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Managing Editor
Jim Donovan

Program Manager
Nancy Bowman

Internet Address
www.usdoj.gov/usao/reading_room/foiamanuals.html

Send article submissions and address changes to Program Manager, United States Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

Asset Forfeiture

In This Issue

Introduction

Richard Weber
Chief, Asset Forfeiture and Money Laundering Section
Criminal Division

The Asset Forfeiture Program (Program) is a nationwide law enforcement initiative that removes the tools of crime from criminal organizations, deprives wrongdoers of the proceeds of crimes, recovers property that may be used to compensate victims, and deters crime. As the Program has grown and matured, asset forfeiture has been used to attack the financial infrastructure of criminal enterprises, return funds to victims of large scale fraud, and share forfeited property with state and local law enforcement agencies.

Organized criminals are motivated by one thing—profit. Greed drives the crimes. Huge sums of money are generated through criminal activity and the success of crime is often based upon its ability to launder the money. The better prosecutors are at tracking dirty money and ultimately forfeiting the illegally-gained assets, the greater the government's ability to bring down criminals, and particularly the leaders of criminal organizations.

To provide a framework to enhance the capability, reach, and effectiveness, of the Program for the next five years and beyond, the Asset Forfeiture and Money Laundering Section (AFMLS) of the Criminal Division formed a Strategic Planning Working Group, which includes representatives from all the agencies and components participating in the Department of Justice's Forfeiture Program. It is the first such plan for the Program, which will soon be celebrating its twenty-five year anniversary in 2009.

This Strategic Plan (Plan) seeks to guide and lead the law enforcement community as it expands its efforts both domestically and internationally within a Program that removed over $2.5 billion from criminals and their criminal organizations in fiscal years 2006 and 2007. The Plan consists of four strategic objectives.

- Communication: Communicate the benefits and accomplishments of the Program to law enforcement leadership, government leaders, and the American public.
- Program resources: Obtain the funding and tools required to sustain and enhance asset forfeiture investigations, prosecutions, and Program operations.
- Case development and execution: Integrate asset forfeiture in all appropriate investigations and cases.
- Program growth: Expand partnerships with foreign, state, and local governments, regulatory agencies, and the private sector, to increase the effectiveness of asset forfeiture as a law enforcement tool.

The Plan is designed to provide a strategic framework to enhance the capability, reach, and effectiveness of the Program; provide direction to the asset forfeiture community; enable the Program participants to manage and expand this vital law enforcement tool; ensure maximum participation by all Program participants and determine appropriate areas of growth; and advocate for the resources needed to support and grow the Program.

Investigating and forfeiting criminal assets can be a long, difficult, and complex process. It is critical to bear in mind, however, that it is more than a bloodless exercise in accounting. When assets are taken away, crime is fought.

- Drugs are kept out of playgrounds and away from kids.

- Women and children are safeguarded against forced labor and prostitution by human trafficking gangs.
- Funding is kept out of the hands of terrorists and organized crime.

If the Department is to continue to be effective, it must think strategically. The stakes are high. The national security and lives of Americans are at risk. The government cannot and will not fail in this important endeavor. ❖

ABOUT THE AUTHOR

❑**Richard Weber** has served as the Chief of the Asset Forfeiture and Money Laundering Section since March 2005. Prior to that, he was an Assistant United States Attorney in the Eastern District of New York, serving as Deputy Chief of the Civil Division and Chief of the Asset Forfeiture Unit. Rich first joined the Department under the Attorney General's Honors Program. His expertise in asset forfeiture and money laundering has developed from prosecuting over 100 complex international and domestic money laundering and asset forfeiture cases. Among many others, he prosecuted *U.S. v. Blarek/Pellecchia*, 166 F.3d 1202 (2d Cir. 1998) (interior decorators were convicted of laundering millions of dollars of drug proceeds for the leader of the Cali cartel and forfeited $7 million dollars); *U.S. v. Jordan Belfort and Daniel Porush*, 98-CR-00859-JG (E.D. N.Y. Oct. 14, 2003) (where an international securities fraud money laundering investigation resulted in the forfeiture of $15 million dollars); and *U.S. v. Palm View Corp*, 99-CR-00702-ILG (E.D. N.Y. July 21, 2000) (which involved gambling proceeds and the forfeiture of $6 million dollars).✠

United States Department of Justice
Asset Forfeiture Program

Strategic Plan
Executive Summary

The Asset Forfeiture Program (hereafter, the Program) is a nationwide law enforcement initiative that removes the tools of crime from criminal organizations, deprives wrongdoers of the proceeds of their crimes, recovers property that may be used to compensate victims, and deters crime. As the Program has grown and matured, asset forfeiture has been used to attack the financial inrastructure of criminal enterprises, return funds to victims of large-scare fraud, and share forfeited property with state and local law enforcement agencies.

This Asset Forfeiture Strategic Plan is designed to:

- provide a strategic framework to enhance the capability, reach, and effectiveness of the Program;
- provide direction to the asset forfeiture community to ensure that the Program's mission is carried out effectively and efficiently;
- enable Program participants to manage and expand this important and vital law enforcement tool;
- ensure maximum participation by all Program participants and determine appropriate areas of growth; and
- advocate for the resources needed to support and grow the Program.

Program Vision
To ensure that crime does not pay, the Department of Justice Asset Forfeiture Program will lead law enforcement to make the tracing and recovery of assets an integral part of every prosecution for the benefit of the American people

Program Mission
To use asset forfeiture consistently and strategically to disrupt and dismantle criminal enterprises, deprive wrongdoers of the fruits and instrumentalities of criminal activity, deter crime, and restore property to crime victims while protecting individual rights

Executive Summary

Strategic Objectives, Goals, and Program Priority Tactics

Strategic Objective 1
Communication

Communicate the benefits and accomplishments of the Program to law enforcement leadership, government leaders, and the American public

Goal 1.1: Communicate that asset forfeiture is an important and essential law enforcement tool

- Develop channels and clarify protocols for communicating with and among senior Department and Program participant management about asset forfeiture
- Issue an annual report on the accomplishments of the Asset Forfeiture Program

Goal 1.2: Improve communication among all law enforcement entities to increase awareness of forfeiture operations, policies, and available resources

- Establish a central website that is accessible by all Program participants to communicate information regarding national, departmental, and agency policies and priorities affecting forfeiture
- Establish regularly scheduled USAO/agency meetings to facilitate communication and to address problems
- Maximize the use of existing forums (such as working groups, domestic and international conferences, training programs, and AFML Online) to provide information on resources and best practices
- Communicate to all Program participants information on standard operating procedures, protocol, policy, and guidance implemented as a result of this strategic plan

Goal 1.3: Implement a community outreach and public awareness campaign

- Develop an outreach program to educate professional associations, law schools, trade groups, and other organizations about asset forfeiture and money laundering

Strategic Objective 2
Program Resources

Obtain the funding and tools required to sustain and enhance asset forfeiture investigations, prosecutions, and Program operations

Goal 2.1: Expand the use of the Assets Forfeiture Fund to enhance the Program

- Seek a waiver to hire SAUSAs and government attorneys in the USAOs and the Criminal Division to handle criminal and civil forfeiture work in victims' cases
- Seek a waiver to hire SAUSAs and government attorneys to support SAR/ Financial Investigation Review Teams
- Seek a waiver to hire paralegals to conduct asset forfeiture work in the USAOs
- Hire contract financial analysts to support asset forfeiture cases in the USAOs

Goal 2.2: Develop and implement a resource allocation process that is fair, equitable, and transparent

- Require that Program participants annually report all funding sources that support their asset forfeiture programs

Goal 2.3: Advocate for additional funding through the budgetary and appropriations process

- Advocate for appropriated funding to hire agents to support asset forfeiture cases in the USAOs and the Criminal Division

Goal 2.4: Review and enhance the systems that track assets, cases, victims, and resources

- Conduct an assessment of existing data collection and tracking systems to identify desired capabilities, system deficiencies, and recommendations for improvements
- Develop and implement a five-year asset forfeiture information technology plan

Goal 2.5: Develop model staffing guidelines

- Develop model staffing guidelines based on best practices in staffing
- Create and devise succession plans to minimize the effect of the loss of experienced personnel in the Program

Goal 2.6: Establish recruitment and retention guidelines to hire personnel with specialized skills, experience, and the aptitude necessary for asset forfeiture and financial investigations

Goal 2.7: Provide comprehensive and continual training and education in asset forfeiture, money laundering, and financial investigations

Strategic Objective 3
Case Development and Execution

Integrate asset forfeiture in all appropriate investigations and cases

Goal 3.1: Develop and prosecute administrative and judicial forfeiture cases in accordance with the Attorney General's priorities

- Make effective use of forfeiture in terrorism cases

Goal 3.2: Use asset forfeiture to recover victims' assets whenever possible

- Familiarize judges and train criminal prosecutors, forfeiture prosecutors, Financial Litigation Units (FLUs), Victim/Witness Coordinators, and probation officers on victim-related forfeiture issues
- Develop and implement guidelines to achieve greater coordination between Asset Forfeiture Units and FLUs to benefit crime victims

Goal 3.3: Develop policies, procedures, and practices that facilitate the consistent development and prosecution of administrative and judicial forfeiture cases as authorized by law

- Develop standard operating procedures to ensure a financial investigation is included in every case where appropriate
- Ensure that the USAO and Criminal Division establish procedures that track and review cases, indictments, prosecutions, and sentencing

Goal 3.4: Develop productive and cooperative relationships among law enforcement entities and forfeiture programs

- Expand partnerships with foreign, state, and local governments; regulatory agencies; and the private sector to increase the effectiveness of asset forfeiture as a law enforcement tool

Strategic Objective 4
Program Growth

Goal 4.1: Develop partnerships with foreign governments and domestic agencies to promote the international use of asset forfeiture

- Make effective use of forfeiture to support the August 2006 National Strategy to Internationalize Efforts Against Kleptocracy
- Coordinate with OFAC, FinCEN, and regulators to develop procedures for identifying assets for forfeiture in cases involving the use of sanctions under IEEPA, the Kingpin Act, the Terrorism Act, and Section 311 of the USA PATRIOT Act
- Provide advice, technical assistance, and training to foreign prosecutors and agents in their efforts to identify, seize, restrain, and forfeit assets

Goal 4.2: Expand money laundering forfeiture efforts

- Encourage the development of SAR Review Teams to analyze and target criminal proceeds within the financial system
- Develop working groups and other coordinated efforts with FinCEN, law enforcement, and private industry to address the growing concerns in money service businesses (currency exchangers, check cashers, money order issuers, and stored value card vendors)
- Foster coordination, communication, and cooperation with federal financial regulators to promote outreach to the banking industry on anti-money laundering programs and to assist in the identification of assets for seizure and forfeiture

Goal 4.3: Develop partnerships with state and local law enforcement agencies to expand the use of asset forfeiture

- Develop criteria and protocols for inviting additional agencies to participate in existing task forces or joint investigations

Goal 4.4: Enact and promulgate appropriate laws, regulations, rules, and guidelines

- Advocate for the passage of Title III of the Violent Crime and Anti-Terrorism Act of 2007
- Revise the Attorney General's Guidelines on Seized and Forfeited Property
- Revise the Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies

******The bulleted tactics that appear on these pages are Program priorities. Please see the full Asset Forfeiture Program Strategic Plan for a complete list of tactics.*

Guiding Principles
• Lead law enforcement
• Partner and collaborate
• Reduce crime
• Restore property to crime victims
• Measure the impact

Strategic Planning Working Group

Richard Weber, Chief
Asset Forfeiture and Money Laundering Section

Alice W. Dery
Special Counsel to the Chief
Asset Forfeiture and Money Laundering Section

Lester M. Joseph
Principal Deputy Chief
Asset Forfeiture and Money Laundering Section

Special Advisors

Stuart G. Nash
Associate Deputy Attorney General
Director, Organized Crime Drug Enforcement Task Forces

The Honorable Frank D. Whitney
Former U.S. Attorney
Eastern District of North Carolina

Working Group Members

Susan Ashcraft
Chief, Domestic Asset Forfeiture Section
Drug Enforcement Administration

Douglas Bruce
Branch Chief, Criminal Intelligence and Research Branch
Diplomatic Security Service
United States Department of State

Regina Bullock
Asset Forfeiture Program Administrator
U.S. Postal Inspection Service

Richard Cohen
Assistant U.S. Attorney
United States Attorney's Office
Western District of Washington

Anita Cream
Assistant U.S. Attorney
United States Attorney's Office
Middle District of Florida

Katherine Deoudes
Chief, Asset Forfeiture Office (retired)
United States Marshals Service

Geneva Dunaway
Special Agent-in-Charge
Bureau of Alcohol, Tobacco, Firearms and Explosives

Michael Fleming
Detective Lieutenant
Nassau County Police Department

Katharine Goepp
Trial Attorney
Asset Forfeiture and Money Laundering Section

G. Wingate Grant
Assistant U.S. Attorney
United States Attorney's Office
Eastern District of Virginia

Harry Harbin
Legal Counsel to the Chief
Asset Forfeiture and Money Laundering Section

John Hieronymus
Forfeiture Counsel
Drug Enforcement Administration

Richard Hoffman
Assistant Chief, Legal Policy Unit
Asset Forfeiture and Money Laundering Section

Dace Krastkalns
Supervisory Administrative Management Specialist
Asset Forfeiture and Money Laundering Section

Courtney Linn
Assistant U.S. Attorney
United States Attorney's Office
Eastern District of California

Robert Marca
Assistant Director, Budget & Finance
Asset Forfeiture Management Staff

Eben Morales
Acting Chief, Asset Forfeiture Office,
United States Marshals Service

Candace Olds
Director
Asset Forfeiture Management Staff

Mike Perez
Director (retired)
Asset Forfeiture Management Staff

Dwight Rawls
Senior Operations Manager
Office of Criminal Investigations
Food and Drug Administration

Frances Reddis
Assistant U.S. Attorney
United States Attorney's Office
Western District of Missouri

Nancy Rider
Deputy Chief, Asset Forfeiture Program Unit
Asset Forfeiture and Money Laundering Section

James Russell
Assistant U.S. Attorney
United States Attorney's Office
District of Colorado

Wendy Taylor
Management Analyst
Asset Forfeiture and Money Laundering Section

Lisa Trueblood
FSA Training Technician
Asset Forfeiture and Money Laundering Section

Nora Waldren
Senior Program Manager
Asset Forfeiture and Money Laundering Section

Sharon Weinstein
Senior Program Analyst
Office of the Inspector General
U.S. Department of Agriculture

Steven Welk
Assistant U.S. Attorney
United States Attorney's Office
Central District of California

District of Oregon

Leslie Westphal
Assistant U.S. Attorney
United States Attorney's Office

Norman Wong
Assistant Director, Office of Legal Programs and Policy
Executive Office of U.S. Attorneys

Overview of Asset Forfeiture Law in the United States

Stefan D. Cassella
Special Assistant United States Attorney
United States Attorney's Office
Eastern District of Virginia

I. Overview

Asset forfeiture is an integral part of federal criminal law enforcement in the United States. This brief introduction to federal forfeiture law attempts to answer three questions: 1) Why is asset forfeiture important to law enforcement? 2) What types of property are subject to forfeiture, and in what circumstances? and 3) How is forfeiture accomplished?

A. Why do forfeiture?

There are many reasons to include the forfeiture of assets as part of a criminal case. First, law enforcement agents and prosecutors want to punish the wrongdoer and remove the tools of the crime from circulation, so they cannot be used again. Thus, law enforcement wants to accomplish the following objectives, among others.

- Seize and forfeit the guns, airplanes, and cars with concealed compartments, that are used for drug smuggling.
- Take the computers, printers, and other electronic devices used in child pornography, counterfeiting, and identification fraud cases.
- Shut down the "crack house" where drugs are distributed to children on their way to school.
- Confiscate the farm used to grow marijuana.
- Close down the business used to commit insurance fraud, telemarketing fraud, or to run a Ponzi scheme.

In this sense, asset forfeiture is a form of incapacitation.

Asset forfeiture is the most effective means of recovering property that may be used to compensate innocent victims, in any case involving property offenses and fraud. Indeed, restoration of property to victims in white collar cases is the first priority of law enforcement when it comes to disbursing forfeited property. Much time and effort is expended in such cases to ensure that the wrongdoer's assets are preserved pending trial, so that they remain available for this purpose once the case is settled. *See* 18 U.S.C. § 981(e)(6) (authorizing the government to use forfeited property to pay restitution, in civil forfeiture cases, to the victims of the underlying crime); 21 U.S.C. § 853(i) (same for criminal forfeiture).

