixing the maximum penalty for a crime, a legislature 'include[s] within the definition of the crime itself a judgment about the seriousness of the offense'" and the maximum period of incarceration is "the most powerful indication" of that judgment).

Congress' judgment concerning the seriousness of a willful violation of the reporting requirement is well-founded. As previously discussed, Congress was aware that the secret export of large amounts of cash is often associated with money laundering, tax evasion, and other serious offenses. Congress reasonably determined that a

reporting requirement was essential to deter and detect such activity and that willful violations of that requirement should result in strict punishment. See *United States v. O'Banion*, 943 F.2d 1422,1482-1488 (5th Cir. 1991) (regulation of currency that crosses our borders is a "serious matter," and claim that classification of a reporting offense as a felony violates the Cruel and Unusual Punishment Clause is not "plausible").

In light of the seriousness of a willful violation of the reporting requirement, the forfeiture of the very money involved in that offense cannot be viewed as a "grossly disproportionate" punishment. In general, while "[p]enalties such as * * * a fine may engender 'a significant infringement of personal freedom,' * * * they cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542. If respondent were sentenced to a term of imprisonment, he could not seriously claim that his punishment was grossly disproportionate to the offense. See *O'Banion*, 943 F.2d at 1422. Because the forfeiture of the money concealed in the offense is a less severe penalty, any claim that it is excessively punitive is even less persuasive.

b. Nothing in the facts of this case suggests that forfeiture of the undeclared currency would be an excessive fine. Respondent violated the reporting requirement after a customs officer approached him and told him that he was required to file a report if he was intending to export more than $10,000 in currency. Respondent then deliberately lied about the amount of money in his possession, claiming that he had less than $10,000 when he was actually planning to export $847,144. After customs inspectors discovered the currency concealed by respondent and his 32

wife, respondent admitted to agents that he knowingly and willfully failed to report the cash. Pet. App. 3a; Plea Agreement 7 (Oct. 27, 1994) (Stipulated Statement of Facts). Respondent then lied about the source of the funds, providing three different explanations about it. Gov't Trial Mem. 5-6 (filed Nov. 28, 1994); Def. Trial Mem. 2-3 (filed Dec. 15, 1994). For that conduct, respondent was sentenced to three years' probation and fined $5,000. Particularly in light of the range of possible sentences that Congress contemplated, it cannot be excessively punitive to add to respondent's sentence a forfeiture of the very money he concealed.

c. That conclusion is not affected by the district court's finding that "even though it's a somewhat suspicious and confused story, documented in the poorest way, and replete with past misrepresentation," respondent obtained the funds from a legitimate source and intended to use them for a legitimate purpose. Pet. App. 17a-18a. Congress viewed willful violations of the reporting requirement as a serious offense, without regard to whether the government can prove that the defendant was violating or intending to violate other laws at the same time. Rather than viewing the presence of other violations
as a necessary element of the offense, Congress regarded such additional violations as grounds for doubling the maximum penalties. In such cases, Congress authorized a fine of "not more than $500,000, imprison[ment] for not more than 10 years, or both." 31 U.S.C. 5322(b).

Congress' decision to mandate forfeiture for a willful reporting violation, whether or not additional violations are proven, was entirely reasonable. Deliberately violating an important criminal law is itself a serious matter,

regardless of whether the dangers that the law is designed to prevent materialize. Moreover, if Congress had mandated forfeiture only in cases in which other violations of the law could be proven, there would have been far less incentive for persons to 'comply with the reporting requirement in the first place. Those planning to export money for money laundering or tax evasion purposes would be far more willing to attempt to smuggle the cash if they knew that the money was not at risk unless the government could prove that their clandestine movement of the money was designed to further other violations of the law. Acceptance of respondent's asserted defense would therefore significantly undermine Congress' purposes.

d. It is also relevant to the constitutional inquiry in this case that Congress has left room for mitigation of a forfeiture in appropriate cases. Congress has authorized the Attorney General to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section." 21 U.S.C. 853(i)(1) (applicable to forfeitures under 18 U.S.C. 982(a)(1) by reference to 18 U.S.C. 982(b)(1)). Congress could reasonably decide that the Attorney General is in the best position to decide when the mitigation of criminal forfeiture would not compromise legitimate law enforcement interests.

e. In sum, as long as Congress has made a reasonable judgment that the punishment fits the crime, judicial inquiry is at an end. *Harmelin*, 501 U.S. at 998-999, 1001 (Kennedy, J., concurring in part and concurring in the judgment); *Solem* 463 U.S. at 303. Congress's

determination that forfeiture of undeclared funds is a fitting punishment for a willful reporting violation, leaving to the Attorney General the power to decide when mitigation is warranted, is eminently reasonable and satisfies constitutional requirements.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for the imposition of a sentence that requires respondent to forfeit to the government the currency involved in his offense.

