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Money Laundering / Fungible Property / Foreign Bank Accounts / Out-of-District Seizures

- **Mexican bankers and professional money launderers indicted in *Operation Casablanca*. The Government seeks criminal and civil forfeiture of over 100 bank accounts in the United States and 18 foreign countries.**

On May 18, 1998, the United States unsealed four criminal indictments and numerous civil forfeiture complaints in *Operation Casablanca*, a long-running undercover operation conducted by the U.S. Customs Service. The operation targeted professional money launderers for the Cali and Juarez cartels and numerous Mexican and Venezuelan bankers who assisted in laundering over $80 million in drug proceeds. Three Mexican banks were included in the indictments, and a number of other banks will be named as defendants in a civil money laundering enforcement action under 18 U.S.C. § 1956(b).

The scheme involved the delivery of tens of millions of dollars in cash to undercover agents who posed as money launderers. The cash was deposited in an undercover bank account in California, transferred to Mexican bank accounts, and, with the cooperation of the Mexican bankers, sent back to the United States in the form of monetary instruments in fictitious names. Ultimately, the money was disbursed to bank accounts in the United States and abroad on the instructions of professional money launderers employed by the Cali and Juarez Cartels.

The indictments filed in the Central District of California charged the defendants with money laundering conspiracy, in violation of 18 U.S.C. § 1956(h), and with substantive counts of money laundering in violation of section 1956(a)(1), (2), and (3). Each indictment also contains criminal forfeiture counts pursuant to 18 U.S.C. § 982(a)(1). Under the forfeiture counts, the defendants will be required to forfeit all money involved in the money laundering offense, including both the actual money laundered and any commissions paid to the bankers and money launderers. The forfeiture counts also specifically seek the entry of money judgments against each defendant for a sum equal to the amount laundered and substitute assets.

Simultaneously, the Government commenced two sets of civil actions to recover the laundered funds. In Washington, D.C., the Government filed a civil forfeiture complaint under 18 U.S.C. §§ 981 and 984 against approximately $23.1 million that was sent from the undercover account to bank accounts in 18 countries, including Colombia, Ecuador, Mexico, the Cayman Islands, the Bahamas, Italy, Switzerland,

Israel, and Hong Kong. These accounts are held either by persons or entities acting as nominees for the drug dealers or by persons who purchased the laundered funds from the drug dealers on the peso exchange "black market." Venue for civil forfeiture actions against assets located abroad is proper in the District of Columbia pursuant to 28 U.S.C. § 1355(b)(2).

At the same time, civil forfeiture actions under sections 981 and 984 were filed in Los Angeles against bank accounts located throughout the United States. The complaints seek the forfeiture of all money found in the correspondent bank accounts of the Mexican and Venezuelan banks involved in the scheme, up to the amount laundered by each bank through its U.S. account. The complaints also seek the forfeiture of the funds disbursed, at the direction of the defendants, to U.S.-based accounts, again either to nominees or to black market customers.

In all of these instances, the complaints rely on the provisions of 18 U.S.C. § 984, which permit the forfeiture of funds involved in a money laundering offense without regard to strict tracing, if the funds are found in an account through which a money laundering offense was committed in the past year.

The funds in the United States were seized pursuant to section 981(b) civil seizure warrants, all issued in the Central District of California and served throughout the United States pursuant to the nationwide service-of-process provision in 28 U.S.C. § 1355(d). The funds outside the United States were seized by foreign governments acting at the request of the United States. Finally, the defendants were served in the criminal cases with pretrial restraining orders directing them to repatriate to the United States all funds subject to forfeiture which are under their control in foreign countries. —*SDC*

Operation Casablanca, ___ F. Supp. ___ (C.D. Cal. and D.D.C. May 18, 1998). Contact: AUSAs Janet Hudson, ACAC15(jhudson), Ruth Pinkel, ACAC15(rpinkel), and Steve Welk ACAC15(swelk) (domestic civil forfeitures); AFMLS Attorneys Stefan Cassella, CRM20(scassell), and Debbie Brinley, CRM20(dbrinley) (foreign civil forfeitures); AUSAs Joe Brandolino, ACAC15(jbrandoli), Duane Lyons, ACAC15(dlyons), and Julie Shemitz, ACAC15(jshemitz) (criminal forfeitures).

Money Laundering / Attorneys' Fees

- **Defense attorney agrees to forfeiture of $245,000 in legal fees paid to him in gold bars by a convicted money launderer.**

In 1993, Stephen Saccoccia was convicted of money laundering and RICO offenses and ordered to forfeit $137 million in money laundering proceeds pursuant to 18 U.S.C. § 1963(a)(1) and (3). The court also ordered Saccoccia to forfeit all property acquired or maintained by his RICO enterprise, and expressed its view that the judgment would be satisfied from substitute assets. Also, the court had entered a protective order at the time of indictment restraining all assets and proceeds of the enterprise including up to $140 million in U.S. currency.

After the entry of the forfeiture order, the Government took note that Saccoccia was continuing to hire and, presumably, pay up to a dozen attorneys. In an effort to find the source of these continuing payments, the Government asked the court for authorization to depose these attorneys pursuant to 18 U.S.C. § 1963(k). Through these depositions, it was learned that some of the attorneys were paid in

gold bars, in cash left in cars or dropped off by anonymous donors, and through wire transfers from Switzerland.

The evidence, adduced during the three trials of Saccoccia and his criminal associates, showed that for several years on a full-time basis they took cash from street-level cocaine deals, purchased gold with the cash, sold the gold for checks which were deposited in banks, and wire transferred the proceeds to Colombia and Switzerland. While the Government was unable to trace the cash, gold, or wire transfers received by the defense attorneys directly to Saccoccia's money laundering operation, the Government contended that the form of the fees and manner of payment were sufficient to show that they were the assets or proceeds of Saccoccia's money laundering enterprise that had been ordered forfeit.