Asset forfeiture takes the profit out of the crime. There is an element of simple justice in ensuring that a wrongdoer is deprived of the fruits of illegal acts, but there is also an element of general deterrence as well. Surely, the incentive to engage in economic crime is diminished if persons contemplating such activity understand that there is high likelihood that they will not be allowed to retain any profits that might be reaped. Conversely, convicting the defendant, but not forfeiting the illegally gained benefits, gives others the impression that a life of crime is worth the risk.

There is also the matter of the message that is sent to law-abiding citizens when a notorious gangster or fraud artist is stripped of the trappings of what may have appeared to be an enviable lifestyle. Criminals typically spend their spoils on expensive homes, airplanes, electronic goods, and other "toys" that everyone wants. Taking the criminal's toys away, as law enforcement agents

typically put it, not only ensures that the criminal enterprise is deprived of its economic resources and makes funds available for restitution to the victims, but it also sends a signal to the community that the benefits of a life of crime are illusory and temporary at best. This rationale for asset forfeiture has been cited, as well, by the courts in other countries that have recently enacted forfeiture laws. For example, in turning back the first challenge to the civil forfeiture statute enacted in the United Kingdom in 2002, the court said the following: "The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from circulation property which can be shown to have been obtained by unlawful conduct thereby diminishing the productive efficiency of such conduct and rendering less attractive the untouchable image of those who have resorted to it for the purpose of accumulating wealth and status." *In the Matter of the Director of the Assets Recovery Agency and in the Matter of Cecil Stephen Walsh*, High Court of Justice in Northern Ireland, 2004 NIQB 21 (Apr. 1, 2004).

Finally, asset forfeiture constitutes a form of punishment. Some of the remedial aspects of forfeiture are as follows.

- Takes the instrumentalities of crime out of circulation.
- Obtains funds for restitution.
- Takes the profit out of crime.
- Achieves some measure of deterrence.
- Deprives the wrongdoer of the accoutrements of an expensive lifestyle, or the items that gave him the leverage, prestige, or wherewithal, to commit a criminal act.

Forfeiture, in other words, gives the criminal his just desserts.

B. What can the government forfeit?

In most countries, the asset forfeiture laws are written in generic terms. A typical statute will authorize a court to order the forfeiture of "all proceeds of any crime" (often including foreign crimes) and any property "used to commit, or to facilitate the commission" of any such crime. The asset forfeiture laws in the United States, while developed piecemeal over a long period of time, were not written in generic terms. There is neither a common law of forfeiture, nor a single provision authorizing forfeiture in all cases. To the contrary, Congress enacted different forfeiture provisions at different times for different offenses. The result of which is that what can be forfeited varies greatly from one offense to another. Indeed, the first task of a federal prosecutor is to check the statute for the crime under investigation to see what, if any, asset forfeiture options are available.

The process has almost no rhyme or reason. For some crimes, Congress has not authorized any forfeiture authority at all. For others, law enforcement can confiscate only the proceeds of the offense itself, or only the instrumentalities used to commit the offense. *See* 18 U.S.C. § 981(a)(1)(C) (authorizing the forfeiture of the proceeds, but only the proceeds, of a long list of federal criminal offenses); *see also* 16 U.S.C. § 470gg (authorizing forfeiture of tools and equipment used to steal archaeological treasures, but not the proceeds of such offense). Other statutes are broader, permitting the forfeiture of any property "involved" in the offense, or property that provides a criminal with economic power over a criminal organization, whether that property was involved in the offense, or not. *See* 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1) (authorizing civil and criminal forfeiture, respectively, of all property involved in a money laundering offense); *see also* 18 U.S.C. §1963(a)(2) (authorizing forfeiture of any property giving a defendant a source of influence over a racketeering enterprise). Finally, one statute permits law enforcement to confiscate virtually everything the wrongdoer owns. *See* 18 U.S.C. § 981(a)(1)(G) (authorizing forfeiture of all assets of a person engaged in terrorism). The following is a brief survey of some of the better-known forfeiture provisions in federal law.

- Proceeds. The closest Congress has come to enacting one all-powerful forfeiture statute is 18 U.S.C. § 981(a)(1)(C), which authorizes the forfeiture of the proceeds of more than 200 different state and federal crimes. *See United States v. All Funds Distributed to Weiss*, 345 F.3d 49, 56 n.8 (2d Cir. 2003) (as amended by the Civil Asset Forfeiture Reform Act, § 981(a)(1)(C) permits the forfeiture of all proceeds of a "specified unlawful activity;" it is no longer necessary for the government to use the money laundering statute to forfeit such proceeds). The federal crimes include all of the following and scores of more obscure ones as well.

  - Fraud
  - Bribery
  - Embezzlement
  - Theft

  The state crimes include murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and state drug trafficking. The crimes for which forfeiture is authorized in § 981(a)(1)(C) are listed in 18 U.S.C. § 1956(c)(7).

  Many other statutes also provide for the forfeiture of the "proceeds" or "gross proceeds" of a particular offense. Indeed, statutes authorizing the forfeiture of proceeds in one form or another are scattered throughout the federal criminal code. Some examples include 18 U.S.C. § 982(a)(5) (forfeiture of the gross proceeds of trafficking in stolen automobiles); *id.* § 982 (a)(7) (forfeiture of the proceeds of a federal health care offense); and *id.* § 794(d) (forfeiture of proceeds of espionage).

  Proceeds are defined in the case law by a "but for" test: the proceeds of an offense comprise any property, real or personal, tangible or intangible, that the wrongdoer would not have obtained or retained, but for the crime. Moreover, the forfeiture of proceeds is not limited to depriving a criminal of net profits. Someone who invests $10,000 in start-up costs for a fraud scheme, and then bilks a victim of only $10,000, makes no profit at all. Forfeiting the net profit in that case would simply leave the criminal where he began. For forfeiture law to achieve its various public policy purposes, it must allow the government to recover the gross proceeds of the offense without reduction for overhead expenses or start-up costs. Thus, a criminal who engages in illegal activity will know from the outset that both the initial investment, as well as any potential profits, are risked.

  The proceeds of an offense also include property derived indirectly from the offense, such as the appreciation in the value of property purchased with criminal proceeds, or payments received on an insurance policy when the property acquired with the criminal proceeds is lost or destroyed. *See United States v. Real Property Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 873 (9th Cir. 2001) (property traceable to criminal proceeds is forfeitable in its entirety, even if it has appreciated in value); *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998) (if property is subject to forfeiture as property traceable to the offense, it is forfeitable in full, including any appreciation in value since the time the property became subject to forfeiture); *United States v. Hill*, 46 Fed. Appx. 838 (6th Cir. 2002) (Table) (following *Hawkey*; stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares); *United States v. Young*, 2001 WL 1644658, at *2 n.3 (M.D. Ga. Dec. 21, 2001) (defendant, whose residence was forfeited upon his conviction, cannot complain that, in the year between the conviction and the time the order of forfeiture became final, he continued to make repairs to the residence). While statutes authorizing the proceeds of the crime are powerful and necessary law enforcement tools, they are

limited in scope. The government may be required to separate the tainted proceeds, and return the untainted portion to the wrongdoer, because only the proceeds of the crime (or property traceable to it) are forfeitable under such statutes. *See United States v. One 1980 Rolls Royce*, 905 F.2d 89, 90 (5th Cir. 1990) (claimant could avoid forfeiture to the extent that he could prove what portions of the property were purchased with legitimate funds); *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74, 78 (D.R.I. 1999) (in proceeds cases, forfeiture limited to portion of property purchased with drug money; portion traceable to subsequent investment of legitimate funds *not* forfeitable; property apportioned after sale). This contrasts with the scope of forfeiture under the money laundering statutes and others discussed below.

- **Drug cases**. The statutes pertaining to drug offenses authorize the forfeiture of more than just the proceeds of the offense. Under 21 U.S.C. §§ 853(a) and 881(a) (criminal and civil forfeiture, respectively), a court may order the forfeiture of both the drug proceeds and any real or personal property used to commit, or to facilitate the commission of, the drug offense. These are the statutes that a federal law enforcement agency or federal prosecutor would use to take a car, boat, gun, airplane, or farm, away from a drug dealer.

  Facilitating property is defined in the case law to mean any property that "makes the prohibited conduct less difficult or more or less free from obstruction or hindrance." *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990) (Facilitation occurs when the property "make[s] the prohibited conduct less difficult or more or less free from obstruction or hindrance."); *United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998) (citing *Schifferli*); *United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003) (citing Bornfield)). The drug cases provide a plethora of examples of cases where houses, businesses, and even medical licences, have been forfeited as facilitating property.

- **Other crimes for which facilitating property may be forfeited**. Drug cases are not the only ones in which law enforcement can forfeit more than just the proceeds of the offense, however. Many other statutes authorize the forfeiture of "facilitating property" as well. Indeed, many older forfeiture statutes authorize the forfeiture of instrumentalities or facilitating property, *but not* the proceeds of the offense.

  Some typical facilitating property statutes include 8 U.S.C. § 1324(b) and 18 U.S.C. § 982(a)(6) regarding civil and criminal forfeiture, respectively, of property used by alien smugglers; 18 U.S.C. § 981(a)(1)(B) for forfeiture of the proceeds and property used to facilitate certain foreign crimes, such as drug trafficking, crimes of violence, and public corruption; and 18 U.S.C. §§ 2253 and 2254 authorizing criminal and civil forfeiture, respectively, of property used to commit a child pornography offense.

- **Money laundering**. One of the most powerful and most popular forfeiture statutes is the one that permits the forfeiture of all property involved in a money laundering offense. If someone launders the proceeds of a drug offense, or a corruption offense, by commingling the money with clean money from another source, or by investing it in land or in a business, it is often possible for the government to forfeit *all* of the property involved in the offense—not just the proceeds being laundered—under 18 U.S.C. §§ 981(a)(1)(A) (civil forfeiture) and 982(a)(1) (criminal forfeiture).

  Accordingly, prosecutors like to use the money laundering forfeiture statute because it eliminates the need, in most cases, to distinguish between the portion of the property traceable to the underlying offense

and the portion derived from other sources. *See also* Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 BUFF. CRIM. L. REV. 582 (2004).

- **RICO and terrorism**. Finally, the most powerful federal forfeiture statutes are the ones that apply to racketeering and terrorism. Under Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. § 1963(a), the government can forfeit any property acquired or maintained through the racketeering activity, and any interest that the defendant has in the racketeering enterprise itself. For example, if someone runs a chain of restaurants or convenience stores as a RICO enterprise, a court can order the forfeiture of the defendant's interest in the entire business, whether a given asset or portion of the business was directly involved in the illegal operation of the enterprise, or not. *See United States v. Angiulo*, 897 F.2d 1169, 1211 (1st Cir. 1990) ("Any interests in an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is not tainted by the racketeering activity."); *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir.1987) ("[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest *in the enterprise."); United States* v. Anderson, 782 F.2d 908, 918 (11th Cir. 1986) ("[A] defendant's conviction under the RICO statute subjects *all* his interests in the enterprise to forfeiture regardless of whether those assets were themselves 'tainted' by use in connection with the racketeering activity.") (quoting *United States v. Cauble*, 706 F.2d 1322, 1359 (5th Cir.1983)).

  The forfeiture statute for terrorism, 18 U.S.C. § 981(a)(1)(G), is even more powerful. That statute says that if someone is engaged in planning or perpetrating acts of domestic or international terrorism, the government may seize and forfeit *all* assets, foreign or domestic, whether the property was involved in the terrorism activity, or not. This statute is designed to incapacitate the terrorist completely, by leaving no assets, whatsoever, to perpetrate further acts of violence against governments, their citizens, or their property. *See* Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA Patriot Act of 2001*, 34 LAW & POL'Y INT'L BUS. 7 (2002).

II. The three kinds of forfeiture under federal law

Federal law gives the government three procedural options: administrative forfeiture, civil forfeiture, and criminal forfeiture. The first applies only to uncontested cases and can, as the name implies, be undertaken by a federal law enforcement agency as an administrative or "nonjudicial" matter, without the involvement of either a prosecutor or a court. In contrast, both civil forfeiture and criminal forfeiture are judicial matters, requiring the commencement of a formal action in a federal court, and concluding, if the government is successful, with the entry of a court order directing the transfer of title to the property in question to the United States.

A. Administrative forfeiture

The vast majority of all federal forfeitures are administrative forfeitures, for the simple reason that the vast majority of all forfeiture proceedings are uncontested. Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested. Since CAFRA, which made it easier to contest a forfeiture action, the number of uncontested DEA cases has dropped to 80 percent. Other seizing agencies report similar figures.

Basically, an administrative forfeiture begins when a federal law enforcement agency with statutory authority in a given area (DEA in a drug

case, FBI in a fraud case, ATF in a firearms case) seizes property discovered in the course of an investigation. The seizure must be based on probable cause to believe that the property is subject to forfeiture and generally must be pursuant to a judicial warrant. There are, however, numerous exceptions authorizing warrantless seizures, such as when property is seized in the course of an arrest, or the property is mobile, making the delay involved in obtaining a warrant impractical. *See* 18 U.S.C. § 981(b); *see also Florida v. White*, 526 U.S. 559, 564-65 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment where there was probable cause to believe the automobile was subject to forfeiture and found in a public place).

Once the property has been seized, the agency commences the administrative forfeiture proceeding by sending notice of its intent to forfeit the property, to anyone with a potential interest in contesting that action and by publishing a notice in the newspaper. In essence, the agency says to the world, "We have seized this property and intend to forfeit it to the United States. Anyone wishing to object must speak now or forever hold his peace." If no one contests the forfeiture by filing a claim within the prescribed period of time, the agency concludes the matter by entering a declaration of forfeiture that has the same force and effect as a judicial order. For a summary of the pre-CAFRA administrative forfeiture procedure, *See United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001); *United States v. $57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999); *United States v. $50,200 In U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999); *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996). For a summary of post-CAFRA administrative forfeiture procedure, *See United States v. Weimer*, 2006 WL 562554, *3 n.1 (E.D. Pa. Mar. 7, 2006); *See generally* Stefan D. Cassella, The Civil Asset Forfeiture Reform Act of 2000, 27 NOTRE DAME J. LEGIS. 97 (2001).

An administrative forfeiture is not really a proceeding, at all, in the judicial sense. It is more like an abandonment. In 2000, however, Congress substantially revised the rules governing administrative forfeitures to ensure that property owners are afforded due process. The procedural statutes governing administrative forfeiture procedures are 18 U.S.C. §§ 983(a)(1) and (2) (enacted by CAFRA), and 19 U.S.C. §§ 1602-1613. *See United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F. 3d 66, 77 n.7 (2d Cir. 2002) (procedures set forth in 19 U.S.C. §§ 1602-1613 are superceded by CAFRA where inconsistent). Under CAFRA, the seizing agency must begin the forfeiture proceeding within a fixed period of time and must give the property owner ample time to file a claim. Then, if someone files a claim, the agency has another fixed period of time in which to refer the matter to a prosecutor for the commencement of a judicial forfeiture action, or to simply return the property.

Most types of property may be seized and forfeited administratively. The most important exceptions are real property and personal property (other than cash or monetary instruments) having a value in excess of $500,000. Such property must always be forfeited judicially. *See* 19 U.S.C. § 1607 (setting maximum dollar value on administrative forfeiture of personal property); 18 U.S.C. § 985(a) (real property may never be forfeited administratively).

If someone files a claim contesting the administrative forfeiture, the government has two options: civil forfeiture and criminal forfeiture. *See* 18 U.S.C. § 983(a)(3).

B. Criminal forfeiture

Criminal forfeiture is part of the sentence in a criminal case. *See Libretti v. United States*, 516 U.S. 29, 39-41 (1995). Thus, it is often said that criminal forfeiture is an *in personam* action against the defendant, not an *in rem* action against the property involved in the offense. *See United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a

judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the *in rem* judgment in a civil forfeiture case). As a result, the *in personam* nature of the forfeiture has important consequences. For example, the court in a criminal forfeiture case can order the defendant to pay a money judgment, or to forfeit substitute assets, if the directly forfeitable property has been dissipated or cannot be found. This cannot happen in a civil forfeiture case that is styled as an *in rem* action against specific property. Accordingly, in this regard, criminal forfeiture is considered a broader and more powerful tool of law enforcement than civil forfeiture.