Respectfully submitted.

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JULY 1997

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Section 5816 of Title 81, United States Code, provides in relevant part:

> (a) Except as provided in subsection (c) of the section, a person or an agent or bailee of the person shall file a report under subsection (b) this section when the person, agent, or bail knowingly—
>
> > (1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
> > > (A) from a place in the United States or through a place outside the United States;
>
> * * *
>
> (b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. * * *

No. 96-1487

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER,

v.

HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. As we show in our opening brief (at 15-27), the forfeiture of respondent's cash is not an excessive fine, because the cash is an instrumentality of respondent's currency transportation offense and because instrumentality forfeitures are proportionate remedial sanctions, not excessive fines.

1.a. Respondent contends (Br. 15-16) that his unreported cash was not an instrumentality of his offense, because money is both lawful to possess and to transport across the border. Historically, however, property subject to forfeiture has not been limited to property that is unlawful to possess. Instead, forfeiture laws have long authorized the seizure of lawful property when it becomes significantly involved in an offense. *See United States v. 92 Buena*

Vista Avenue, 507 U.S. 111, 119-121 (1993) (plurality opinion); *see also Austin v. United States*, 509 U.S. 602, 627-628 (Scalia, J., concurring in part and conurring in the judgment). In some cases, the inquiry into whether property is significantly involved in an offense presents close questions. Here, however, the cash subject to forfeiture is the very property that respondent sought to transport across the border without the required declaration. Respondent's cash is not merely substantially involved, but entirely and indispensably involved, in that offense.

In that respect, the cash subject to forfeiture in the present case is identical to the goods made subject to forfeiture under early customs laws (*see* U.S. Br. 15), and the gems that were subject to forfeiture in *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam). The early customs laws authorized forfeiture of goods that were entered into the country without the required declarations (Act of July 31, 1789, ch. 5, §§ 12, 23, 1 Stat. 39, 43), and in *One Lot Emerald Cut Stones*, this Court upheld against a double jeopardy challenge the forfeiture of gems that were entered into the country without the required declaration.

Respondent contends (Br. 18) that the gems in *One Lot Emerald Cut Stones* constituted contraband. But it is unclear whether that characterization is correct, or how it would assist him in any event. The gems in *One Lot Emerald Cut Stones* were lawful both to possess and to transport. They were subject to forfeiture in that case only because they were transported across the border without the filing of a declaration. 409 U.S. at 234. The same factors exist here. It is lawful to possess cash and to transport it across the border.

But if an attempt is made to transport more than $10,000 in cash across the border without the required declaration, the money becomes subject to forfeiture as a consequence of the offense.

b. Respondent contends (Br. 16-17) that, if unreported cash is an instrumentality of a currency transportation offense, earned income would have to be an instrumentality of the offense of failing to file an income tax return. There is no historical basis, however, for treating earned income as an instrumentality of the offense of failing to file an income tax return, and the relationship of the money to the offense is different. The cash in a currency transportation offense, like the gems in *One Lot Emerald Cut Stones*, is the very property that is physically transported across the border, and physical transportation of the property is an actus reus of the offense. Although earning income is a necessary precondition to the offense of failing to file an income tax return, the actus reus of the offense is simply the failure to file the return. See 26 U.S.C. 7203. Thus, treating the cash involved in a currency transportation offense as an instrumentality of that offense does not imply that earned income is an instrumentality of the offense of failing to file an income tax return.

c. Respondent also contends (Br. 16) that his cash was not an instrumentality, because there was no indication that his cash was to be used in the commission of "any other criminal offense," such as money laundering. The forfeiture in this case, however, is premised on the involvement of respondent's cash in the offense of willfully violating the prohibition against transporting more than $10,000 across the border without filing the required currency report, not on its

involvement in some other offense. *See* 18 U.S.C. 982(a)(1) (requiring forfeiture of property involved in a currency transportation offense); 31 U.S.C. 5322(a) (making willful violation of the reporting requirement a criminal offense). Respondent's cash was the central instrumentality of his currency transportation offense; whether it was derived from or involved in some other offense is irrelevant.