In January 1998, the U.S. Attorney for the District of Rhode Island moved to recover the money Saccoccia paid to five attorneys, arguing that the money came from forfeited criminal assets. Alternatively, the Government argued that the attorneys were on notice that the Government intended to satisfy its money judgment against Saccoccia through the forfeiture of substitute assets, and that the attorneys should not have accepted any fees from Saccoccia until the outstanding $137 million judgment had been satisfied. The Government further contended that the protective order restraining substitute assets remained in force after the order of forfeiture was entered.

Defense Attorney Robert Luskin contended that the fees he accepted were clean and were not paid with property subject to forfeiture. He also contended that the protective order evaporated upon the entry of the final order of forfeiture and that case law and Department of Justice policy support the position that substitute assets are up for grabs until the Government names them in an amended forfeiture order. Certain cases support the position that the Government cannot forfeit clean assets that were paid to, and earned by, a third party before the entry of the final order of forfeiture, even though they could forfeit clean assets still retained by a defendant as substitute assets. There are no cases that consider an attorney's taking substitute assets in the face of an outstanding forfeiture money judgment knowing that the Government intended to seek forfeiture of any substitute assets it could find.

Ultimately, Luskin and the Government agreed to settle the case without litigation. Luskin agreed to the forfeiture of $245,000, or slightly more than half of the challenged fees he retained. The proceedings against the other four attorneys continue. —*MED*

United States v. Saccoccia, Crim. No. 91-115T (D.R.I. May 8, 1998). Contact: AUSAs James H. Leavey, ARI01(jleavey), and Michael P. Iannotti, ARI01(miannott); and AFMLS Attorney Michael E. Davitt, CRM20(mdavitt).

The case summaries and comments in *Quick Release* are intended to assist government attorneys in keeping up-to-date with developments in the law. They do not represent the policy of the U.S. Department of Justice and may not be cited as legal opinions or conclusions binding on any government attorneys.

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Money Laundering / Substitute Assets

- **Tenth Circuit holds that property involved in a money laundering case includes the corpus being laundered, any commissions paid to the launderer, and any property used to facilitate the offense.**

- **If the defendant did not retain the laundered funds, but passed them on to a third party, there is no "corpus" for the Government to forfeit.**

- **Criminal forfeiture is limited to the property involved in the offense; it was error for the district court to order the defendant to forfeit funds in his business checking account when it was his personal account, not his business account, that was used to commit the money laundering offense.**

- **Because the initial forfeiture order was invalid, the court could not properly order the forfeiture of substitute assets.**

Defendant was an accountant who provided various financial services for a drug-dealer client. In particular, when the client asked Defendant to convert $13,000 in cash into a check, Defendant accepted the cash, deposited it into his personal checking account, wrote a check on that account, and gave the check to the client.

Based on this transaction, Defendant was convicted of money laundering, and the Government sought criminal forfeiture of the funds involved in the transaction pursuant to section 982(a)(1). Unfortunately, the Government drafted the forfeiture count in the indictment so that it sought the forfeiture of all property involved in the offense including, but not limited to, contents of Defendant's *business* account, and not the personal account that he used to commit the money laundering offense. In any event, the jury returned a special verdict simply answering "yes" to the question, "[w]as $13,000 involved in the money laundering offense?" The court then ordered Defendant to forfeit $13,000 "contained within" Defendant's business account, *i.e.*, the account named in the indictment, pursuant to both sections 982(a)(1) and 853(p).

On appeal, the **Tenth Circuit** reversed the forfeiture order. In order to be subject to forfeiture in a money laundering case, the court said, the property must be shown to be "involved in" or "traceable to" the money laundering offense. The money in Defendant's *business* account was neither; only Defendant's *personal* checking account was involved in the money laundering transaction. Therefore, to the extent that the forfeiture order was directed at the funds in the business account, it was "clearly erroneous."

Next, the court discussed forfeiture as if it had been directed at the proper bank account. Following the Fifth Circuit, the panel held that forfeitures in money laundering cases extend to the "corpus" being laundered, any commissions paid to the launderer, and any property used to facilitate the laundering offense. *See United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (applying facilitation theory to clean money in a bank account). "Forfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the Government demonstrates that the defendant pooled the funds to facilitate, *i.e.*, disguise the nature and source of, his scheme," the court said. The panel held, however, that none of the three theories of forfeiture applied in this case: (1) the "corpus" of the offense was the $13,000, which was immediately withdrawn from the

account in the form of the check that Defendant gave to his client; therefore, there was no "corpus" for the Government to forfeit; (2) there was no evidence that Defendant was paid any commission; and (3) the Government did not rely on the facilitation theory to support the forfeiture.

Finally, the court discussed the forfeitability of the money in the business account as substitute assets. First, the panel criticized the district court for describing the funds as subject to forfeiture directly under section 982(a)(1) *and* as substitute assets under section 853(p). "Property cannot logically be both involved in a money laundering offense and substitute assets," the court said. It must be one or the other.

More important, the court held that the district court may not enter an order forfeiting substitute assets unless there is a valid "initial award of forfeiture" by a jury. Without specifying what was invalid about the jury's special verdict, the court held that substitute assets could not be forfeited in this case.

Finally, in *dicta*, the court noted that, even if the substitute assets provision applied, Defendant probably fell within the "mere intermediary" exception to the forfeiture of substitute assets in money laundering cases. *See* 18 U.S.C. § 982(b)(2).

—*SDC*

United States v. Bornfield, ___ F.3d ___, No. CR-95-524, 1998 WL 239265 (10th Cir. May 13, 1998). Contact: AFMLS Attorneys Laury Estrada, CRM20(lestrada), and Stefan Cassella, CRM20(scassella).