It is also said, however, that the *in personam* nature of a criminal forfeiture means that only property belonging to the defendant can be forfeited in a criminal case. *See United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (explaining the difference between civil and criminal forfeiture; because criminal forfeiture is *in personam*, only the defendant's property can be forfeited); *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001) ("Because it seeks to penalize the defendant for his illegal activities, *in personam* forfeiture reaches only that property, or portion thereof, owned by the defendant."). That is not strictly true. Any property described in the applicable forfeiture statute, for example, the proceeds of the offense or property used to facilitate it, may be included in the order of forfeiture, if the government establishes the connection between the property and the offense by a preponderance of the evidence. *See De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; "it reaches *any* property that is involved in the offense;" but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited). At the time the order of forfeiture is entered, the defendant's ownership of the property is irrelevant. *Id. See also* FED. R. CRIM. P. 32.2(b)(2), (providing that the preliminary order of forfeiture must direct the forfeiture of specific property "without regard to any third party's interest in all or part of it"). Indeed, there are many cases in which property is forfeited even though the defendant had no legal interest in the property at all. Stolen property, contraband, the proceeds of a drug sale, and money laundered by the defendant for a third party, are a few of the most common examples.

Because third parties are excluded from participating in a criminal trial, it would violate the due process rights of a third party to forfeit property that belonged *to him* in the criminal case. *See United States v. Totaro*, 345 F.3d 989, 993 (8th Cir. 2003) (because criminal forfeiture is *in personam*, property of third parties cannot be forfeited; if a third party's interest could be forfeited, the forfeiture would become an *in rem* action in which the third party would have the right to contest the forfeiture on more than ownership grounds). Therefore, to protect the property rights of third parties, there must be a procedure for ensuring that the property subject to forfeiture in a criminal case does not belong to a third party. That procedure is called the "ancillary proceeding" and is conducted by the court after the criminal trial is concluded.

Again, the inability of the court to order the forfeiture of third-party property in criminal forfeiture cases contrasts dramatically with the situation in civil forfeiture cases where the *in rem* nature of the proceeding allows the court to order the forfeiture of *any* property involved in the offense, subject only to the statutory innocent owner defense. In this regard, criminal forfeiture is a much more *limited* tool of law enforcement than is civil forfeiture. Various statutes, and Rule 32.2 of the Federal Rules of Criminal Procedure, govern the criminal forfeiture process. To initiate a criminal forfeiture action, a prosecutor must give the defendant notice of the government's intent to forfeit his property by including a forfeiture allegation in the indictment. *See* FED. R. CRIM. P. 32.2(a). The case then proceeds to trial in the normal fashion for any criminal case,

except that if the property is not already in government custody, the government may apply for a pretrial restraining order preserving the property pending the conclusion of the criminal trial. *See* 21 U.S.C. § 853(e).

At trial, no mention is made of the forfeiture until and unless the defendant is convicted. In other words, the trial is bifurcated. Once the defendant is convicted, however, the court (or the jury, if a party so requests) hears additional evidence, argument, and instructions, on the forfeiture, and returns a special verdict finding, by a preponderance of the evidence, that the government has established the requisite nexus between the property and the crime. *See* FED. R. CRIM. P. 32.2(b). That is, the court (or jury) must determine that the property in question was, in fact, the proceeds of the offense, constituted facilitating property or property "involved" in the offense, or had whatever other relationship to the offense that the applicable forfeiture statute requires. Once that finding is made, the court enters a preliminary order of forfeiture that is made final and included in the judgment of the court at sentencing. *Id.* As noted earlier, neither the court nor the jury is concerned with the ownership of the property at this stage of the case. That issue is not litigated until and unless some third party contests the forfeiture on ownership grounds in the posttrial ancillary proceeding. *See* FED. R. CRIM. P. 32.2(b) and (c).

C. Civil forfeiture

Civil forfeiture is *not* part of a criminal case. In a civil forfeiture case, the government files a separate civil action *in rem* against the property itself, and then proves, by a preponderance of the evidence, that the property was derived from, or was used to commit, a crime. Because a civil forfeiture does not depend on a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all. *See United States v. One-Sixth Share*, 326 F.3d 36, 40 (1st Cir. 2003) ("Because civil forfeiture is an in rem proceeding, the property subject to forfeiture is the defendant. Thus, defenses against the forfeiture can be brought only by third parties, who must intervene."); *United States v. Cherry*, 330 F.3d 658, 666 n.16 (4th Cir. 2003) ("The most notable distinction between civil and criminal forfeiture is that civil forfeiture proceedings are brought against property, not against the property owner; the owner's culpability is irrelevant in deciding whether property should be forfeited."); *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23, 25 (D.C. Cir. 2002) ("Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest."); *United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 657 (3d Cir. 2002) (civil forfeiture is an in rem action against the property itself; the forfeiture is "not conditioned on the culpability of the owner of the defendant property").

It is because civil forfeiture actions are brought against the property directly that federal civil forfeiture cases have what appear to be very peculiar names, such as *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (6th Cir. 2003), *United States v. One 1992 Ford Mustang GT*, 73 F. Supp. 2d 1131 (C.D. Cal. 1999), or *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002).

At one time, it was said that civil forfeiture was based on the legal fiction that the property itself was guilty of the offense. That is no longer true. Although the property is named as the defendant in the civil forfeiture case, it is not because the property did anything wrong. Things do not commit crimes. People commit crimes using or obtaining things that consequently become forfeitable to the state. The *in rem* structure of civil forfeiture is simply procedural convenience. It is a way for the government to identify the thing that is subject to forfeiture and the grounds therefor, and to give everyone with an interest in the property the opportunity to come into court at one time and contest the forfeiture action. *See United States v. Ursery*, 518 U.S. 267,

297 (1996) (Kennedy, J., concurring). The alternative—a separate civil action against every person or entity with a potential legal interest in the property—would be administratively impossible.

Essentially then, when the government commences an *in rem* forfeiture action it is saying, "This property was derived from, or was used to commit, a criminal offense. For a variety of public policy and law enforcement reasons, it should be confiscated. Anyone who has a legal interest in the property and who wishes to contest the forfeiture may now do so."

Procedurally, civil forfeiture actions are much like other civil cases. The government, as plaintiff, files a verified complaint alleging that the property in question is subject to forfeiture pursuant to the applicable forfeiture statute, and claimants are required to file claims to the property and to answer the forfeiture complaint within a certain period of time. Civil forfeiture procedure is governed by 18 U.S.C. § 983 and by Supplemental Rule G of the Federal Rules of Civil Procedure. Thereafter, the case moves forward through civil discovery, motions practice (motions to dismiss on the pleadings, motion for judgment for the government for lack of standing on the part of the claimant, and motion for summary judgment on the merits), and trial. A trial by jury is guaranteed by the Seventh Amendment, if the claimant has standing and asserts the right to a jury at trial. *See United States v. One Lincoln Navigator* 1998, 328 F.3d 1011, 1014 n.2 (8th Cir. 2003) (claimant has a Seventh Amendment right to a jury trial on her innocent owner defense). The government bears the burden of establishing the forfeitability of the property by a preponderance of the evidence. *See* 18 U.S.C. § 983(c).

Even if the government succeeds in establishing the nexus between the property and an offense, the case is not over. To protect the interests of truly innocent property owners who were unaware that their property was being used for an illegal purpose, or who took all reasonable steps under the circumstances to stop it, Congress has enacted a "uniform innocent owner defense." *See* 18 U.S.C. § 983(d). Under that statute, a person contesting the forfeiture must establish ownership interests and innocence by a preponderance of the evidence. *See* Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture*, 89 KY. L.J. 653 (2001).

Ultimately, if the government establishes the forfeitability of the property, and no claimant succeeds in proving the elements of an innocent owner defense, the court will enter judgment for the government and title to the property will pass to the United States.

For a variety of reasons, in certain cases, civil forfeiture can be a much more powerful tool of law enforcement than criminal forfeiture. As discussed below, it is the option of choice in numerous instances when criminal forfeiture is unavailable or provides an inadequate remedy. Civil forfeiture, however, has an important limitation. The government can only forfeit the actual property derived from, or used to commit, the offense, because the forfeiture is limited to the specific property involved in the crime. *See United States v. $8,221,877.16 in U.S. Currency*, 330 F.3d 141, 158 (3d Cir. 2003) (In civil forfeiture cases, "the government is required to trace the seized property directly to the offense giving rise to the forfeiture."). There are no money judgments and no forfeitures of substitute assets if the property directly traceable to the crime turns out to be missing, dissipated, or spent. There are exceptions to this general rule. Several civil forfeiture statutes, for example, 18 U.S.C. § 545, permit the forfeiture of the "value" of the property involved in the offense. *See United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000); and 18 U.S.C. § 984 relaxes the tracing requirement for fungible property in certain circumstances. *See* also 18 U.S.C. § 981(k) (no tracing requirement when the defendant property is funds in the correspondent bank account of a foreign bank).

III. Tactical choices: civil versus criminal forfeiture

The best way to appreciate the differences between civil and criminal forfeiture under federal law may be to run through the checklist of tactical considerations that a federal prosecutor takes into account when deciding whether to pursue the forfeiture civilly or criminally. It is entirely appropriate (and commonplace) for the prosecutor to commence parallel civil and criminal cases in order to keep all options open. *See United States v. One Parcel ... Lot 41, Berryhill Farm*, 128 F.3d 1386, 1391 (10th Cir. 1997) (civil case stayed pending criminal trial; once stay was lifted, court granted motion to civilly forfeit property that was also forfeited in the criminal case).

A. The advantages of civil forfeiture

The lower burden of proof. In a civil case, the government is only required to prove the forfeitability of the property by a preponderance of the evidence. That applies both to the proof that the crime was committed and to the proof that the property was derived from, or was used to commit, the crime. In contrast, in criminal cases, the government must prove beyond a reasonable doubt that the crime was committed and that the defendant committed the crime. Only the nexus between the property and the offense giving rise to the forfeiture can be shown by the preponderance standard.

There is no need for a criminal conviction. Because the civil forfeiture is a separate civil proceeding against the property *in rem*, neither the property owner, nor anyone else for that matter, need be convicted of the crime giving rise to the forfeiture. *See United States v. Ursery*, 518 U.S. 267, 267-68 (1996) (pursuing civil and criminal forfeiture based on the same underlying offense is not a violation of the Fifth Amendment Double Jeopardy Clause because "*[i]n rem* civil proceedings are neither 'punishment' nor criminal"); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984) (acquittal on gun violation under § 922 does not bar civil forfeiture under § 982(d)); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (per curiam) (acquittal on criminal smuggling charge does not bar later civil forfeiture); *United States v. One "Piper" Aztec "F" Deluxe Model 250 PA 23 Aircraft*, 321 F.3d 355, 360 (3d Cir. 2003) (overturning claimant's criminal conviction for alien smuggling has no effect on civil forfeiture under § 1324(b)); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670, 675 (5th Cir. 1993) (acquittal of claimant does not create material issue of fact to avoid summary judgment in civil forfeiture case); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986) (same).

Thus, civil forfeiture is an essential tool when the government seeks to forfeit the property of fugitives, defendants who have died, or where it can prove that the property was involved in a crime, but cannot prove who the wrongdoer was. *See United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254, 265 (D. Mass. 1999) (defendant died while criminal forfeiture was pending, making civil forfeiture necessary). A typical example of the latter situation is when law enforcement officers find a stash of currency bearing all of the indicia of money derived from a drug deal (drug residue on large quantities of small denomination bills, bundled in rubber bands and wrapped in plastic or brown paper), but have no idea who the drug dealer was who assembled the currency.

Civil forfeiture is also available as a means of recovering property for the benefit of victims and for imposing a sanction on the wrongdoer, when the crime is a relatively minor offense and the interests of justice do not require bringing to bear the full force of the federal criminal justice apparatus against the accused. For example, teenagers who use their home computers to produce counterfeit $20 bills are more likely to have the computer confiscated in a civil forfeiture case then to be prosecuted and sent to prison for the offense.

The forfeiture is not limited to property related to a particular transaction. As already mentioned, because criminal forfeiture is part of sentencing, the forfeiture order imposed by a court in a criminal case is limited to the property involved in the particular offense for which the defendant was convicted. In contrast, civil forfeiture actions *in rem* may be brought against any property derived from either a specific offense or from a course of conduct. For example, criminal forfeiture in a drug case might be limited to the proceeds of the specific transaction charged in the indictment, but a civil forfeiture could reach all proceeds of someone's long-running career as a drug dealer. *See United States v. Two Parcels in Russell County*, 92 F.3d 1123, 1127 (11th Cir. 1996) ("[w]hen probable cause is based on evidence that the participants are generally engaged in the drug business ... , have no other source of income, and ... [bought the properties with drug proceeds], it is not necessary to identify specific drug transactions in the complaint."); *United States v. 5443 Suffield Terrance*, 209 F. Supp. 2d 919, 923 (N.D. Ill. 2002) (forfeiture complaint does not have to detail specific transactions supporting government's theory of forfeiture).

Forfeiting the property of third parties. Because third parties are excluded from participating in the criminal case (until the ancillary proceeding), property belonging to third parties is not subject to criminal forfeiture. On the other hand, anyone with an interest in the property can contest a civil forfeiture. Therefore, if the government establishes the required nexus between the property and the offense in a civil forfeiture case, and it has given proper notice of the forfeiture to all interested parties, it is able to obtain a judgment of forfeiture against the property regardless of who the owner of the property is. Accordingly, a prosecutor will elect to use civil forfeiture when a criminal uses someone else's property to commit a crime, and the third party is not an innocent owner.

There is less work for the criminal prosecutor. Criminal prosecutors like to point out that asset forfeiture law is a bit of a speciality in the United States, and that specialties are best handled by specialists. Thus, in some jurisdictions, policy makers have decided that it is preferable to have a forfeiture specialist handle the forfeiture in a separate civil case, rather than have the overburdened criminal prosecutor go through the trouble of learning forfeiture law so that the forfeiture can be made part of the criminal prosecution and sentence.

B. The disadvantages of civil forfeiture

There is more work for everyone else. The flip side of the last point, of course, is that the effort saved by the criminal prosecutor is offset by the additional work that must be done by everyone else when handling a forfeiture separately as a civil matter, instead of as part of a pending criminal case. A civil forfeiture requires the filing of a separate action and relitigating all of the issues that were litigated in the criminal case, making work for a civil specialist, the support staff, and the court.

Filing deadlines. If property is initially seized for the purpose of civil forfeiture, the government must file its complaint against the property within ninety days of the filing of any claim contesting an administrative forfeiture proceeding. If the government fails to comply with this deadline, and no exceptions apply, civil forfeiture of the property in connection with the offense for which it was seized is forever barred. In contrast, criminal forfeiture actions are not subject to any statutory deadlines.

Unless stayed by the court, a parallel civil case can interfere with a criminal investigation or trial. Once a civil forfeiture action is commenced, both sides have the option of requesting that the other side produce evidence in support of its case, through the process of civil discovery. Claimants who are also defendants in parallel criminal matters often seek to use this procedure to gain access to the government's

witnesses and evidence in ways that are not allowed in the criminal case. For example, the claimant may seek to get a preview of the government's criminal case by noticing the deposition of the government's case agent or confidential informant. In reality, however, this is rarely a serious problem, as the government's reciprocal right to notice the deposition of the defendant, himself, usually persuades both sides that it would be preferable for the court to order the stay of the civil case until the parallel criminal matter is resolved. *See* 18 U.S.C. § 981(g) (providing for the stay of a civil forfeiture case at the request of either side).

The forfeiture is limited to property traceable to the offense. The most serious limitation of civil forfeiture is that, as an *in rem* action, the government must prove that the defendant property is directly traceable to the underlying criminal offense. The court may not, in other words, order the forfeiture of a money judgment or substitute assets. This is a particular problem in cases involving cash proceeds of a drug deal or a fraud offense, where the money actually involved in, or derived from, the crime has been commingled with other funds or dissipated. The only salvation for the government in such matters—and for the victims on whose behalf the government may be seeking to recover the property—is that cash and electronic funds are considered fungible for one year after the offense is committed. *See* 18 U.S.C. § 984; *United States v. U.S. Currency Deposited in Account No. 1115000763247 For Active Trade Company*, 176 F.3d 941, 946-47 (7th Cir. 1999) (once the government has established probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under § 984). In cases where that statute applies, it is unnecessary for the government to comply with the strict tracing requirements that otherwise govern civil forfeiture cases. *See Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119, 1126 (2d Cir. 1993) (Section 984 eliminates tracing requirement); *see also* 18 U.S.C. § 981(k) (eliminating the tracing requirement in cases involving correspondent accounts of foreign banks).