2. Respondent and Amicus Clarendon Foundation contend (Resp. Br. 14; Amic. Br. 11-12) that a showing that the property forfeited is an instrumentality of an offense is not sufficient to satisfy the Excessive Fines Clause, and that an inquiry into the culpability of the owner is also necessary. But, as we show in our opening brief (at 15-17), for 200 years, Congress has authorized the forfeiture of property substantially involved in an offense, without an inquiry into the owner's culpability. That practice is constitutional because it is based on a reasonable judgment by Congress that such forfeitures are fair remedial sanctions, regardless of proof of individual culpability. As this Court has explained, "[t]o the extent that such forfeiture provisions are applied to [persons] who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care * * * [over] their property." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-688 (1974). And by dispensing with a judicial inquiry into wrongdoing, such a forfeiture scheme "precludes evasions" by those who may otherwise be able to conceal their culpability. *Van Oster v. Kansas*, 272 U.S. 465, 467-468 (1926).

In *Bennis v. Michigan*, 116 S. Ct. 994 (1996), the Court reaffirmed that the forfeiture of property that is substantially

involved in an offense does not violate the Due Process Clause as applied to so-called "innocent owners." The Court relied on the long history of that practice, *id.* at 998-999, and the distinct remedial aims of such forfeitures, *id.* at 1000-1001. Those same considerations demonstrate that the forfeiture of property that is significantly involved in an offense is not an excessive fine.*

B. Even if it were necessary to consider culpability as an element of an excessive fines inquiry, the forfeiture of respondent's unreported cash would still be constitutional because petitioner committed a serious criminal offense. *See* U.S. Br. 27-34.

1. In arguing that the offense in this case was not serious, Amicus Clarendon Foundation contends (Br. 6-7) that the government did not have to show that respondent knew that it was unlawful to fail to file a currency report. That contention is incorrect.

Under 31 U.S.C. 5316, a currency report must be filed by any person who "knowingly * * * transports, is about to transport, or has transported, monetary instruments of more than $10,000 * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). In a civil case, a violation of that requirement is established by proof that a person knew that he was transporting more than $10,000, without proof that he knew

* Since the First Congress, the remedy for mitigating the sometimes harsh consequences of instrumentality forfeitures has been administrative remittance. *Calero-Toledo*, 416 U.S. at 689 n.27. That remedy is available here. 21 U.S.C. 853(i)(1) (criminal forfeiture); 31 U.S.C. 5321(c) (civil forfeiture).

that transporting that amount of cash requires the filing of a report. *See United States v. $94,000 in U.S. Currency*, 2 F.3d 778, 784-786 (7th Cir. 1993); *United States v. $359,500 in U.S. Currency*, 828 F.2d 930, 933-934 (2d Cir. 1987); *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085, 1090-1091 (9th Cir. 1986).

Respondent, however, was convicted under 31 U.S.C. 5322(a) of the criminal offense of "willfully" failing to file the report required under Section 5316. In *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994), this Court construed the willfulness requirement in Section 5322(a) to require proof that the defendant "knew the [conduct] in which he engaged was unlawful." In order to convict respondent under Section 5322(a), it was therefore necessary to establish that respondent knew it was unlawful for him to transport more than $10,000 across the border without filing a report.

2. Respondent asserts (Br. 22) that he lacked a "criminally culpable intent" because his cash was obtained from a legitimate source and intended for a lawful purpose. Section 5322(a), however, makes it a criminal offense to violate the reporting requirement willfully, regardless of the source or intended use of the cash. 31 U.S.C. 5322(a). Respondent acted with "criminally culpable intent" when he deliberately failed to file such a report, knowing that it was unlawful to do so.

3. Respondent suggests that (Br. 18-20), because there was no proof that he was involved in money laundering or some other criminal activity, his offense was a minor one that does not warrant the forfeiture of the cash that he illegally attempted to export. The best measure of the seriousness of an offense, however, is the maximum penalties authorized by

Congress. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-542 (1989). Here the maximum penalty for respondent's offense includes five years' imprisonment, even when there is no other violation of the law. 31 U.S.C. 5322(a). The presence of other violations, such as money laundering, increases the maximum term of imprisonment to ten years' imprisonment. 31 U.S.C. 5322(b). The willful violation of the reporting requirement is therefore itself a serious offense, and the forfeiture of the cash that the defendant has deliberately involved in that offense is not an excessive fine.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

SETH P. WAXMAN
Acting Solicitor General

OCTOBER 1997