Comment: Some portions of this opinion are helpful to the Government. For example, the court goes to some length in endorsing the notion that facilitating property is forfeitable under section 982(a)(1), even though the Government did not rely on the facilitation theory in this case. The court also says that district courts should generally define the term "property involved" in its jury instructions to include the corpus, the commissions, and facilitating property.

Other parts of the opinion, however, are hard to understand. Most troubling is the court's assertion that it is improper to order the forfeiture of substitute assets in a money laundering case. The court's first [illegible] was that the jury in this case was asked only if the [illegible] was involved in the money laundering offense. The jury answered "yes." Generally, that is all that is required for the court to enter either a money judgment for the amount of an order forfeiting property of equal value as substitute assets. *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 retained only a fraction for his fee); *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (the Government is entitled to a personal money judgment equal to the amount of money involved in the money laundering offense). But the Tenth Circuit made no mention whatsoever of a money judgment, and apparently believed that there was something invalid about the special verdict that made the forfeiture of substitute assets improper.

Exactly what was invalid about the initial forfeiture is unclear. It may be that the court was troubled by the fact that both the indictment and the order of forfeiture referred to the wrong bank account, or that the special verdict referred only to a dollar amount and did not name either bank account. But the court seemed to suggest that the initial forfeiture was invalid because the corpus of the money laundering offense—the $13,000—was no longer in either of the defendant's accounts. It is precisely in that situation, of course, that the forfeiture of substitute assets is needed. If the laundered money were still in the defendant's account, the Government would simply forfeit that money and never raise the substitute assets issue at all.

Professional money launderers—*i.e.*, third parties who launder money on behalf of the person who committed the underlying offense—frequently do not retain the laundered funds. In such cases, they must be subject to a money judgment for the amount laundered, as the Third Circuit recognized in *Voight*, or the forfeiture of substitute assets, as the First Circuit recognized in *Hurley*. If the forfeiture of substitute assets were not authorized in such cases, there would be no need for the intermediary exception in section 982(b)(2).

—*SDC*

Money Laundering / Bankruptcy / Excessive Fines

- **Property not disclosed in a bankruptcy proceeding is the proceeds of "specified unlawful activity"—bankruptcy fraud—and may be forfeited if it is involved in a money laundering offense.**

- **Ninth Circuit holds that forfeiture of property not disclosed in a bankruptcy proceeding is not an excessive fine under the Eighth Amendment because the owner does not suffer the loss of anything he had the right to retain.**

Defendant concealed his ownership of various businesses from a bankruptcy proceeding, and thereafter engaged in a series of financial transactions involving the businesses that were designed to conceal and disguise their true ownership. He was convicted of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i) and ordered to forfeit the real property where the businesses were located under section 982(a)(1).

On appeal, Defendant argued that there was an insufficient nexus between the forfeited property and the money laundering offense to support the forfeiture, and that the forfeiture was excessive under the Excessive Fines Clause of the Eighth Amendment. The **Ninth Circuit** rejected both arguments and affirmed the forfeiture.

On the first point, the court held that property concealed from a bankruptcy court constitutes the proceeds of bankruptcy fraud, which is a "specified unlawful activity" for money laundering. Because Defendant subsequently used rent checks generated by the property to conduct financial transactions that concealed his true ownership, he was guilty of money laundering and the property was "involved" in that offense within the meaning of the forfeiture statute. Therefore, the requisite nexus between the property and the offense was established.

Pertaining to the excessiveness claim, the court noted that the Ninth Circuit test requires the court to consider whether the "harshness" of the forfeiture is "grossly disproportionate" to the defendant's "culpability." In determining "harshness," courts in the Ninth Circuit must take into account: (1) the fair market value of the property; (2) the intangible, subjective value of the property; and (3) the hardship that the loss of the property will cause to the defendant. On the culpability side, the court must consider whether: (1) the defendant was negligent or reckless in allowing his property to be used illegally; (2) whether he was directly involved in the offense; and (3) the harm caused by the illegal activity. *See United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995).

Here, the court found the absence of any hardship to the defendant. Although the forfeited property had a market value of $500,000, it was commercial property, not property such as a family home with "intangible, subjective value." Most important, the property was the proceeds of a bankruptcy fraud—*i.e.*, property Defendant had no right to retain in the first place. A forfeiture can not be unduly harsh, the court said, if it causes the loss of property obtained *or retained* as the proceeds of a crime. Finally, Defendant was directly involved in concealing the ownership of the property for years. Thus, his culpability factor was high. Accordingly, the forfeiture of the property was not grossly disproportionate to the offense. —*SDC*

United States v. Ladum, ___ F.3d ___, Nos. 97-30018, 30019, 30022, 30027, 30030, and 30044, 1998 WL 178557 (9th Cir. Apr. 17, 1998). Contact: AUSAs Claire Fay, AOR01(cfay), and Kent Robinson, AOR01(krobinso).

Comment: This case is a variation on the rule that the forfeiture of criminal proceeds is never excessive under the Eighth Amendment. *See United States v. One Parcel, Lot 41, Berryhill Farm*, 128 F.3d 1380 (10th Cir. 1997) (collecting cases). What makes it somewhat unique is that the "proceeds" in this case were not obtained as a result of the offense, but instead were *retained*. Nevertheless, the rule applies. Depriving a person of what he had no right to obtain (or retain) in the first place does not violate the Excessive Fines Clause.

This rule is generally applied in cases where the forfeiture is ordered pursuant to a "proceeds" statute, such as 21 U.S.C. § 853, but it also applies to money laundering forfeitures where the property being laundered is the proceeds of the SFA.