A successful claimant is entitled to attorneys fees. The "American Rule" is that parties to civil cases pay their own costs and attorneys fees. Congress, however, has provided that a claimant who prevails in a civil forfeiture case is entitled to have the government pay his attorneys fees and other litigation expenses. *See* 28 U.S.C. § 2465(b). This is true regardless of how meritorious the government's case was. In contrast, in criminal forfeiture cases, third parties are entitled to attorneys fees only in the relatively rare case in which the government's case was not "substantially justified." *See United States v. Douglas*, 55 F.3d 584, 587-88 (11th Cir. 1995) (the government's position in obtaining a preliminary order of forfeiture not substantially justified where the government failed to take notice that property had been awarded to third party in action enforcing civil judgment).

C. The advantages of criminal forfeiture

A single proceeding takes care of the forfeiture of the defendant's interest. A civil forfeiture is a separate proceeding that can take years to process through a federal district court. If there is a parallel criminal case, filing a separate civil case means relitigating many, if not all, of the issues that the government already established in the criminal trial. In contrast, criminal forfeiture permits the court to dispose of the forfeiture as part of the sentencing phase of the criminal trial or guilty plea, saving substantial time and resources.

The court can order the forfeiture of a money judgment and/or substitute assets. Criminal forfeiture allows the court to order a defendant to pay a money judgment in an amount equal to the value of the proceeds realized from the crime. Thus, a defendant who defrauded his victims of $10 million may be ordered to pay a $10 million judgment to the government, even if

the actual money derived from the crime has disappeared. Moreover, the court can order the forfeiture of some unrelated, untainted asset of equal value to satisfy the money judgment. *See United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit "every last penny" he owns as substitute assets to satisfy a money judgment). In contrast, civil forfeitures, because they are in rem proceedings, are limited to property directly traceable to the underlying offense. The court could no more order the forfeiture of a substitute asset for a missing *in rem* defendant in a civil forfeiture case than it could order the conviction and sentence of a substitute individual for a missing human defendant in a criminal case. *But see* 18 U.S.C. § 545 (allowing value-based civil forfeiture orders in smuggling cases); 18 U.S.C. § 984 (treating certain property as fungible for one year after the offense).

There are no statutory time limits on filing an indictment following seizure of the property. If property is seized, in the first instance, for civil forfeiture, and someone files a claim, the government must commence judicial forfeiture proceedings within ninety days. 18 U.S.C. § 983(a)(3). However, if the property is seized, in the first instance, for criminal forfeiture, as would generally be the case if the property were seized pursuant to a criminal seizure warrant, the time limits for instituting judicial forfeiture proceedings do not come into play. *See* 21 U.S.C. § 853(f). The trade-off is that, in the latter instance, the government probably must forego the option of disposing of the case as an uncontested administrative forfeiture matter. Generally, the government would prefer to start every case as an administrative forfeiture case so that uncontested matters can be disposed of quickly.

Third parties have no right to recover attorneys fees. The right to attorneys fees in 28 U.S.C. § 2465(b) applies only to civil forfeiture cases. It does not apply to any part of a criminal forfeiture case, including the ancillary proceeding in which third party rights are litigated.

D. The disadvantages of criminal forfeiture

Property of third parties cannot be forfeited in a criminal case. As already mentioned, because third parties are excluded from participating or intervening in a criminal case, property belonging to a third party cannot be forfeited criminally. Any person who establishes that he or she was the true owner of the property at the time the crime was committed, or that acquired it later as a bona fide purchaser for value, is entitled to have the forfeiture declared void in a post-trial ancillary proceeding. *See* 21 U.S.C. § 853(n). Most important, a third party challenging a criminal forfeiture on the ground that the property belonged to him, not to the defendant, when the crime occurred, does not have to be innocent. He or she must establish *superior* ownership, not *innocent* ownership. *Id.* Thus, in criminal cases, noninnocent spouses and unindicted coconspirators who had an interest in the property at the time the crime occurred can recover the forfeited property in the ancillary proceeding. To forfeit the interests of such persons, the government must resort to civil forfeiture and rebut the claimant's attempt to establish an innocent owner defense.

Bifurcation of trial and additional jury instructions and special verdicts add to the length of the criminal trial. Most criminal forfeiture proceedings are short in duration. Nevertheless, it is undeniable that even the most straightforward criminal forfeiture proceeding will add to the length of what may already have been a protracted criminal proceeding. Often, all parties, including the judge and the jury, will be exhausted at the end of the criminal case and will prefer to abort the criminal forfeiture in favor of a separate civil proceeding at another time.

Criminal forfeiture requires a criminal conviction. Because criminal forfeiture is part of the defendant's sentence, there can be no forfeiture without a conviction. This eliminates criminal forfeiture as an option in cases where

the defendant is a fugitive or is dead, or where, in the interests of justice, the government has decided not to prosecute the owner of the property, such as a spouse who played a minor role in the commission of the offense. It also means that if the defendant pleads guilty to just one count of a multicount indictment, the forfeiture may be limited to the property involved in that single count. *See United States v. Adams*, 189 Fed. Appx. 600, 602 (9th Cir. 2006) (following *Garcia-Guizar*; if defendant pleads guilty to a fraud conspiracy beginning "no later than 2001," proceeds derived from fraud occurring in 1999 were not related to the crime of conviction and could not be forfeited in the criminal case). To forfeit the property involved in the remaining counts, or in offenses that were never charged in the criminal case at all, the government must use civil forfeiture.

Delay in disposing of property. If property is forfeited in a criminal case, it cannot be disposed of until the criminal case is over and all potential third parties have had their chance to contest the forfeiture. This may be years after the property was seized at the outset of the case. In contrast, if the property is forfeited administratively, and no one files a claim, the forfeiture can be concluded within a few weeks of the seizure. Therefore, the government generally prefers to start a forfeiture administratively, even if there is going to be a criminal prosecution, to see if the forfeiture is going to be uncontested.❖

ABOUT THE AUTHOR

❑**Stefan D. Cassella** is currently detailed as a Special Assistant United States Attorney to the Eastern District of Virginia, United States Attorney's Office. Mr. Cassella is the Deputy Chief for Legal Policy in the Asset Forfeiture and Money Laundering Section (AFMLS). He has been a prosecutor since 1979. He came to the Department of Justice in 1985 and has been involved in forfeiture and money laundering issues since 1989. He handles civil and criminal forfeiture cases, lectures at training conferences on many aspects of money laundering and forfeiture law, and is responsible for legal advice, policy, and legislative issues for the Department. He has published numerous law review articles on forfeiture, a treatise entitled *Asset Forfeiture Law in the United States*, and is the editor of *Quick Release*, the Department's forfeiture newsletter. From 1987 to 1989, he served as Senior Counsel to the U.S. Senate Judiciary Committee. ✠

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Criminal Forfeiture

Craig Gaumer
Assistant United States Attorney
Southern District of Iowa

I. Introduction

Prosecutors are familiar with the multiple consequences a person faces when convicted of a federal crime. The defendant may face jail time, a fine, or both. A special assessment payable to the

Crime Victims' Fund is mandatory. If the crime caused financial harm, the defendant's obligation to repay those hurt by his misdeeds is set forth in the Mandatory Victim Restitution Act. In most cases, the defendant will also face a term of supervised release after imprisonment. He or she may also lose valuable rights, such as the right to vote and the right to possess a firearm.

Prosecutors should not forget about criminal forfeiture where authorized by statute. If it is included in the criminal case, criminal forfeiture is part of the sentence imposed on a defendant convicted of any offense for which forfeiture is authorized. *See Libretti v. United States*, 516 U.S. 29, 38-39 (1995) ("Forfeiture is an element of the sentence imposed *following* conviction or, as here, a plea of guilty.") (emphasis in the original). Most federal crimes are driven by greed. The defendant who is stripped of the profits and tools of his crime, through criminal forfeiture, typically feels more punished by the forfeiture than the jail time. Forfeiture is also a stronger deterrent to keep others from engaging in criminal conduct, and in cases involving victims (e.g., frauds), it acts to preserve assets for eventual return to the victims.

One advantage of criminal forfeiture over civil forfeiture is that the court can criminally forfeit property that is not directly traceable to, and/or has no direct nexus to, the underlying crime. Such property cannot be forfeited in a civil forfeiture *in rem* action, which is limited solely to property that is directly tainted by crime. On the other hand, as an *in personam* action, criminal forfeiture is directly linked to the punishment of the criminal defendant.

- The defendant must be convicted of at least one offense that supports the forfeiture.
- The forfeiture is limited to property involved in the offense(s) of conviction.
- The government cannot forfeit the interest of certain third parties (but even as to property exempt from criminal forfeiture because it belongs to such third parties, the government often may successfully seek civil forfeiture of the property in a parallel proceeding if the property is, in fact, tainted by the crime and civil forfeiture is authorized).

Thus, as part of every criminal case, the prosecutor and investigators should consider forfeiture, examine the connection between the property to forfeit and the crimes to be charged, and find out early on to whom the property belongs in title and in fact.

II. Criminal forfeiture authority

Federal criminal forfeiture authority began in 1970 as part of the Racketeer Influenced and Corrupt Organizations (RICO) statute. Congress continued to enact several criminal forfeiture provisions—such as those applicable to drug trafficking, money laundering, and a wide variety of other crimes. Statutory authority for civil forfeiture vastly outnumbered the crimes for which criminal forfeiture was authorized until the enactment of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000.

CAFRA amended 28 U.S.C. § 2461(c) to authorize criminal forfeiture whenever an offense has civil forfeiture authority, even though no specific criminal forfeiture statute exists for that offense. *See, e.g., United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005) (Section 2461(c) "authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the government to combine criminal conviction and criminal forfeiture in a consolidated proceeding.") Thus, criminal forfeiture is now fully coextensive with civil forfeiture authority, except in rare instances where Congress has specifically enacted both civil and criminal forfeiture statutes for a given offense and the scope of property subject to forfeiture under the two statutes differs. Moreover, section 2461(c) addresses the problem of which criminal forfeiture procedures to use where the criminal forfeiture statute being utilized does not contain its own procedural provisions. It applies the procedures relating to criminal

forfeiture in 21 U.S.C. § 853 (the criminal forfeiture statute for drug trafficking offenses) in all cases brought under such statutes.

In addition to the broad expansion of criminal forfeiture authority through section 2461(c), there are dozens of statutes that provide criminal forfeiture authority directly. Some of the most commonly used statutes are identified below.

Section 853 of Title 21, United States Code, sets forth the statutory scheme for criminal forfeiture in federal drug cases. Subsection (a) of section 853 requires a person convicted of any felony federal controlled substance offense to forfeit to the United States any proceeds obtained, directly or indirectly, from the offense, and any property used to facilitate the offense. Section 853(a)(1) and (2). The statutory definition of "property" in this context is broad. It includes both "real property, including things growing on, affixed to, and found in land," 21 U.S.C. § 853(b)(1), and "tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 21 U.S.C. § 853(b)(2) . The statute is very far-reaching. In addition to drug proceeds and any property traceable to such proceeds, virtually any property that is used to facilitate the federal drug offense is potentially forfeitable (assuming it meets the net equity thresholds or an exception thereto, and there are no other practical impediments to forfeiture). For example, bank accounts, money, guns, cars, houses, art work, businesses, planes, stocks, motorcycles—and even a doctor's license or business license—might fall within the statute's expansive scope.

Section 853(d) creates a "rebuttable presumption" in favor of forfeiture that applies in select situations. It provides the following:

> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--
>
> (1) such property was acquired by such person during the period of the violation . . . or within a reasonable time after such period; and
>
> (2) there was no likely source for such property other than the violation . . . .

21 U.S.C. § 853(d). Consequently, it is important for prosecutors and agents working a "proceeds theory" of forfeiture in a drug case to do a thorough financial investigation that establishes either that assets are "dirty" through direct evidence, or that the defendant had no legitimate source of income during all or part of the period of criminal activity charged in the indictment and the property in question was acquired during that period. In addition, a thorough financial investigation will often help to reveal potential third party owners of forfeitable property and to widen the scope of the criminal investigation. It often uncovers evidence supporting additional counts, such as money laundering, for example.

Section 982 of Title 18, United States Code, is another frequently-used criminal forfeiture statute. Subsection (a) of section 982 provides that the court, when sentencing a person convicted of money laundering or conducting an illegal money transmitting business, shall order that the defendant forfeit to the United States "any property, real or personal, involved in such offense, or any property traceable to such property." Section 982(a)(1). It also authorizes the government to seek forfeiture of the "proceeds" of thirty-four crimes, (section 982(a)(2)), the "gross proceeds" of crimes involving frauds against certain federal financial institutions in specific circumstances, section (982(a)(3)-(4)), and several federal crimes involving motor vehicle theft or fraud. (Section 982(a)(5)). Other forfeiture predicates in this statute include certain immigration offenses, (section 982(a)(6)), health care fraud, (section 982(a)(7)), and telemarketing fraud, (section 982(a)(8)).

The "granddaddy" of all modern criminal forfeiture statutes, RICO, authorizes sweeping

criminal (but not civil) forfeiture for all racketeering offenses charged under 18 U.S.C. § 1962. (Counsel should note that, by Department of Justice (Department) policy, approval of the Organized Crime and Racketeering Section, Criminal Division, must be obtained in advance of charging such offenses). A defendant convicted of such a racketeering offense—which includes a conspiracy to commit such an offense, if charged under section 1962(d)—must forfeit the following:

- Any interest the defendant acquired or maintained in violation of section 1962 (section 1963(a)(1)).
- Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the defendant established, controlled, conducted, or participated in the conduct of, in violation of section 1962 (section 1963(a)(2)).
- Any property constituting, or derived from, any proceeds the defendant obtained, directly or indirectly, in violation of section 1962 (section 1963(a)(3)).

Many federal prosecutors and law enforcement agents do not know that firearms and ammunition involved in federal crimes do not constitute contraband *per se*, and must be forfeited or formally abandoned before they may be properly disposed of. It is the policy of the United States to forfeit all firearms and ammunition involved in federal crimes, and the Asset Forfeiture And Money Laundering Section's A GUIDE TO THE FORFEITURE OF FIREARMS AND AMMUNITION (Apr. 2006) lists numerous ways to do so, depending on the nature of the offense.

As part of the Attorney General's "Project Safe Childhood" initiative against child exploitation offenses, prosecutors can criminally forfeit illegal images, media that contain such images, all profits or proceeds from such offenses, and any property, real or personal, used to commit or promote such a crime, or traceable thereto. 18 U.S.C. § 2253.

Before a criminal forfeiture is very far along, it is both a good idea, and Department policy, for prosecutors to work with their forfeiture chief or coordinator and the federal sponsoring agency to engage in preforfeiture planning. This includes assessing whether an asset's net equity meets Department or agency thresholds, and ironing out any logistical problems with seizure or storage.

III. The forfeiture and the predicate offense

If the prosecutor includes a forfeiture allegation in the indictment, he or she also needs to charge at least one criminal offense that supports the forfeiture, and prove that charge beyond a reasonable doubt at trial. Because criminal forfeiture is part of the defendant's sentence, there can be no forfeiture in the criminal case unless the defendant is convicted of such an offense. If the conviction underlying a forfeiture is reversed on appeal, the forfeiture may also be lost. *See, e.g., United States v. Cherry*, 330 F.3d 658, 670 (4th Cir. 2003) (criminal forfeiture constitutes part of the sentence and is used to enhance the punishment of a defendant who has already been convicted of a particular offense; if the underlying conviction is vacated, the forfeiture based on that conviction must be vacated as well).

This rule is not as limited as it sounds. A defendant charged with more than one offense supporting forfeiture of the same property may be acquitted of one offense and convicted of another without, in any way, jeopardizing the forfeiture. In other words, the government need only obtain a conviction, or prevail on appeal, as to just *one* of the charges supporting forfeiture of the property in question. *See, e.g., United States v. Rosario*, 111 F.3d 293, 301 (2d Cir. 1997) (declining to vacate the criminal forfeiture when conspiracy conviction under 21 U.S.C. § 846 was reversed on

appeal, yet the surviving section 848 conviction supported the same forfeiture).