Ben

Excessive Fines

- **District court in the First Circuit adopts the Ninth Circuit's proportionality test of excessiveness in civil forfeiture cases, but nevertheless upholds the forfeiture of the family home.**

- **When a defendant sells drugs from the family home, the culpability factor is "great," while the harshness of the forfeiture is mitigated by the fact that it was the defendant's choice to put his family in harm's way by using their home as the base for its drug operations.**

Defendant sold cocaine to undercover agents from his home on three occasions. He was convicted of a drug offense, and the Government filed a civil forfeiture action against the property under 21 U.S.C. § 881(a)(7). Defendant objected that the forfeiture of the residence would constitute an excessive fine in violation of the Eighth Amendment.

Noting that the First Circuit has not yet adopted a test of excessiveness to govern Eighth Amendment challenges to civil forfeitures, the district court surveyed the case law from other circuits. The Government urged the court to adopt the Fourth Circuit's instrumentality test, *see United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), while Defendant argued that the court should apply the Ninth Circuit test from *El Dorado County, supra.* Holding that the Eighth Amendment requires the court to take the harshness of the forfeiture in comparison to the defendant's culpability into account, the court rejected the Government's argument and applied the Ninth Circuit rule, but ruled that the forfeiture of the residence was valid nevertheless.

First, the court had to determine whether there was a sufficient nexus between the property and the offense. While the Ninth Circuit makes this part of the excessive fines analysis, the court observed that the forfeiture statute itself requires a substantial connection between the criminal offense and the property being forfeited. In this case, the substantial connection requirement was satisfied. Defendant did not simply sell drugs from his home, the court said, "he stored the drugs there, measured them there, and concealed the proceeds there. ...It was the base of his drug dealing operations."

Moving on to the proportionality analysis, the court compared the harshness of the forfeiture to Defendant's culpability. The proper test, the court said, was whether the disproportionality was so great

that "in justice the punishment is more criminal than the crime." The court found that Defendant's culpability was great: he was convicted of an offense carrying a maximum sentence of 40 years imprisonment and a $2 million fine. On the other hand, the court was unimpressed with Defendant's assertion that the forfeiture was too harsh.

The defendant's equity in the property was $48,972, and it had been the family home. But Defendant's claim that the property therefore had "intangible, subjective value" was somewhat hollow, given that Defendant had agreed to allow the U.S. Marshals Service to sell the property and hold the proceeds of the sale in escrow pending the forfeiture litigation. More important, the court said, even if Defendant's family still resided in the home, it was Defendant who "intentionally placed his family in harm's way" by conducting his drug business from his residence. "To permit a drug dealer to shield his property with innocent minor children would be to adopt a rule that only encourages exposing children to drugs."

Thus, the court held that Defendant had failed to demonstrate that the forfeiture was disproportionate to the drug offense. —*SDC*

United States v. Parcel of Real Property . . . 154 Manley Road, ___ F. Supp. ___, No. CA-93-0511ML, 1998 WL 224687 (D.R.I. May 4, 1998). Contact: AUSA Mike Iannotti, ARI01(miannott).

Claim and Answer

- **Requirement in Rule C(6) that claimants of seized property file verified claims within ten days after process of forfeiture has been initiated and file answers to complaint within 20 days after filing of claim is strictly enforced.**

Claimant was arrested when attempting to buy a kilogram of cocaine from an undercover DEA agent. DEA agents seized $21,044 in currency from Claimant's vehicle at time of arrest, and Claimant subsequently pled guilty to conspiracy to possess with the intent to distribute cocaine. As part of the plea, Claimant said that when arrested, he was prepared to purchase a kilogram of cocaine and intended to pay for this with the seized $21,044.

The United States subsequently brought a civil forfeiture action against the currency pursuant to 21 U.S.C. § 881(a)(6). Pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, the Government served process on the currency. The Government published notification of the forfeiture action in a local newspaper of general circulation and mailed a notice to Claimant. The notice specifically stated that a claim had to be filed within 10 days of service and an answer within 20 days of filing the claim. Although Claimant filed a timely claim to the money, he failed to file an answer within 20 days. As a result, the United States was granted a default judgment. Claimant then moved to reinstate his claim.

In his motion, Claimant provided no reason why the court should ignore the time requirements stated in the Government's notice and established by Rule C(6). The court denied Claimant's motion, stating that it is generally accepted that strict compliance with the procedural provision of Rule C(6) is required. The court noted that the Fifth Circuit has established a three-part test for determining when an entry of default brought, pursuant to 21 U.S.C. § 881, should be set aside under Fed. R. Civ. P. 55(c). The district court must decide whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is

presented. Although each element must be satisfied to set aside a default decree, Claimant failed to satisfy even the first one since his failure to file a timely answer was willful. —*MSB*

United States v. $21,044.00 in United States Currency, No. 96-CIV-A-97-2994, 1998 WL 213762 (E.D. La. Apr. 30, 1998) (unpublished). Contact: AUSA Tom Watson, ALAE01(twatson).

Comment: [illegible]

Rule 60(b)

■ **Eleventh Circuit holds that a Fed. R. Civ. P. 60(b) motion cannot be used to challenge a criminal forfeiture order.**

Defendant and his brother were both convicted of structuring financial transactions in violation of 31 U.S.C. § 5324(a)(3), and both were ordered to forfeit certain property. Defendant forfeited $25,000 while the brother forfeited a grocery store. Six years later, Defendant filed a Fed. R. Civ. P. 60(b) motion to set aside the judgment of criminal forfeiture, arguing that the property forfeited in his brother's case actually belonged to Defendant. The district court denied the motion, and the court of appeals affirmed.

The court of appeals held that a Rule 60(b) motion cannot be used to challenge criminal forfeitures. Because Defendant was a party to the criminal case, he should have challenged the criminal forfeiture order on direct appeal. —*BB*

United States v. Mosavi, 138 F.3d 1365 (11th Cir. 1998). Contact: AUSA James Ingram, AALN01(jingram).

Comment: In this case, the panel appears to be suggesting the defendant could have taken a direct appeal from a forfeiture order imposed on his brother. At first, that seems odd. Generally, a codefendant in a criminal case is considered a third party with respect to criminal forfeiture orders imposed on other defendants. *See United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir. 1995) (defendant's brother-in-law is considered third party for purposes of making claim in the ancillary proceeding to property forfeited by defendant, even though brother-in-law was a codefendant). If that is the case, then a defendant's remedy, if he believes his property is being forfeited in a codefendant's case, would be to file a petition in the ancillary proceeding, not to take a direct appeal from the conviction, sentence, and forfeiture order in his own case.

But another way to view criminal forfeiture is that each defendant is required to forfeit his interest in the property used to commit the offense, whatever that interest may be. In that view, it would never be necessary for the court to determine which of the codefendants was the owner of the property in order to enter a forfeiture order. The court would simply order all codefendants to forfeit whatever interest they might have in all of the property involved in the offense, and no codefendant would have standing to challenge the forfeiture in the ancillary proceeding. *See* 21 U.S.C. §853(n)(2).

[illegible]

Ancillary Proceeding

- **Court enters preliminary order forfeiting Defendants' interests in gambling business based on finding that Defendants were *de facto* owners; Defendants' children failed to establish they were true owners, not nominees, in the ancillary proceeding.**

In a RICO case, the court found that two defendants were the *de facto* owners of a racketeering enterprise and ordered them to forfeit their interests in the business. In the ancillary proceeding, however, the defendants' children filed claims asserting that they each owned 50 percent of the business and were, therefore, the true owners. The Government opposed the children's claims, and the court held an evidentiary hearing.

At the hearing, one of the claimants admitted that he always thought of the company as his father's business, and that he understood his own role to be that of a nominee. He was unfamiliar with the details of the business and could not explain why his personal income tax return showed more than $160,000 income from the business, when he had in fact received no income. Pertaining to his ownership of the business, he said only that, "I understand that I'm part of it in some type of way."

The other claimant was likewise unable to explain her role in the business. She admitted signing business documents given to her by her father without any explanation of their purpose, and she could not explain why she was paid only 1 percent of the business profits if she was, in fact, a 50-percent owner.

The court found that both claimants' testimony was "self-serving" and "short of the mark." It concluded that neither claimant had established that he or she had a legal interest in the forfeited property, that the defendants were the true owners of the property, and that the order of forfeiture was therefore valid. —*SDC*

United States v. Cleveland, No. CRIM-A-96207, 1998 WL 175900 (E.D. La. Apr. 15, 1998) (unpublished). Contact: AUSAs Lyman Thornton III, ALAM01(lthornto), and Rand Miller, ALAM01(rmiller).

Comment: This case is a good illustration of the procedural steps the Government should take in forfeiting the defendant's interest in property ostensibly held by a nominee. Although criminal forfeiture is limited to the defendant's interest in property, it is entirely proper to include property in an indictment that is superficially held in the name of a third party, if the Government has a basis to believe that the defendant is really the true owner. In such a case, the Government should be prepared to make a showing at the end of the trial that the defendant is the owner of the property and the titled owner is really a nominee. The jury trial this may be done in the forfeiture phase of the trial, with the jury asked to check a box on the special verdict form indicating that the defendant has an ownership interest in the property. In a case decided without a

[illegible]

Return of Seized Property / Restraining Order

■ **Section 853 does not require the Government to restrain indicted property to protect the defendant's interest pending trial.**

Defendant *pro se* moved the district court for return of real property ordered forfeited in connection with his narcotics convictions. He argued that the Government had a duty under 21 U.S.C. § 853(e) to preserve that property for forfeiture by obtaining a restraining order to prevent foreclosure. He also argued that the court should use its equitable jurisdiction to return to him his girlfriend's car, his airplane, and property listed in the indictment that was later deleted from the forfeiture order. The court denied the motion and the subsequent motions for reconsideration. The **Ninth Circuit** affirmed.

The panel held that section 853 does not require the Government to seek a restraining order to preserve the availability of indicted property for forfeiture. Section 853 provides that "[u]pon application of the United States, the court may enter a restraining order. ..." "[N]othing in the language of section 853(e)," the panel observed, "indicates that the [G]overnment is required to seek a restraining order, nor that the court is required to enter such an order when sought. ..."

The panel then considered and summarily rejected the defendant's other arguments. The panel found that the defendant lacked standing to challenge the forfeiture of his girlfriend's car where he had no legal interest in it. It concluded that the district court lacked jurisdiction to order the return of the airplane because the airplane was forfeited in a separate civil proceeding. Finally, it held that the defendant was not entitled to relief relating to property deleted from the final order of forfeiture. —*MLC*

United States v. McCullough, ___ F.3d ___, No. 97-10035, 1998 WL 196667 (Table Case) (9th Cir. Apr. 23, 1998) (unpublished). Contact: AUSA Thomas Flynn, ACAE01(tflynn).

Restitution / Remission Petitions

- **Prosecutor's promise to transfer forfeited property to a victim as restitution—at least where a plea agreement appears to memorialize that intention, the victim arguably relied upon the statements to his detriment, and the judgment in the criminal case provides, via an order of restitution, for such delivery—establish a contract between the Government and the victim, and the Government thereafter becomes a constructive trustee for the victim of any forfeited property, which must be paid over to the victim pursuant the restitution order.**

- **It is an abuse of discretion for the Attorney General to refuse to grant a petition for remission where the petitioner is the beneficiary of a constructive trust on the forfeited property.**

A search of the home of defendant and his wife resulted in the seizure of $7,320 in cash and the discovery of evidence that an ongoing illegal gambling business was being operated from the premises. Civil forfeiture complaints were filed against the cash and the home, alleging that they were property used in the operation of an illegal gambling business (18 U.S.C. § 1955(d)). Defendant was thereafter indicted for operating an illegal gambling business, conspiracy, and, based upon the subsequent discovery that he had been embezzling money from his employer by forging the employer's signature on company checks, bank fraud.