Likewise, criminal forfeiture is limited to property with a *legal* nexus to the offenses on which the forfeiture is based. *See, e.g., United States v. Messino*, 382 F.3d 704, 714 (7th Cir. 2004) (there must be a connection between property subject to forfeiture and the underlying criminal activity "on which the conviction rests"); *United States v. Iacaboni*, 363 F.3d 1, 7 (1st Cir. 2004) (because defendant was convicted of "promotion" money laundering under section 1956(a)(1)(A)(i), court could not order forfeiture of property forfeitable under section 1956(a)(1)(B)(i)). *But see United States v. Genova*, 333 F.3d 750, 762-63 (7th Cir. 2003) (because criminal forfeiture is part of sentencing, the forfeiture is not limited to the property involved in the offenses for which the defendant was convicted; to the contrary, property involved in conduct for which the defendant has been acquitted may be forfeited, if the judge finds that it is forfeitable by a preponderance of the evidence). For example, if a defendant is charged with a single drug offense, the forfeiture is limited to the property connected to that offense. *See, e.g., United States v. Juluke*, 426 F.3d 323, 328-29 (5th Cir. 2005) (The government must prove that the property subject to forfeiture was the proceeds of the drug activity for which the defendant was convicted, not of the defendant's drug trafficking generally.)

Finally, because the offense of conviction defines the property subject to forfeiture, conspiracy offenses often provide the greatest scope of property subject to forfeiture for a single offense. For example, a single conviction on a criminal conspiracy extending over a five-year period might support the forfeiture of all proceeds realized over the entire conspiracy, any property traceable to such proceeds, and any nonproceeds property that was involved in the acts of the conspirators—assuming, of course, that forfeiture was authorized for the conspiracy offense and included all of these categories of property. This is useful to keep in mind during plea bargaining with a defendant who is willing to plead to one or several, but not all, counts in the indictment. Because jointly convicted coconspirators are considered jointly and severally liable for a forfeiture judgment, a plea to the conspiracy count will expose the convicted defendant to liability for the entire forfeiture judgment.

IV. Criminal forfeiture procedures

Criminal forfeiture procedures are derived from the following authorities.

- Section 853 of Title 21, United States Code (which is also incorporated by reference in 28 U.S.C. § 2461(c) and several other statutes).
- Section 1963 of Title 18 (RICO).
- Rules 32.2 and 7 of the Federal Rules of Criminal Procedure.

A. Restraint and seizure of assets

One of the most important aspects of forfeiture procedure is the ability, before trial, to secure the availability of property for forfeiture. Section 853(e) allows federal courts, upon application of the United States, to enter a protective order against forfeitable property. Such an order usually takes the form of a restraining order and can be entered, for cause shown and with certain limits, preindictment, pursuant to section 853(e)(1)(B), (e)(2), or postindictment, pursuant to section 853(e)(1)(A). A protective order—or, as discussed below, a seizure warrant—should be sought at the inception of all forfeiture cases involving real property or in any case involving personal property that the government has not previously taken into custody (for example, by search or seizure warrant or warrantless seizure). Such orders are particularly useful as to any property that is subject to the following.

- A mortgage or other installment payment contract.

- Waste or undue diminution in value, if not properly maintained and/or insured.
- Pledged as security or transferred to another person.

If a court finds that a protective order "may not be sufficient to assure the availability of the property for forfeiture," it may, upon the *ex parte* request of the government, issue a warrant authorizing the seizure of any personal property subject to forfeiture (generally, a restraining order is sufficient to secure real property). 21 U.S.C. § 853(f).

B. Indictment language

Federal Rule of Criminal Procedure 7(c)(2) establishes that a judgment of forfeiture cannot be entered in a criminal case unless the indictment or information "provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute." This requirement is mirrored in Federal Rule of Criminal Procedure 32.2(a). ("A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.") FED. R. CRIM. P. 32.2a.

Indictment language that simply tracks the pertinent language of the applicable forfeiture statute is usually sufficient notice. Counsel should, however, itemize any property believed to be subject to forfeiture at the time of indictment, as this facilitates obtaining a protective order or seizure warrant as to the itemized properties. Where property is itemized in the indictment, care should be taken to state that property subject to forfeiture "includes but is not limited to" the itemized property. If this is done later, discovered property may be added to the forfeiture allegation via a bill of particulars, without superseding the indictment. A defendant's right to such notice of forfeiture is waivable. *Cf. United States v. Lemaster*, 403 F.3d 216 (4th Cir. 2005) ("defendant may waive his right to attack his conviction and sentence collaterally"); *United States v. Rutan*, 956 F.2d 827 (8th Cir. 1992) (defendant waived right to appeal guideline sentence).

C. Forfeiture phase of trial

The "forfeiture phase" of a criminal case does not occur until after the defendant has been convicted of an offense or offenses supporting forfeiture because criminal forfeiture is part of the defendant's sentence, and not part of the government's case-in-chief. The court conducts the postconviction "forfeiture phase" of a bifurcated trial upon the government's motion for a preliminary order of forfeiture. FED. R. CRIM. P. 32.2(b)(1) (forfeiture findings must be made as soon as practicable after the court enters a verdict or finding of guilty). In this phase, the court or, in some instances, the jury, "must determine what property is subject to forfeiture under the applicable statute." *Id.*

If the government seeks forfeiture of specific property, the court, or perhaps the jury, must determine whether the government has established the required "nexus" between the property and the offense, by a preponderance of the evidence. *See, e.g., United States v. Garcia-Guizar*, 160 F.3d 511, 518 (9th Cir. 1998) (preponderance standard is constitutional because criminal forfeiture is not a separate offense, but only an additional penalty for an offense that was established beyond a reasonable doubt). Federal Rule of Criminal Procedure 32.2(b)(4) provides that either side may request that the jury that convicted the defendant act as the trier-of-fact as to whether the requisite "nexus" exists for the forfeiture of such property. The trier-of-fact's determination may be based on evidence already in the record, including written plea agreements, or made after an evidentiary hearing. FED. R. CRIM. P. 32.2(b)(1).

If the government seeks a personal money judgment for the amount of proceeds derived from the criminal conduct supporting forfeiture,

or the value of funds involved in a charged money laundering offense, "the court must determine the amount of money that the defendant will be ordered to pay." *Id.* Courts are split as to whether Rule 32.2(b)(4) affords a right to a jury trial regarding the amount of a money judgment (as opposed to whether specific property has the requisite "nexus" to the criminal activity). *Compare United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (no right to jury trial on amount of money judgment) *with United States v. Armstrong*, 2007 WL 809508, at *4 (E.D. La. Mar. 14, 2007) (overruling defense objection to government request for jury trial on the amount of the money judgment).

In any case in which the forfeiture phase is to be tried to a jury, the jury must be the same one that heard the "guilt phase" of the case resulting in the conviction of the defendant(s). A specific and timely request to have the forfeiture go before a jury must be made. FED. R. CRIM. P. 32.2(b)(4). A jury cannot be empaneled solely to hear the forfeiture phase of a criminal case. *See, e.g., United States v. Davis*, 177 F. Supp. 2d 470, 483 (E.D. Va. 2001).

A major advantage to using criminal, instead of civil, forfeiture, is that criminal forfeiture is not limited solely to specific assets directly traceable, or having a direct nexus, to the offense. Rather, the government can obtain a personal money judgment against the defendant for the total amount of funds proven, at trial, to be subject to forfeiture (the total proceeds of the criminal offense(s) or the total amount of funds involved in money laundering transactions). The government may execute on any property of the convicted defendant or jointly-convicted codefendants, including legitimate property completely untainted by crime, until the amount of the money judgment is fully satisfied. *See, e.g., United States v. Iacaboni*, 363 F.3d 1, 6 (1st Cir. 2004) (court entered money judgment equal to total amount involved in all money laundering transactions in the conspiracy even though defendant did not retain the money for himself). Similarly, the government may seek to forfeit "substitute assets" (legitimate assets of a defendant equal in value to directly forfeitable property) upon showing that, by the defendant's own act or omission, the directly forfeitable property has been rendered unavailable for criminal forfeiture for any one of five specific reasons. 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m).

With respect to either unsatisfied money judgments or substitute assets, once the government locates additional untainted assets of a convicted defendant at any time following conviction, it may simply ask the court to amend the order of forfeiture to include forfeiture of that property. FED. R. CRIM. P. 32.2(e)(2). Similarly, whenever the government later locates additional tainted assets (property traceable to proceeds of a convicted defendant or specifically identified in the forfeiture judgment, but not located until later) of a convicted defendant, it may ask that the order of forfeiture be amended to include such property. FED. R. CRIM. P. 32.2(e)(1).

D. Preliminary order of forfeiture

Once the trier-of-fact finds that property or an amount of money is subject to forfeiture, the court must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property. FED. R. CRIM. P. 32.2(b)(2). The issue of whether any nondefendant third party may have an interest in the forfeitable property and, if so, whether the interest is exempt from forfeiture, must be deferred until after entry of the preliminary order of forfeiture. *Id.* The preliminary order of forfeiture authorizes the government, *inter alia*, to seize specific property subject to forfeiture and to conduct any discovery the court considers appropriate "in identifying, locating, or disposing of the property." FED. R. CRIM. P. 32.2(b)(3).

At sentencing, or at any time before sentencing if the defendant consents, the preliminary order of forfeiture becomes final as to the defendant and "must be made a part of the

sentence and be included in the judgment." *Id.* The court may include conditions in the order of forfeiture that are "reasonably necessary to preserve the property's value pending any appeal." *Id.* According to Rule 11(b), the court must advise the defendant of the forfeiture aspect of his sentence at the time he enters a guilty plea. FED. R. CRIM. P. 11(b)(1)(J). Moreover, the court must include a reference to the forfeiture in the oral announcement of the sentence, and include the preliminary order of forfeiture in the written judgment. FED. R. CRIM. P. 32.2(b)(3). Courts, unfortunately, sometimes miss these procedural requirements, which can be fatal to the forfeiture order and eliminate the forfeiture entirely.

E. Third parties and ancillary proceedings

After the court issues a preliminary order of forfeiture, the government must commence an ancillary proceeding to address any interests that nondefendant third parties may have in any of the specific property forfeited. 21 U.S.C. § 853(n)(1); 18 U.S.C. § 1963(l)(1). An ancillary proceeding is not required if the forfeiture consists solely of a money judgment. FED. R. CRIM. P. 32.2(c)(1). The court, however, retains jurisdiction to amend orders of forfeiture, at any time, to include property located after entry of the forfeiture order, provided the property was included in the original order or is substitute property. FED. R. CRIM. P. 32.2(e)(2)(B). There is no right to a jury trial in the ancillary proceeding. FED. R. CRIM. P. 32.2(e)(3).

The statutes direct that the government "shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General ... direct[s]" and "to the extent practicable, provide direct written notice to any person known to have alleged an interest in the [forfeited] property . . . ." 18 U.S.C. § 1963(l)(1); 21 U.S.C. § 853(n)(1). The Asset Forfeiture and Money Laundering Section (AFMLS) has recently released a Legal Advice Memorandum directing that the government must publish notice in a manner consistent with the requirements of Supplemental Rule G(4)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, unless one of the Rule's stated exceptions to the publication requirement applies. *See* INTERIM LEGAL ADVICE MEMO 07-1: Publication and Notice of the Order of Forfeiture in a Criminal Case. Also consistent with Supplemental Rule G(4)(b), the government must send direct written notice to any person known to the government, who reasonably appears to have an interest in the forfeited property, and such notice may be sent by any of the means described in Rules G(4)(b)(iii)-(v). *Id.* The notice invites nondefendant third parties wishing to defend their interests to file a petition with the court that forfeited the property. It must describe the forfeited property, state the place and times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and the contact information for the government attorney to be served with the petition. *Id.*

If a third party files a petition asserting an interest in the forfeitable property, the court must conduct an ancillary proceeding. FED. R. CRIM. P. 32.2(c)(1). The court may, based on a motion made in the ancillary proceeding, dismiss the petition for lack of standing, for failure to state a claim, or for any other legal reason. FED. R. CRIM. P. 32.2(c)(1)(A). For purposes of such a motion, the facts set forth in the petition are assumed to be true. *Id.*

A third party wishing to challenge a criminal forfeiture on the ground that he or she is the true owner of an interest in all or part of the property, and that the interest is exempt from forfeiture under one of the two categories set forth in 18 U.S.C. § 1963(l)(6) or 21 U.S.C. § 853(n)(6), bears the burden of proving that either: (A) he or she holds a superior interest to that of the convicted defendant and this interest was vested in the petitioner before the government's interest arose upon commission of the crime subjecting the property to forfeiture, or (B) he or she qualifies as a bona fide purchaser for value of the property, who had no knowledge, or reason to

know, that the property was subject to forfeiture when purchased.

Before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure, provided the court concludes that discovery is necessary or desirable to resolve disputed factual issues. FED. R. CRIM. P. 32.2(c)(1)(B). At the close of discovery, either party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Id.* If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition cannot be appealed until rulings are made on all the petitions, unless the court determines that there is no just reason for delay. FED. R. CRIM. P. 32.2(c)(3).

The ancillary proceeding is essentially a quiet title action. The court determines what portion of the property is forfeitable as belonging to the defendant and what portion is not forfeitable because it constitutes an interest shown to be exempt from forfeiture by a third-party petitioner. *See, e.g., United States v. Totaro*, 345 F.3d 989, 993-94 (8th Cir. 2003); *United States v. Gilbert*, 244 F.3d 888, 920-21 (11th Cir. 2001). When the ancillary proceeding is over, the court enters a final order of forfeiture by amending the preliminary order, as necessary, to resolve any third-party rights. FED. R. CRIM. P. 32.2(c)(2). If no third party files a timely petition, the preliminary order becomes the final order of forfeiture. *Id.* A defendant cannot object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party. *Id.*

The premise that criminal forfeiture only forfeits the defendant's interest really means that all property included in the preliminary order is subject to forfeiture and may be removed only if a third party appears in the ancillary proceeding and proves that his or her interest in such a property is legally exempt from the forfeiture.

Importantly, criminal forfeitures can be used to satisfy victim restitution orders through the Department's "restoration" process, by coordinating with the AFMLS.

V. Conclusion

Prosecutors and investigators should consider forfeiture a part of every criminal case for which criminal forfeiture is authorized, in order to strip the defendants of the profits and tools of their crimes and deter others from engaging in such criminal activity. Prosecutors should also keep in mind that forfeited assets may be "equitably shared" or put into "official use" by the federal, state, and local law enforcement agencies that participated in the investigation leading to the forfeiture. They may also be liquidated and the net sales proceeds returned to victims of the crimes of conviction, or, by law, deposited into the Department's Assets Forfeiture Fund and thereafter used to support the forfeiture related law-enforcement functions of all federal investigative and prosecutorial agencies participating in the Department's asset forfeiture program.❖

ABOUT THE AUTHOR

❒**Craig Gaumer** is an Assistant United States Attorney, Civil Division, in the Southern District of Iowa. He previously served in both the Civil and Criminal Divisions in the District of South Dakota. He was a member of the National Bankruptcy Fraud Working Group, past member of the Executive Office for United States Attorneys' (EOUSA) Civil Bankruptcy Working Group, and past member of EOUSA's Bankruptcy Fraud Working Group. Mr. Gaumer has taught numerous Office of Legal Education courses in civil bankruptcy and bankruptcy fraud. He has also served as an Adjunct Professor of Law, Advanced Bankruptcy Practice, University of South Dakota.✠

Returning Forfeited Assets to Victims

Nancy Rider
Deputy Chief
Asset Forfeiture Programs
Criminal Division

I. Introduction

Money laundering and fraud prosecutions can lead to forfeitures amounting to hundreds of millions of dollars. Forfeiture is an essential tool for restraining assets that defendants would otherwise hide or spend during the course of prosecution. These assets, in turn, can then be used to compensate fraud victims for their losses. During Fiscal Year 2006, the Department of Justice (Department) returned over $400 million in forfeited assets to nearly 14,000 fraud victims.