The Assistant United States Attorney handling the prosecution told the employer that he would receive the proceeds of forfeiture actions against the defendant's property as restitution and (or at least the district court so found) asked the employer not to file a suit against the defendant. The defendant then signed a plea agreement which provided that he would pay restitution to his employer in the amount of $358,410 and which stated that "[t]he parties agree that in making full restitution, the [d]efendant shall be credited with the money he has agreed to forfeit [in the related civil forfeiture cases]." Defendant then stipulated to the forfeiture of his $7,320 and, with his wife, to the forfeiture of their home. The district court subsequently accepted the plea agreement and entered a judgment requiring "the [d]efendant [to] pay restitution in the amount of $358,410 to [employer] with credit for forfeited assets to [employer]."

Meanwhile the civil forfeiture case had gone forward and, prior to the entry of the judgment in the criminal case, the defendant's property was civilly forfeited to the United States and paid into the Assets Forfeiture Fund. Because there was no authority to turn over to the employer what had now become property of the United States, the United States Attorney's Office (USAO) could not comply with the restitution order, which apparently contemplated the surrendering of the forfeited property to the employer. Nevertheless, the USAO did not appeal the restitution order.

In an attempt to comply with the restitution order, the USAO encouraged the employer to file a petition for remission with the Asset Forfeiture and Money Laundering Section (AFMLS). AFMLS denied the petition because the employer did not demonstrate a legally cognizable interest in the property (28 C.F.R. § 9.5(a)(i)), and there were no extenuating circumstances or extreme hardship to warrant mitigation of the forfeiture (28 C.F.R. § 9.5(b)(i)). The employer also was not a victim of the offense underlying the forfeiture or of a related offense (as is required by 28 C.F.R. § 9.8), and, in any event, there is no statutory authority to grant a petition for remission from a non-owner victim where the property was forfeited pursuant to 18 U.S.C. § 1955(d).

The employer, increasingly irritated by his failure to receive the ordered restitution, filed a motion with the district court in the criminal case demanding payment of the ordered restitution, plus interest, attorneys' fees and costs. AFMLS advised the USAO to attempt to undo the civil forfeiture by filing a Rule 60(b) motion in the civil case. If the court had granted that motion, the USAO's Financial Litigation Unit would have immediately executed upon the released funds to satisfy the restitution order. But before the USAO filed the Rule 60(b) motion, the district court in the criminal case ruled on the employer's motion for payment of the ordered restitution, plus interest, attorney's fees and costs.

The court in the criminal case first examined AFMLS's denial of the petition for remission and held that, under the circumstances of this case, the denial was an "abuse of discretion and clearly erroneous." The court reasoned that, having contractually promised in the plea agreement to deliver any funds which might be forfeited to the employer [who then, or so the court found, had relied to his detriment on that promise by not filing a civil action against the defendant or filing claims in the forfeiture actions], the United States became a trustee of the funds for the employer once the forfeiture occurred. Therefore, the employer had a traceable interest in the funds and, in any event, extenuating circumstances (the United States' failure to live up to its commitment to the employer) had been shown justifying mitigation. Alternatively, the court reasoned that "[b]y agreeing to provide the proceeds of the forfeiture actions to [the employer] as restitution from Defendant, the United States in effect became a constructive trustee of those funds, and [the employer] may seek recovery of those funds from the United States pursuant to this [c]ourt's judgment [and restitution order]."

The court then quickly found that the employer was entitled to interest, citing *United States v. $277,000 in U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995), and to attorneys' fees under 28 U.S.C. § 2412(d)(1) (the Equal Access to Justice Act) or, because the actions of the United States had been "vexatious," under the recently-enacted Hyde Amendment, Pub. L. 105-119, Title VI, § 617, 111 Stat. 2440, 2519 (1997) (codified at notes to 18 U.S.C. § 3006A). Thus, the employer's motion was granted and the United States was ordered to comply with the court's order of restitution, to pay interest on the forfeited funds and to pay reasonable attorneys' fees and costs to the employer. —*JGL*

United States v. Chan, No. 94-02176-01 (D. Haw. Apr. 1, 1998) (unpublished). Contact: AUSA Tracy Hino, AHI01(thino).

Comment. This case illustrates several recurring problems. First, the Government attorneys or agents should not represent to victims, and should not imply in plea agreements, that the proceeds of a judicial forfeiture will be turned over to victims, since once property is judicially forfeited, it is no longer within the power of the government attorney or the USAO to dispose of it. Second, the Government should not permit property to be civilly forfeited if the intention is to turn it over to victims as restitution. Once property is forfeited, it no longer belongs to the defendant and cannot be used for restitution. Moreover, AFMLS has no statutory authority to remit the proceeds of civil forfeitures to victims, with the exception of certain proceeds generated by forfeitures ordered pursuant to 18 U.S.C. § 981(a)(1)(C). Third, once property has been civilly forfeited and, thus, is no longer available to the victim through either restitution or remission, the Government, if it believes using the property as restitution to victims would be in the interests of justice, must move promptly to rescind the civil forfeiture through the extraordinary means of a motion to the civil forfeiture court pursuant to Fed. R. Civ. P. 60(b). However, the government attorney should examine the applicable law to determine whether this course of action would produce the desired result. In the Hawaii case, this option was not certain to accomplish the desired result because of the applicability of an unusual aspect of Hawaii law. Fourth, government attorneys should not permit a criminal court judgment which intends to direct the disposal of forfeited property to go unchallenged, as courts have no authority to order the disposition of

[redacted]

Probable Cause / Motion to Dismiss

- **The Government is not required to meet its burden to show probable cause prior to trial.**

- **In order to survive a motion to dismiss, the Government must state allegations in the complaint which set forth a reasonable basis for belief that the defendant property is subject to forfeiture, and which reasonably support a more-than-incidental nexus between the defendant property and the related drug offense.**

Claimant was indicted for conspiracy to distribute and distribution of heroin and was subsequently convicted and incarcerated. Claimant also served time for state violations, which included manslaughter and manufacture and delivery of a controlled substance. After his release from federal prison and while on probation, he purchased a Chevrolet Impala for $24,655. He tendered a $1,500 cash down payment and submitted an application for financial assistance to pay the balance. On the application, he misrepresented the name of his employer, the length of employment service and the salary, as he had done several months earlier on another credit application.

Less than a year later, Claimant completed a credit application to finance a portion of the purchase price for a new Lexus LX450. The application included the same name of employer, but designated a salary, position, and length of employment period different than those listed in his earlier finance applications. The application to finance partial payment for the Lexus was denied. He ultimately paid the entire purchase price with a combination of $8,500 in cash and $48,500 in checks.

An investigation of the state's employment records and federal tax returns revealed that the Claimant earned no wages in the state and declared no income earned from wages during this period. The Government filed a complaint seeking an *in rem* forfeiture of the vehicles pursuant to 21 U.S.C. § 881(a), and Claimant filed a motion to dismiss.

Claimant argued that the verified complaint lacked sufficient allegations to state a claim. The particularity requirement of Supplemental Rule E(2)(a) ensures that a forfeiture complaint appraises any potential claimants of the circumstances supporting the Government's allegations connecting the defendant property with illegal drug activity. This requirement was designed to enable the claimant to frame a responsive pleading. The Government is not required to meet its burden of proof to show probable cause at the time a complaint is filed, but is required to set forth a reasonable basis for belief that the property is subject to forfeiture under section 881(b). In order to survive a motion to dismiss, the Government must allege facts that tend to show probable cause, and which reasonably support a more-than-incidental

nexus between the defendant property and the related drug offense.

In the instant case, the court concluded that the factual allegations provided by the Government supported a reasonable belief that probable cause existed to forfeit the defendant property, by considering that the claimant had been: (1) a convicted drug dealer; (2) removed from the work force for six years while in prison; (3) involved in drug trafficking while on probation; (4) able to produce $81,000 in cash to buy two cars within ten months; (5) misrepresenting his employment status; (6) filing tax returns with information in conflict with the representations previously made on credit applications; and (7) unlisted in any state records of employed residents. Accordingly, the court denied Claimant's motion to dismiss. —*WJS*

United States v. One 1996 Lexus LX-450, No. 97-C-4759, 1998 WL 164881 (N.D. Ill. Apr. 2, 1998) (unpublished). Contact: AUSA Young B. Kim, AILN02(ykim).

Firearms Forfeitures / Statute of Limitations

- **Requirement in 18 U.S.C. § 924(d)(1) that forfeiture of firearms or ammunition must be commenced within 120 days of seizure is satisfied by commencement of either administrative or judicial forfeiture proceedings within that period.**

- **Section 924(d)(1) authorizes forfeiture for any "willful violation," including misdemeanor recordkeeping violations under section 922(m).**

The Bureau of Alcohol, Firearms, and Tobacco (BATF) executed a search warrant on claimant gun dealer's business in April 1996 and seized twelve firearms for forfeiture pursuant to 18 U.S.C. § 924(d)(1). The forfeiture was based on record keeping violations of 18 U.S.C.§ 922(m), which makes failure to comply with the record keeping requirements of 18 U.S.C. §923(g)(1)(A) unlawful. The following month, BATF initiated an administrative forfeiture action against the seized firearms by publishing notice of its administrative forfeiture proceeding and by providing notice by certified mail to the claimant gun dealer. Subsequently, in January 1997, the United States initiated judicial forfeiture proceedings against the firearms and moved for summary judgment. The claimant's primary argument in opposition was that the judicial forfeiture action should be dismissed as untimely under 18 U.S.C. § 924(d)(1) because it had been commenced more than 120 days after BATF's seizure of the firearms.

The claimant also contended that summary judgment was inappropriate because of an alleged factual issue as to whether the seized firearms were business inventory for which records are required under 18 U.S.C. § 923(g)(1)(A). However, the court ruled that, because the claimant offered no evidence that the firearms were personal property rather than business inventory, there was no genuine issue of material fact concerning this point to warrant a trial and defeat a motion for summary judgment. The court also rejected the claimant's argument that section 924(d)(1) does not permit forfeiture for section 922(m) misdemeanor recordkeeping violations. The court ruled that section 924(d)(1) clearly permits forfeiture for "willful violation of any other provision of this chapter," which includes willful misdemeanor recordkeeping violations of section 922(m) and that, inasmuch as claimant did not even assert that any violation by him of section 922(m) was not willful, there was also no issue of material fact

relating to whether the forfeiture was permitted.

Pertaining to the timeliness of the forfeiture action, the court pointed out that the relevant language of section 924(d)(1) provides that "[a]ny action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure," and that the only two reported cases interpreting this provision differ. *Compare United States v. Twelve Miscellaneous Firearms*, 816 F. Supp. 1316, 1317 (C.D. Ill. 1993) (forfeiture action is timely so long as at least an administrative action is commenced within 120 days of seizure) *with United States v. Fourteen Various Firearms*, 889 F. Supp. 875, 877 (E.D. Va. 1995) (interpreting "any" to mean the same as "every" and concluding that any administrative forfeiture action and any judicial forfeiture action must be commenced within 120 days of seizure).