For example, last year in the Southern District of New York, three securities fraud prosecutions led to the forfeiture of over $1.2 billion, which will be used to compensate the defrauded investors. The settlement in *U.S. v. Rigas (Adelphia)*, 1:02-CR-01236 (Apr. 25, 2005), led to the forfeiture of $715 million; *U.S. v. Approximately $337.5 Million in United States Currency including Additional Contingent Funds (Bawag Bank)*, 1:06-CV-04222 (May 31, 2006), resulted in the forfeiture of $437.5 million; and *U.S. v. Samuel Israel, III*, 7:2005CR01039 (Sept. 29, 2007), *U.S. v. Daniel E. Marino*, 7:2005CR01036 (Sept. 29, 2007), and *U.S. v. All Assets of Bayou Accredited Fund, LLC*, (Sept. 29, 2006) resulted in the forfeiture of $100 million.

Similarly, in the District of Connecticut, nearly $30 million is expected to be forfeited in *U.S. v. Martin Frankel*, 3:1999CR00235, (Stipulations of Settlement filed on June 21, 2007) and twelve related civil forfeitures, which will be remitted to victims of insurance fraud. In the District of Puerto Rico, over $34 million was forfeited in *U.S. v. Carlos H. Soto*, 3:04-CR-00127, (Feb. 17, 2005) and returned to institutional and individual victims of investment fraud. Prosecutors in the District of Colorado forfeited $24 million in the *Norm Schmidt/Capital Holdings/Redstone Castle* prosecutions, all of which was returned to the investment fraud victims, who recovered nearly 60 percent of their losses. *See* 04-CR-0103 (Nov. 5, 2004); 03-RB-0385 (Feb. 17, 2005); 03-RB-0403 (Feb. 17, 2005).

Forfeiture permits the government to compensate victims for their losses. The forfeiture process, however, transfers title of the assets to the United States and they become U.S. government property. Certain regulations and procedures must be followed before the proceeds are turned over to victims. This article will cover regulatory and policy requirements in returning forfeited assets to victims and highlight practical considerations so this may be accomplished smoothly.

The two avenues for returning forfeited property to victims are through remission and restoration.

II. Remission

Once assets have been judicially forfeited, the authority to distribute them to victims rests solely with the Attorney General, pursuant to the regulations governing the remission of forfeitures at 28 C.F.R. Part 9. Known victims must be notified that they can file a petition for remission. Notification in judicial forfeitures is done by the U.S. Attorney's office (USAO). Known victims should be notified by mail, and if there are believed to be unknown victims, notification may be made by publication. The USAO may use the Victim Notification System (VNS) and modify the standard victim notice to incorporate notice of the forfeiture and a model petition for remission. The Asset Forfeiture and Money Laundering Section (AFMLS) provides a model petition,

which victims can adapt to their situation and file with the U.S. Attorney and AFMLS.

The authority to decide petitions for remission has been delegated to the Chief of the AFMLS, Criminal Division. 28 C.F.R. § 9.1(b)(2). Moreover, 28 C.F.R. § 9.4(g) stipulates that petitioners have no right to a hearing. Petitioners, however, may file one request for reconsideration of a denial of a petition. 28 C.F.R. § 9.4(k)(3). The petition decisions are subject only to very circumscribed judicial review. Judicial review is available only where the decision maker arbitrarily and erroneously refuses to entertain a petition, where the Department has a formalized, invariable policy to deny petitions, or, in the Ninth Circuit, where a denial of a petition raises a constitutional challenge to the forfeiture.

The regulations governing petitions for remission are used to determine who is a victim and are key to determining whether, and to what extent, distributions of forfeited property will be made to victims. The breadth of options available for transfer of forfeited property to victims depends on the statute under which the property is forfeited. The options are broadest in criminal forfeiture. In such cases, the Attorney General has statutory authority not only to grant petitions for remission to victims of a violation of the offense that is the basis for the forfeiture, but also to "*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 [the applicable chapter or section]." 21 U.S.C. § 853(i)(1), incorporated by reference in 18 U.S.C. § 982 for money laundering and other offenses (emphasis added). In civil forfeitures, the statutory authority is less broadly stated, and the Attorney General's authority to decide petitions for remission or mitigation does not extend to other "innocent persons." *See, e.g.*, 18 U.S.C. § 981(d); 21 U.S.C. § 881(d).

A. 28 C.F.R. Part 9, Standards for Victims

The factual basis and legal theory underlying the forfeiture will determine the victims under 28 C.F.R. Part 9. "The term victim means a person who has incurred a pecuniary loss as *a direct result of the commission of the offense underlying a forfeiture*." 28 C.F.R. § 9.2(v) (emphasis added). The term "person" is defined as "an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property." 28 C.F.R. § 9.2(m). Victims also may recover losses caused by a related offense. 28 C.F.R. § 9.8(a)(1). "Related offense" means: "(1) Any predicate offense charged in a Federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; 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." 28 C.F.R. §9.2(s).

B. Qualification to file

A victim may be granted remission of the forfeiture of property if the victim satisfactorily demonstrates that:

> (1) a pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and the loss is supported by documentary evidence including invoices and receipts; (2) the pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of the criminal offense; (3) the victim 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, that was the underlying basis for the forfeiture; (4) the victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and (5) the victim does not have recourse reasonably available to other assets from which to obtain

compensation for the wrongful loss of the property.

28 C.F.R. § 9.8(a).

"The amount of the pecuniary loss suffered by a victim for which remission may be granted 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." 28 C.F.R. § 9.8(b). This provision presents three issues to be determined in connection with calculating a victim's loss: (1) What property did the victim lose as a direct result of the underlying illegal activity? (2) On what date was the victim deprived of it? and (3) What was the fair market value of that property on that date? The term "fair market value" is not defined in 28 C.F.R. Part 9. When the loss is property other than money, the date of the victim's loss and the fair market value of the property on that date must be decided in order to determine the victim's recoverable loss.

However, losses that are not supported by documentary evidence (*See* 28 C.F.R. § 9.8(a)(1) and (2)) are excluded, as are losses that only *indirectly* resulted from the underlying or a related offense, such as "interest foregone or for collateral expenses incurred to recover lost property or to seek other recompense." 28 C.F.R. § 9.8(b).

Notably, 28 C.F.R. § 9.8 excludes victims who "knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture." 28 C.F.R. § 9.8(a)(3).

C. Trustees

"[T]he services of a trustee, other government official, or appointed contractors [may be used] to notify potential petitioners [for remission of forfeiture], process petitions [for remission], and make recommendations ... on the distribution [of forfeited property to petitioners]. The expense [of] ... such assistance [is] ... paid out of the forfeited funds" in that case.

28 C.F.R. § 9.9(c).

D. Additional grounds for denial of victims

Remission to victims may also be denied: (1) if determination of the pecuniary loss to be paid to individual victims is too difficult; (2) if the amount to be paid to victims is small compared to the expense incurred by the government in deciding the victims' claims; or (3) if the total number of victims is large and the amount available for payment to victims is so small as to make granting payments to victims impractical. 28 C.F.R. § 9.8(d).

III. Restoration

In October 2002, the Criminal Division issued new procedures designed to simplify and accelerate the return of forfeited property to victims. The Restoration Procedures were generated by a working group of representatives of all the Department's asset forfeiture components who investigate and prosecute fraud. The new procedures apply where: (1) both restitution to compensate victims and a related forfeiture (either civil, criminal, or administrative) have been ordered, (2) the victims and amounts listed in the restitution order virtually conform to the victims and amounts that would have been paid through the forfeiture remission process, and (3) other property is not available to satisfy the order of restitution.

The Restoration Procedures enable the United States to complete the forfeiture and recover costs. This permits victims to obtain fair compensation from the forfeited assets, in accordance with the court's restitution order, without having to file petitions for remission with the government and await decisions. They are standardized alternative procedures to petitions for remission, designed to accommodate victims and the courts to the furthest extent possible, while still meeting statutory requirements.

A. Background

Because forfeited assets are property of the United States, courts and defendants lack authority to use them to satisfy a defendant's criminal debts, including fines or restitution obligations. *See United States v. Trotter*, 912 F.2d 964 (8th Cir. 1990). Prior to the passage of the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. No. 106-185, 114 Stat. 202 (Apr. 2000), victims could file petitions for remission with the Attorney General and recover, as nonowner victims, only in criminal forfeitures and civil bank fraud forfeitures. In other civil forfeitures, victims could be compensated only where they were named in a restitution order resulting from the successful prosecution of a related criminal case. However, only property that remained in the hands of the defendant after the civil forfeiture would be available to satisfy the order of restitution. In most cases, little or no property was left after the civil forfeiture was completed. Thus, the government often seized property, but rather than complete the forfeiture, made the property available to satisfy court-ordered restitution.

This process, although cumbersome, worked where the seized assets were cash or bank accounts, and where there were no competing claims for the property. Where assets needed to be maintained and sold, or where third parties claimed an interest in the property, completion of the forfeiture often was required and nonowner victims had no right to compensation from the forfeited assets. Even where remission of forfeited assets to nonowner victims was authorized by statute, Assistant U.S. Attorneys (AUSAs) were often placed in the uncomfortable position of advising judges that victims would have to take the additional step of filing petitions with the Department in order to recover any part of the forfeited assets.

The passage of CAFRA amended 18 U.S.C. § 981(e) to broaden the Attorney General's authority to restore forfeited property to the victim of any offense that gives rise to forfeiture. The Attorney General's restoration authority has been delegated to the Chief of the AFMLS, pursuant to Attorney General Order No. 2088-97 (June 14, 1997). Under the new procedures, the government is now able to forfeit a defendant's property and represent to the court and to victims that, where other property is insufficient, the forfeited property will be applied to the order of restitution.

B. How the Restoration Procedures work

The Restoration Procedures require that both a court order of restitution *and* an order of forfeiture be in hand. The Restoration Procedures contemplate preliminary review of the expected restitution and forfeiture order so that AUSAs can advise the court of the Department's intended distribution of the property. To the extent that the victims named and the amounts listed in the restitution order virtually match the victims and amounts that would be paid through the remission process, the forfeited assets are made available to the court to satisfy (or partially satisfy) the order of restitution. To use the procedures, the USAO must send the Chief of AFMLS a copy of the judgment and commitment order containing the order of restitution and a copy of the forfeiture order, along with a written request signed by the U.S. Attorney, or his or her delegee, that includes the representations set forth in Part A of the Restoration Procedures, discussed below. Once the Chief of AFMLS has approved the request for restoration of forfeited assets, AFMLS will notify both the USAO and the U.S. Marshals Service (USMS). The USMS will transfer the net proceeds of the forfeiture to the clerk of court for distribution pursuant to the order of restitution.

C. Remission and restitution

Because the Restoration Procedures only come into play when the restitution order virtually matches the results obtained through the remission process, AUSAs must understand both remedies, in order to determine whether restoration might be appropriate. If prosecutors

want to use the procedures, they must work with the probation officer and the court to make sure that the court's restitution order lists all the victims' names and the amount of restitution due to each. Prosecutors also should be cognizant that restitution is available for a much broader category of losses than may be satisfied through remission, which is allowed only for pecuniary losses caused by the fraud that underlies the forfeiture. They should pay particular attention to 28 C.F.R. § 9.8(b), which sets forth how the pecuniary loss is calculated. The loss is limited to the fair market value of the property of which the victim was deprived, as of the date of the loss. No allowance is made for interest forgone or for collateral expenses incurred to recover lost property or to seek other recompense. Thus, the Restoration Procedures may not be used where a significant portion of the losses covered by the restitution order relate to bodily harm, injuries in tort or contract that may relate to the crime of conviction, collateral expenses such as legal, accounting, or security expenditures incurred in trying to correct the harm caused by the crime, or lost profits.

D. Representations

The Restoration Procedures are designed to accomplish results that are consistent with the standards that apply to the remission of forfeited assets set forth at 28 C.F.R. § 9.8, for determining the remission of property to nonowner victims. In order to ensure that such standards are met, the U.S. Attorney, or his or her designee, must inform AFMLS of the following, in writing, as part of the request for restoration.

- That all known victims have been properly notified of the restitution proceedings and are properly accounted for in the restitution order. This representation is intended to ensure that no victims have been left out of the restitution order and that all are treated fairly in the order.
- That the losses described in the restitution order have been verified and reflect all sources of compensation received by the victims, including returns on investments, interest payments, insurance proceeds, refunds, settlement payments, lawsuit awards, and any other sources of compensation for their losses. This is to avoid double recovery by victims that may already have been compensated for part of their losses.
- That reasonable efforts to locate additional assets establish that the victims do not have recourse reasonably available to obtain compensation for their losses from other assets, including those owned or controlled by the defendant.
- That there is no evidence to suggest that any of the victims knowingly contributed to, participated in, benefitted from, or acted in a willfully blind manner, toward the commission of the offenses underlying the forfeiture or a related offense. This is to prevent the return of forfeited property to those who essentially took part in the conduct that led to the forfeiture.

Because restitution and forfeiture are mandatory and independent sentences, the defendant should not be allowed to use forfeited assets to satisfy the restitution order, if other assets are available for that purpose. Although this situation may not arise often, it does occur on occasion. Typical examples might involve corporations that have extensive holdings that are not subject to forfeiture, or individual business owners, physicians, or others who have property that exceeds the amount subject to forfeiture. The statutes governing restitution permit the government to enforce the restitution order as a final judgment against almost all of the defendant's property, not just the facilitating property or fraud proceeds that may be subject to forfeiture.

E. Timing

Civil and administrative forfeiture actions proceed quickly. Consequently, assets might be

forfeited, equitably shared, or remitted to those victims with the savvy to file petitions long before restitution is ordered. As a result, these assets would not be available for application to the restitution order. To avoid this outcome, the Restoration Procedures permit the USAO to place a twelve-month "hold" on the proceeds of completed forfeitures, pending the entry of a restitution order in a parallel criminal case. Once the hold is entered in the Consolidated Asset Tracking System (CATS), it will bar the granting of any petitions to nonowner victims and will prevent the transfer of forfeited property for official use or equitable sharing. The hold will have no effect, however, on the forfeiture proceedings governing the property, the ability to liquidate the property once forfeited, or to dispose of the property as otherwise ordered by the court. Neither will the hold prevent the processing of petitions filed by owners, lien holders, or federal financial institutions—all of which have priority over nonowner victims—or the payment of awards or property management expenses.

When deciding whether to place a hold on the proceeds of a related forfeiture, the AUSA should consider whether it is more efficient to compensate all victims through the restoration process or to allow the seizing agency (in administrative cases) or AFMLS (in judicial cases) to proceed with the remission process. In some cases, it might be better to use the remission process to provide the victims with at least partial compensation immediately, rather than have them wait until completion of a criminal prosecution and entry of a restitution order. On the other hand, if a victim could use the remission process to obtain a greater percentage of compensation than similarly situated victims who chose to pursue only the restitution route, it might be better to require all victims to be compensated through the restoration process.

USAO personnel are responsible for placing the hold in CATS and must coordinate with the seizing agency to secure retention of the property for restoration. If the forfeited property has already been transferred, placed into official use, or equitably shared, CATS will not accept the hold request and will notify the USAO. Such transfers will not be reversed to make the property available for restoration.

F. Payment

Payment will be made *only* in accordance with the court's restitution order, or if the forfeited assets are not sufficient to fully satisfy the order, pro rata, based on the amounts listed in the restitution order. If the restitution order is not amenable to the restoration process, the USAO will be advised and assets will be distributed through the remission process.

If the assets are to be restored to the victims listed in the restitution order, AFMLS will notify the USAO and USMS in writing. The marshal will then transfer the net forfeited proceeds to the clerk of court for distribution per the restitution order.

G. Nonjustice seizing agencies

The Department of the Treasury (Treasury) law enforcement bureaus participate in this effort with respect to judicial forfeitures. Where the AUSA wishes to return proceeds administratively forfeited by a non-Justice seizing agency, the AUSA must first coordinate with the local Treasury Bureau special agent-in-charge to determine whether the Treasury seizing agency would like to have administratively forfeited assets distributed per the Restoration Procedures in specific cases. With respect to Internal Revenue Service administrative forfeitures, restoration approval must be sought through the Internal Revenue Service chain of command. Judicially forfeited assets may be distributed per the Restoration Procedures regardless of whether a Justice or Treasury agency seized the assets.

H. Benefits

The Restoration Procedures are intended to assist AUSAs in their use of forfeited assets to compensate victims and to assist victims in their

pursuit of compensation. Victims will not need to file petitions for remission, and the review process will be faster. The forfeiture will be completed so that costs can be recovered and third-party rights extinguished. Proceeds from civil, criminal, and Justice administrative forfeitures, can be handled together and applied to restitution. Forfeiture AUSAs and agents will get credit for their work, and assets will be distributed primarily as they would have been under the remission regulations.