The court reasoned that if Congress had intended the time limit always to apply to the filing of a judicial complaint for the forfeiture of firearms, even when an administrative forfeiture has been initiated, it could easily have specified so in the statute, as it did in 21 U.S.C. § 888(e) for certain drug-related forfeitures. Additionally, the court found that an interpretation of section 924(d)(1) that would require the initiation of both administrative and judicial forfeiture actions within the same brief time period would defeat the purpose of administrative forfeitures to provide, if possible, a mechanism for forfeiture issues to be resolved without the need for a judicial action. *See United States v. $8,850*, 461 U.S. 555, 566 (1983). Accordingly, the court adopted the interpretation of *Twelve Miscellaneous Firearms*, ruled that the BATF's initiation of an administrative forfeiture proceeding within 120 days after the seizure satisfied section 924(d)(1), and granted summary judgment for the Government. —*JHP*

United States v. Twelve Firearms, Civ. No. H-97-295 (S.D. Tex. Mar. 30, 1998) (unpublished). Contact: AUSA Michael Kusin, ATXS01(mkusin).

Notice / Delay

▪ Delay of forfeiture proceedings while attempting to ensure that defendant received notice did not violate due process.

The Drug Enforcement Administration (DEA) seized the defendant's car for forfeiture at the time of his arrest in 1996 on drug charges. The defendant was convicted later in 1996 and subsequently filed a *pro se* motion for return of seized property pursuant to Fed. R. Crim. P. 41(e). In the motion, the defendant contended that his right to due process had been violated by insufficient notice of DEA's initiation of administrative forfeiture proceedings and by undue delay in the Government's institution of judicial forfeiture proceedings.

The record showed that within eight weeks of the seizure DEA mailed notice to the defendant in prison and to the defendant's attorney. The court also noted that the defendant did not deny receiving the notices sent to him. Additionally, the Government instituted judicial forfeiture proceedings against the car, and the defendant did not dispute his receipt of the forfeiture complaint and advice of his right to file a claim and answer. The Government treated the defendant's motion for return of property as a claim, that the defendant never filed an answer, and that the car was ordered forfeited.

The court ruled that the Government's delay in the instituting the judicial forfeiture proceedings while trying to ensure that the defendant received notice did not result in a denial of due process. The court also noted that Rule 41(e) is not a vehicle for challenging alleged procedural deficiencies in forfeiture proceedings and that the defendant did not challenge

the factual basis for the forfeiture at all. The court concluded by ruling that the judicial forfeiture action had provided an adequate forum for the defendant to challenge the legality of the seizure of his car but that he had chosen not to avail himself of it. Accordingly, the court denied the defendant's motion. —*JHP*

United States v. Gonzalez, No. 96-365-2, 1998 WL 195703 (E.D. Pa. Apr. 22, 1998) (unpublished). Contact: AUSA Maryann Donaghy, APAE01(mdonaghy).

Effect of Forfeiture on Criminal Sentence

- **Even though exposure to forfeiture is not a ground for downward departure under the Sentencing Guidelines, a voluntary surrender of meritorious defenses to forfeiture perhaps can, under certain rare circumstances, provide evidence of that extraordinary acceptance of responsibility which justifies a downward departure.**

The defendant pleaded guilty to narcotics violations and two counts charging violations of 18 U.S.C. § 1956. The plea agreement prohibited him from contesting the administrative forfeiture of the property identified in the indictment. At sentencing, defendant requested a downward departure based on his agreement not to contest the forfeitures. The court advised the defendant that he was still entitled to contest the forfeitures and that, therefore, he had given up nothing to justify a downward departure. Inexplicably, the Assistant U.S. Attorney agreed that the defendant could still contest the forfeiture. The defendant did not file claims.

On appeal, defendant argued that the district court erred when it denied the downward departure for agreeing to forfeit property. The **Third Circuit** noted that it has held that "exposure to forfeiture is not a ground for departure under § 5K2.0," which authorizes departures for circumstances not adequately considered by the Sentencing Guidelines. However, it pointed out that this defendant was making a somewhat different argument—that "his voluntary surrender of meritorious defenses to forfeiture should entitle him to a departure" because this "evidences extraordinary contrition and acceptance of responsibility." It held that he might have a valid point, under a proper set of circumstances. It remanded to allow defendant to make such an evidentiary showing, even though the appellate court thought that on the surface it did not appear that he was likely to prevail. —*BB*

United States v. Faulks, ___ F.3d ___, No. 96-2056, 1998 WL 205927 (3d Cir. Apr. 29, 1998). Contact: AUSAs Walter S. Batty, Jr., APAE11(wbatty), and Wendy A. Kelly, APAE11(wkelly).

Quick Notes

- **Administrative Forfeiture**

Claimant sued the Government to reverse the administrative forfeiture of his automobile. Finding that the Drug Enforcement Administration gave claimant sufficient notice of the administrative procedure and that claimant had elected to file a petition for remission and mitigation of forfeiture instead of a claim and cost bond, the court granted summary judgment for the Government. As long as the seizing agency complies with due process, an administrative forfeiture is not subject to judicial review on the merits.

Freeman v. United States, No. 97-CV-12302-MEL (D. Mass. Apr. 14, 1998). Contact: AUSA Susan Poswistilo, AMA12(sposwist).

■ Post and Walk / *Good* Violation

In *United States v. 408 Peyton Road*, 112 F.3d 1106 (11th Cir. 1997), *reh'g en banc granted*, 1998 WL 27289 (11th Cir. 1998), the Eleventh Circuit held that the Government's "post and walk" policy violates the Fifth Amendment. However, the court refuses to grant relief to a claimant who failed to object to the lack of notice and hearing when the U.S. Marshals Service posted his property with an arrest warrant *in rem*. By failing to object, Claimant waived the issue, the court held. Moreover, there was no manifest injustice. "Had appellant been given notice and a hearing prior to the posting of the property, the outcome of the case would have been the same."

United States v. 3917 Morris Court, No. 95-9360 (11th Cir. Apr. 22, 1998) (unpublished). Contact: AUSAs Dahil Goss, AGAN02(dgoss), and Al Kemp, AGAN02(akemp).

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