IV. Conclusion

If you wish to use the Restoration Procedures, please consult a complete copy of the procedures, which have been published as Forfeiture Policy Directive 02-1: *Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in lieu of Remission*. The procedures have been distributed to the USAOs, the seizing agencies, and the other asset forfeiture components. They are also available on Asset Forfeiture and Money Laundering Online.❖

ABOUT THE AUTHOR

❑**Nancy Rider** is the Deputy Chief for Asset Forfeiture Programs. Her unit processes petitions for remission and advises on the restoration of assets to victims. She is responsible for policy issues involving the Asset Forfeiture Program and the Assets Forfeiture Fund. Her unit is responsible for all aspects of the equitable sharing program, including the Agreement, Certification, and Audit function. Prior to joining the Criminal Division, she wrote The Prosecutor's Guide to Criminal Fines and Restitution, as an Assistant Director at EOUSA.✠

Forfeiture of Property Involved in Money Laundering

Stefan D. Cassella
Special Assistant United States Attorney
United States Attorney's Office
Eastern District of Virginia

I. Introduction

The courts have interpreted the scope of forfeiture under the money laundering statutes quite broadly; the term "property involved" has been construed to apply to the money being laundered, the money or other property that is commingled with it or obtained in exchange for it when the money laundering transaction takes place, and any other property that facilitates the money laundering offense. Examples include untainted money that a defendant used to conceal or disguise tainted funds, the legitimate business he used as a front for his money laundering operations, and real property, securities, and luxury items, in which he invested the laundered funds to keep them hidden from view. Only the forfeiture statutes for Racketeer Influenced Corrupt Organizations (RICO) and terrorism offenses provide the government with a law enforcement tool that is so sweeping in scope or so powerful in application. *See* 18 U.S.C. § 1963(a) (2003) (authorizing the forfeiture of all property "affording a source of influence" over a RICO enterprise), and 18 U.S.C. § 981(a)(1)(G)

(2003) (authorizing the forfeiture of "[a]ll assets" of a person engaged in terrorism).

This article has two parts. It begins with the provisions of 31 U.S.C. §§ 5317(c) and 5332, which authorize forfeiture in currency reporting and bulk cash smuggling cases, and then moves on to 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1), which provide for civil and criminal forfeiture in the traditional money laundering cases covered by 18 U.S.C. §§ 1956, 1957, and 1960.

II. What property is "involved in" a currency reporting offense?

A. Currency Transaction Report (CTR) violations

There is nothing complicated about what constitutes the "property involved" in a currency reporting violation. If someone fails to report a currency transaction, or files a false or incomplete report regarding that transaction, the government is entitled to forfeit all of the unreported or falsely reported funds (or property traceable thereto). Likewise, in a structuring case, the government may forfeit the entire sum that was divided into smaller parts to evade the reporting requirement (or property traceable thereto). *See United States v. Funds in the Amount of $170,926.00*, 985 F. Supp. 810, 815 (N.D. Ill. 1997) (denying motion to dismiss complaint alleging funds were the subject of structured cash deposits into bank account); *see also United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000) (amount directly traceable to structured deposits is forfeitable).

For example, in *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002), the government seized more than half a million dollars in money orders from a traveler at LaGuardia Airport in New York, when an airport security guard spotted enormous bundles of money orders in the traveler's carry-on luggage. The money orders were in small denominations, bore no payor or payee information, and had been purchased over two or three days at various locations in New York. The government's theory was that someone had purchased the money orders in small amounts in order to avoid providing the identification required when a buyer purchases more than $3,000 in money orders from the same seller in contemporaneous transactions. *See* 31 U.S.C. § 5325.

It is an offense under § 5324(a) to structure the purchase of money orders with the intent to evade the requirements of § 5325. Thus, the $557,933.89 in money orders was subject to forfeiture as property involved the violation of § 5324(a). 287 F.3d at 89.

B. Currency or Monetary Instruments Report (CMIR) violations

Similarly, there is nothing complicated about forfeiture for violating the CMIR reporting requirement when transporting or transferring more than $10,000 in currency into or out of the United States. The entire amount of unreported currency is subject to forfeiture as "property involved" in the offense.

One wrinkle that applies to CMIR cases concerns a person who transports a given sum of money into or out of the United States and, for whatever reason, reports some, but not all, of the money to Customs and Border Protection. In such cases, the person who fails to file the report receives no credit for the fraction that was reported. All of the money is forfeitable as property involved in the reporting violation. *See United States v. $173,081.04 in U.S. Currency*, 835 F.2d 1141, 1144 (5th Cir. 1988) (even though misstatement applied to only a portion of the reported currency, all of it was subject to forfeiture); *United States v. U.S. Currency ($248,430)*, 2004 WL 958010, at *6 (E.D.N.Y. Apr. 14, 2004) (defendant who revealed that he had $3,000 in currency in his pocket, but did not reveal the $245,000 in his suitcase, was required to forfeit the entire $248,000).

There are also several points worth noting with respect to civil forfeiture cases based on a CMIR violation. First, in such cases, it is not necessary for the government to prove that the

person transporting the currency knew about the reporting requirement or willfully intended to violate it. It is only necessary to show that the person knew he had the currency and did not disclose it. Even an acquittal on the underlying criminal charge under § 5316 would not bar the civil forfeiture of the unreported currency. *See United States v. $100,348 U.S. Currency*, 354 F.3d 1110, 1116 (9th Cir. 2004); *accord United States v. $120,856 in U.S. Currency*, 394 F. Supp. 2d 687, 690 (D.V.I. 2005) (following *$100,348*; for civil forfeiture purposes, the traveler need not be aware of the reporting requirement, but need only know that he was carrying more than $10,000).

Second, in civil forfeiture cases, it is unnecessary for the government to show that the person carrying the money to or across the border—the courier—was the person guilty of committing the CMIR offense. It is sufficient to show that *someone* committed the offense, and that the property in the courier's possession was the property involved in that offense. For example, in district court case, the government was able to forfeit more than $1.7 million concealed in a truck when the driver stated that he intended to cross the border into Mexico, but denied any knowledge of the currency. In that case, it was clear that someone was attempting to cause the courier to fail to file a CMIR, making the money forfeitable as property involved in a violation of § 5324(c). *United States v. $1,790,021 in U.S. Currency*, 261 F. Supp. 2d 310, 318 (M.D. Pa. 2003). *See United States v. $23,090.00 in U.S. Currency*, 377 F. Supp. 2d 1223, 1232 (S.D. Fla. 2005) (ordering forfeiture of $17,000 that claimant divided into three smaller amounts and gave to three couriers to carry to Haiti with the express intent of avoiding the CMIR requirement as property involved in violation of both § 5316 and § 5324(c)).

C. Report of Cash Payments over $10,000 Received in a Trade or Business (Form 8300) violations

Forfeiture authority for Form 8300 offenses did not exist before 2001. That was because the filing requirement was previously codified in 26 U.S.C. § 6050I, and there was no statutory forfeiture authority for such Title 26 offenses. But, the USA Patriot Act recodified the Form 8300 filing requirement at 31 U.S.C. § 5331, which, through a somewhat convoluted process, makes it possible for the government to use § 5317(c) to forfeit property involved in Form 8300 cases. The Treasury Department's Financial Crimes Enforcement Network (FinCEN) promulgated regulations for filing Form 8300s under Title 31 in January 2002. *See* 31 C.F.R. § 103.30 (2004). The reporting requirement codified at 31 U.S.C. § 5331 has been in effect since that time.

It works like this. Section 5317(c) does not say anything about forfeitures for Form 8300 violations or about § 5331, but § 5324(b) makes it a crime to cause a trade or business to fail to file a report on a $10,000 cash transaction in violation of § 5331. So, if causing a business to fail to file a Form 8300 is an offense under § 5324(b), and if § 5317(c) authorizes the forfeiture of any property involved in any violation of § 5324, the government can use § 5317(c) to bring a criminal or civil forfeiture action against unreported currency or the merchandise traceable thereto.

D. Application of the Excessive Fines Clause

If all that the court had to be concerned about was whether the forfeiture of the property involved in a currency reporting violation was authorized by statute, forfeitures for CTR, CMIR, and Form 8300 violations would be a simple matter. The unreported or structured currency is obviously "involved" in the reporting offense. However, finding that the property is subject to forfeiture under the applicable statute does not end the inquiry. In every forfeiture case, civil or

criminal, involving a currency reporting offense, the court must also determine whether a forfeiture that is authorized by statute would nevertheless violate the Excessive Fines Clause of the Eighth Amendment.

The application of the Excessive Fines Clause to forfeitures in general, and to money laundering forfeitures in particular, is discussed at length in Chapter 28 of *Asset Forfeiture Law in the United States* (Juris: 2007). For present purposes, it is sufficient to note that currency reporting cases represent the one area of forfeiture law where the courts have found forfeiture of 100 percent of the property involved in the offense to be problematic. This is the result of the Supreme Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 339 (1998), which held that a currency reporting offense—in that case it was a traveler's failure to file the CMIR report—is so minor an infraction that the forfeiture of 100 percent of the unreported currency would be "grossly disproportional to the gravity of the offense" and thus, would constitute a violation of the Eighth Amendment, unless the reporting violation were related to some other criminal conduct.

In *Bajakajian*, however, the Supreme Court was careful to distinguish between currency reporting cases and traditional smuggling cases in which the smuggled property is routinely forfeited in its entirety because it represents the subject matter, or corpus delicti, of the crime. *Id.* at 334 n.9. As we will see momentarily, it was this distinction that led Congress to make bulk cash smuggling a separate criminal offense punishable by the forfeiture of 100 percent of the smuggled currency.

III. Bulk cash smuggling

The distinction the Supreme Court drew between smuggling cases and currency reporting cases in Bajakajian led lower courts to conclude that the excessive fines analysis does not apply to traditional smuggling cases where the smuggled goods being forfeited represent the instrumentalities of the crime. *See United States v. An Antique Platter of Gold*, 184 F.3d 131, 140 (2d Cir. 1999) (section 545 forfeiture of contraband— illegally imported goods—is traditionally viewed as nonpunitive; therefore Bajakajian does not apply); *United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999) (section 1497 forfeitures lie outside scope of excessive fines analysis; *Bajakajian* does not apply). The same reasoning led directly to the enactment of a new "bulk cash smuggling" statute, 31 U.S.C. § 5332, as part of the USA Patriot Act in 2001.

In the Patriot Act, Congress found that smuggling currency in the form of "bulk cash" is a favored device of drug traffickers, money launderers, tax evaders, and persons financing terrorist operations, and that it "is the equivalent of, and creates the same harm as, the smuggling of goods." Pub. L. No. 107-56, § 371, 115 Stat. 272, 337 (2001). Moreover, Congress found that "only the confiscation of smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of the bulk cash is a critical part." *Id.* Finally, picking up on the distinction between instrumentalities and noninstrumentalities in forfeiture law, Congress noted that as long as bulk cash smuggling was considered only a currency reporting offense, the penalties, as limited by *Bajakajian*, could not "adequately provide for the confiscation of smuggled currency." *Id.* In contrast, Congress concluded, "if the smuggling of bulk cash were itself an offense, the cash could be confiscated as the corpus delicti of the smuggling offense." *Id.*

These findings are summarized in the Committee Report accompanying the money laundering provisions of the Patriot Act.

> The Committee believes ... that bulk cash smuggling is an inherently more serious offense than simply failing to file a Customs report. Because the constitutionality of a forfeiture is dependent on the "gravity of the offense" under [*United States v. Bajakajian*], it is anticipated that the full forfeiture of

> smuggled money will withstand constitutional scrutiny in most cases. For the confiscation to be reduced at all, the smuggler will have to show that the money was derived from a legitimate source and not intended to be used for any unlawful purpose. Even then, the court's duty will be to reduce the amount of confiscation to the maximum that would be permitted in accordance with the Eighth Amendment and the aggravating and mitigating factors set forth in the statute.

H.R. REP. NO. 107-250, at 52 (2001).

In short, Congress found that the clandestine movement of bulk cash across the border is really more like a smuggling offense than like the simple failure to file a CTR. Smuggling currency, after all, does more than deprive the government of information that may be used to create a paper trail; it is an integral part of the recycling of drug proceeds, the financing of terrorism, the evasion of income taxes, and other crimes that rely on extracting currency from, or injecting foreign funds into, the U.S. economy, without using the traditional banking or wire transfer systems. In fact, smuggling currency creates the same type of harm as other forms of smuggling, including the smuggling of firearms, counterfeit goods, adulterated foods, and unapproved medicines.

Thus, Congress enacted § 5332 which makes it an offense to conceal and transport currency into or out of the United States without filing a CMIR form, and expressly provided that all of the smuggled currency would be subject to civil and criminal forfeiture, whether the government is able to establish a nexus between the currency and another crime or not. *See* 31 U.S.C. § 5332(b)-(c) (2003). Effective November 1, 2002, the United States Sentencing Commission set the offense level for violations of § 5332 two levels above the offense level for CMIR offenses to reflect the greater seriousness of the offense. *See* U.S.S.G. § 2S1.3 (2003).

In *Bajakajian*, the defendant attempted to leave the United States with $357,000 in currency concealed in the false bottom of a suitcase, and lied about the presence of the currency when questioned by Customs agents at the airport. 524 U.S. at 324. At the time of the offense, the only basis for forfeiture was the failure to file the CMIR report. If the same offense were to occur today, however, the traveler could be prosecuted under the bulk cash smuggling statute and 100 percent of the currency could be forfeited as the instrumentality of the smuggling offense. *See* Stefan D. Cassella, "*Bulk Cash Smuggling and the Globalization of Crime*," 22 BERKELEY J. INT'L L. 98 (2004).

IV. Money transmitting businesses: 18 U.S.C. § 1960

Before moving on to forfeitures for the traditional money laundering statutes—18 U.S.C. §§ 1956 and 1957—it is worth noting the availability of forfeiture for violations of a more recently-enacted money laundering provision that applies to money transmitting businesses: 18 U.S.C. § 1960.

Section 1960 is something of a hybrid between a currency reporting offense and a money laundering offense under §§ 1956 and 1957. As amended in 2001 by the USA Patriot Act, § 1960 makes it an offense to operate a money transmitting business without a state license or without registering the business with FinCEN. *See* 18 U.S.C. § 1960(b)(1)(A) and (B); *See also* 31 U.S.C. § 5330 and regulations promulgated thereunder, 31 C.F.R. § 103.41 (money transmitting businesses are required by statute to register with FinCEN, even if they are already licensed to do business by the state in which they operate). Perhaps more importantly, the statute also makes it an offense to conduct a money transmitting business knowing that the funds being transmitted are derived from an illegal source or are intended for an unlawful purpose. *See* § 1960(b)(1)(C).

Sections 981(a)(1)(A) and 982(a)(1) authorize civil and criminal forfeiture of all property

"involved" in a violation of § 1960. The forfeiture of all property involved in the illegal operation of the money transmitting business could include, of course, the business itself and all of its assets. *See United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (holding that when a business is forfeited, so are all of its assets, including any business that is wholly owned by the forfeited business). What is likely to be of greater importance, however, is that the forfeiture may include the funds being transmitted by a money transmitter who is acting in violation of the statute.

For example, if a group of individuals provide a service whereby, for a fee, they agree to pick up large quantities of cash from a given location, and move it to another location somewhere in the United States, they would qualify as a money transmitting business. The statutes and regulations governing money transmitting businesses define the term "business" broadly to include such informal money-movement operations. *See* 18 U.S.C. §1960(b)(2) (defining "money transmitting" to include "transferring funds on behalf of the public by any and all means including but not limited to transfers . . . by . . . courier . . . ."). *See also* H.R. REP. No. 107-250, at 54 (2001). Such operations are commonly employed by drug traffickers who need to move bulk cash domestically without using the banking system. Thus, if a police officer stops a courier carrying a large quantity of cash as part of such a money-movement operation, and the evidence shows that the courier was aware that the money was derived from an illegal source or intended for an unlawful purpose, the courier could be prosecuted under § 1960, and the money could be seized and forfeited under § 981(a)(1)(A) or 982(a)(1). *See* Stefan D. Cassella, "*Application of 18 U.S.C. § 1960 to Informal Money Service Businesses*," 39 CRIM. L. BULL. 590 (2003).

V. What property is involved in a violation of § 1956 or § 1957?

We now turn to what is forfeitable for violations of the principal money laundering statutes, 18 U.S.C. §§ 1956 and 1957. Sections 981(a)(1)(A) and 982(a)(1) make all "property involved" in a violation of either § 1956 or § 1957 subject to civil and criminal forfeiture, respectively. So, what property is "involved" in such a money laundering offense?

Based on the legislative history, the courts have held unanimously that the term "property involved" should be read broadly to include the money or other property being laundered (the "corpus" or "subject matter" of the money laundering offense); any commissions and fees paid to the money launderer; and any property used to facilitate the money laundering offense. *See United States v. Puche*, 350 F.3d 1137, 1154 (11th Cir. 2003) (affirming money judgment equal to sum of commission paid to money launderer and value of untainted funds used to facilitate the offense); *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997) (discussing legislative history of 1988 amendment at 134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988)); *United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999) (affirming that facilitating property is forfeitable under § 982(a)(1)). Applying this definition, we find that the property subject to forfeiture in a money laundering case falls into four categories: 1) the proceeds of the Specified Unlawful Activity (SUA) offense being laundered; 2) property other than the SUA proceeds which is also part of the subject matter of the money laundering offense; 3) property used to facilitate the money laundering offense; and 4) property (again other than the proceeds) involved in, or used to commit, the SUA offense.

VI. The proceeds of the SUA offense

We begin with the simplest case: forfeiture of the SUA proceeds that the defendant used to commit the money laundering offense.

Every money laundering offense committed in violation of § 1956(a)(1), § 1956(a)(2)(B), or § 1957, necessarily involves at least some property that constitutes the proceeds of a SUA. Accordingly, when the court orders the forfeiture of the "property involved" in the money laundering offense, it will be ordering the forfeiture of the SUA proceeds that were being laundered.

A gambling case from New England provides a simple example. In *United States v. Iacaboni*, 363 F.3d 1 (1st Cir. 2004), the defendant was convicted of conspiring to conduct a gambling operation in violation of 18 U.S.C. § 1955, and money laundering in violation of § 1956(a)(1)(A)(i). He received hundreds of thousands of dollars in bets at his house, ran the gambling operation from there, and dispensed a portion of the proceeds to his employees. Some of the money he disbursed was for the employees' salaries and expenses, and some was to pay off the winning bettors, but all of it was disbursed for the purpose of promoting the continuation of the gambling scheme. Thus, the payments constituted promotion money laundering, and the money involved in those payments—all of which was SUA proceeds—was ordered forfeited as property involved in the offense. *Id.* at 6. *Accord United States v. Huber*, 404 F.3d 1047, 1057 (8th Cir. 2005) (the fraud proceeds obtained by third parties as part of the scheme, and then transferred to defendant as part of money laundering offense, were forfeitable as part of the corpus of the offense); *United States v. Stewart*, 185 F.3d 112, 128-29 (3d Cir. 1999) ($3 million in fraud proceeds forfeited as property involved in § 1957 violation).

If the defendant is found guilty of *conspiring* to launder a sum of money representing SUA proceeds, then he is required to forfeit all of the funds that he conspired to launder, whether he ever successfully laundered those funds or not. *See United States v. Huber*, 404 F.3d 1047, 1056-58 (8th Cir. 2005) (if the defendant is convicted of a § 1956(h) conspiracy, he must forfeit the property that he conspired to launder, including commingled clean money). The same is true if the defendant is convicted of an attempt to commit a money laundering offense. *See United States v. $15,270,885.69 Formerly on Deposit in Account No. 8900261137*, 2000 WL 1234593, at *4 (S.D.N.Y. Aug. 31, 2000) (money in a bank account can be forfeited as property involved in an attempt to commit a money laundering offense).

VII. Property that is the subject matter of the money laundering offense

The second category of property subject to forfeiture in a money laundering case is what is called the "corpus" or "subject matter" of the money laundering transaction. Obviously the SUA proceeds being laundered are part of the subject matter of the offense. The reference here, however, is property, other than the SUA proceeds, that was part of, or integral to, the money laundering transaction. As we will see, this includes "clean" money being used to commit a criminal offense in a reverse money laundering transaction; property that is the subject of a purchase, sale, or exchange constituting a money laundering offense; and property that is commingled with the SUA proceeds in the course of the money laundering transaction.

A. Reverse money laundering: violations of § 1956(a)(2)(A)

Section 1956(a)(2)(A) is the international money laundering statute that does not require proof that the property transported or transferred to or from the United States involved SUA proceeds. It is enough that the money was transported or transferred with the intent to promote such an offense. Thus, § 1956(a)(2)(A) is really a "reverse money laundering" statute. Instead of making it a crime to launder dirty money to make it clean, it makes it a crime to use clean money for an unlawful purpose, thus making the money dirty.

If all the government could forfeit in a money laundering case were the SUA proceeds, there would be nothing to forfeit in a § 1956(a)(2)(A) case, but because the government can forfeit all property involved in a violation of § 1956(a)(2)(A), it can forfeit the untainted funds that are transferred or transported to the United States for some unlawful purpose. So if a drug dealer brings $100,000 into the United States to buy an airplane to be used in his drug smuggling operation, he commits a violation of § 1956(a)(2)(A), and the $100,000 in previously untainted money can be forfeited as property involved in that offense.

This provision can be very useful in terrorism cases. Virtually none of the terrorism-related offenses listed in 18 U.S.C. § 2332b(g)(5)(B) are likely to generate proceeds. Unlike criminals who commit mail and wire fraud offenses, persons who plan to blow up a subway system or contaminate the water supply of a small city do not do so to make money. So a forfeiture statute that only allowed the government to confiscate the proceeds of such an offense would be of little use. It is much more important to be able to confiscate the money that is being used to plan and carry out that offense, before it takes place.

That is where the authority to forfeit any property involved in a violation of § 1956(a)(2)(A) comes into play. While the property transported into or out of the United States for the purpose of promoting an SUA offense does not constitute the "proceeds" of that crime, it nevertheless represents the subject matter of the money laundering offense, and so is subject to forfeiture. *See United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 803 (N.D. Ill. 1999) (sending money into United States to fund Hamas (Islamic resistance movement), a known terrorist organization, satisfies the requirement that the money was intended to promote SUA: foreign murder and extortion). In terrorism cases, the government has another option. Title 18 U.S.C. § 2339C (2003) (financing terrorist activity) is an SUA offense. Thus, any money raised, internationally or domestically, to finance terrorism may be forfeited as the proceeds of a § 2339C offense, pursuant to § 981(a)(1)(C) (authorizing the forfeiture of all SUA proceeds). However, for nonterrorism offenses, the ability to forfeit the property involved in a reverse money laundering offense under § 1956(a)(2)(A) remains the principal way to confiscate clean funds intended for an unlawful purpose.

B. Property involved in a purchase, sale, or exchange

Reverse money laundering cases constitute an important, but rare, application of the principle that the property constituting the subject matter of a money laundering offense is subject to forfeiture under §§ 981(a)(1)(A) and 982(a)(1). The more typical case involves property that is purchased, sold, or exchanged by the money launderer in the course of the money laundering transaction.

As seen in Iacaboni, money laundering transactions can be simple one-way transfers of the SUA proceeds from one person to another. But, money laundering offenses often involve more than just the dirty money. If a person launders his criminal proceeds by buying a car, the car is involved in the offense. If he launders stolen goods by trading them for jewels, the jewels are involved in the offense. If he launders fraudulently obtained securities by selling them for cash, the cash is involved in the offense. Indeed, any time the money laundering offense is committed through a purchase, sale, or exchange, the subject matter of the transaction — the thing being purchased, sold, or obtained in the exchange — is "involved" in the offense and constitutes part of the subject matter of the crime that can be forfeited. *See United States v. Kennedy*, 201 F.3d 1324, 1334 (11th Cir. 2000) (equity defendant acquired when he used SUA proceeds to buy a residence is forfeitable as property involved in a violation of § 1957); *United States v. Huggins*, 376 F. Supp. 2d 580, 585-86 (D. Del. 2005) (where purchase of vehicle

was the money laundering offense, government entitled to forfeiture of the vehicle or to a money judgment for the amount of the purchase).

For example, in *United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998), the defendant misappropriated $140,450 in funds intended as charitable contributions and used the money to purchase a number of items for his personal use, including a motor home. He was convicted of mail fraud and money laundering in violation of section 1957, and was ordered to forfeit $140,450 (in a money judgment) and the motor home as part of his criminal sentence.

The difference between *Hawkey* and *Iacaboni* is that in *Iacaboni*, the financial transaction was a simple one-way transfer of money from one person to another, whereas in Hawkey, there was a two-way transaction with money being transferred from Hawkey to the motor home dealer, and the motor home being transferred to Hawkey. In the one-way transaction there was only one asset involved in the offense, and hence only one thing to forfeit: the money being transferred. In *Hawkey*, there were two assets involved in the offense and hence two things to forfeit: the money being transferred as purchase money, and the motor home that Hawkey received in return.

In *Hawkey*, the Eighth Circuit held that, because both the purchase money and the motor home were involved in the money laundering offense, the government was entitled to forfeit either one. If the motor home has lost value and is no longer worth what is was when it was purchased, the court said, the government can get a money judgment for the full purchase price, because that was the amount of money involved in the money laundering offense. *Id.* at 928 (the purchase price reflects the amount "involved in" the money laundering offense and is subject to forfeiture, even if the defendant's investment turns out to have been unwise). *Accord United States v. Huggins*, 376 F. Supp. 2d 580, 585 n.15 (D. Del. 2005) (following *Hawkey*; the government may forfeit the vehicle that was purchased in a money laundering transaction, but if the vehicle has depreciated in value, the defendant remains liable to pay a money judgment for the amount of the depreciation). But, if the government would prefer to take the motor home, and not worry about the money judgment, it may do that instead. *Hawkey*, 148 F.3d at 928.

Suppose the motor home has appreciated in value, can the government forfeit the property as it finds it? Or is it entitled only to the value that the property had when it was involved in the money laundering offense? In *Hawkey*, the Eighth Circuit held that the government was entitled to the appreciated value, irrespective of whether the appreciation was due to wise investment, effort expended by the defendant, or the infusion of untainted funds. *Id.*; *see United States v. Loe*, 49 F. Supp. 2d 514, 523-24 (E.D. Tex. 1999) (government entitled to forfeit a percentage of the appreciated value of real property corresponding to the percentage of laundered funds used in the purchase). In other words, once the motor home is involved in the money laundering offense, the government is entitled to forfeit the motor home, whatever its value turns out to be at the time the forfeiture judgment is entered.

This is an important point: when property is subject to forfeiture because it was the subject matter of a money laundering transaction, the government is entitled to forfeit the property *in its entirety*. If forfeiture in money laundering cases were limited to the *amount of money* involved in the financial transaction, only the portion of the property traceable to the SUA proceeds could be forfeited. But, the statute does not limit the forfeiture to the amount of money involved in the transaction; it says any *property involved* in the financial transaction is subject to forfeiture. This is the reason why forfeiture orders in money laundering cases can include commingled property.

C. Commingled property

In the examples used so far, all of the money involved in at least one side of the transfer,

purchase, or exchange, consisted of SUA proceeds. None of the money that Iacaboni used to pay off the winning bettors or his employees, or that Hawkey used to buy the motor home, included any untainted funds. Moreover, in all of these cases, the money laundering transaction constituted the entire payment for the item being purchased or sold. None was only a down payment followed by the later infusion of clean funds.

Suppose, however, that the SUA proceeds were commingled with other funds when the transaction took place, or that the defendant made later payments on the property with clean funds. Would the government still be entitled to forfeit the property involved in the offense in its entirety? The answer is yes. If property is "involved" in a money laundering offense, it is subject to forfeiture; that the offense was committed using commingled funds is irrelevant.

The money laundering statutes contain no requirement that the offense be committed only with tainted funds. To the contrary, a great many cases hold that a money laundering transaction can involve commingled money. Section 1956 requires only that the financial transaction "involve" SUA proceeds. Thus, if the other elements of the offense are satisfied, a transaction involving as little as one dollar in tainted funds can be a money laundering offense. *See, e.g., United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005) (the presence of legitimate funds does not make a money laundering transaction lawful; it is only necessary to show that the transaction involves criminal proceeds); *United States v. Rodriguez*, 278 F.3d 486, 491 (5th Cir. 2002) (jury was free to convict alien smuggler of money laundering despite evidence that funds to conduct his financial transactions included some legitimate funds); *United States v. McGauley*, 279 F.3d 62, 71 (1st Cir. 2002) (transfer of $49,000, of which only $155 was fraud proceeds, is a money laundering offense; there is no de minimus rule requiring proof that a given fraction of the funds be SUA proceeds).

For § 1957 cases, the rule is a little different: there must be at least $10,000 in tainted funds. *See United States v. Rutgard*, 108 F.3d 1041, 1063 (9th Cir. 1997) (withdrawal of commingled money does not meet $10,000 threshold if the remaining balance exceeds the amount of the tainted funds; dirty money is presumed to be "last out"; § 1956 case law, holding that the transaction need only "involve" criminal proceeds, is not applicable to § 1957). However, it is still true that not all of the money needs to be SUA proceeds.

So, suppose Hawkey had commingled clean money with the fraud proceeds before he purchased the motor home, or that he made a down payment with dirty money and later paid off the balance with clean funds. The purchase of the motor home would still have been a money laundering offense under § 1957. What property would have been involved in that offense? The answer would be the same as before: the purchase money plus the motor home. The point is this: if a money laundering offense can be committed with commingled funds, then it follows that for forfeiture purposes the "property involved" in the offense—the subject matter or *corpus* of the money laundering transaction—can be commingled funds.

A good illustration of this principle is the Eighth Circuit's decision in *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005). In that case, the defendant, who operated a large farming operation in North Dakota, conspired with other farmers to defraud a federal farm program and received payments for which he was not eligible. *Id.* at 1051. The defendant then commingled the proceeds of the fraud with money received from legitimate grain sales and caused the combined funds to be transferred among the coconspirators and third parties in ways that promoted the underlying fraud offense and concealed the ownership, nature, and control, of the funds. *Id.* at 1057-58. At trial, the defendant was convicted of conspiring to commit promotion and concealment money laundering and was ordered to forfeit all of the property involved in money laundering

offense, including all of the fraud proceeds and all of the commingled money. On appeal, he argued that the district court had erred in including the proceeds of the legitimate grain sales in the forfeiture calculation, but the Eighth Circuit upheld the forfeiture.

The forfeiture statute in a money laundering case, the court said, allows the government to obtain a forfeiture judgment for all of the property "involved in" the offense, including the money or other property being laundered (the *corpus* of the offense). *Id.* at 1056. The defendant's financial transactions were money laundering offenses, the court said, even though they involved commingled money, and the money being laundered in those transactions included both the fraud proceeds and the commingled funds. Accordingly, the government was entitled to a money judgment representing the total amount involved in the money laundering transactions, with no deduction for the amount derived from legitimate grain sales. *Id.* at 1058.

Later, the court emphasized that, in reaching this conclusion, it was not relying on the facilitation theory. Funds that are not actually part of the money laundering transaction may be forfeited if they nevertheless facilitate the commission of the money laundering offense, the court said, but "if the legitimately obtained funds are part of a transaction that also involved proceeds of a specified unlawful activity, they are forfeitable as the corpus of the money laundering offense." *Id.* at 1061 n.11.

The same principle applies when a defendant uses criminal proceeds, or criminal proceeds combined with commingled funds, to make a down payment on real property, and then pays for the balance of the property with untainted funds. In that case, the real property was involved in the money laundering offense and thus is forfeitable, in its entirety. For example, in *United States v. 1700 Duncanville Road*, 90 F. Supp. 2d 737 (N.D. Tex. 2000), aff'd 250 F.3d 738 (5th Cir. 2001), the defendant deposited $452,000 in food stamp fraud proceeds, and other funds, into a bank account. He then moved $133,000 from this commingled account into a custodial account held in the name of his minor child, where it was commingled with more untainted money. Next the defendant used $144,000 of these commingled funds to make the down payment on the real property at Duncanville Road. Finally, he paid the balance of the purchase price of $300,000 with money from an unknown source. *Id.* at 739-40.

At the end of the day it was clear that the defendant had laundered food stamp fraud proceeds through a series of transactions and invested the money in a parcel of real property. It was also clear that much less than half of the value of the property was traceable to SUA proceeds. The district court calculated that at most, 75.8% of the *down payment* on 1700 Duncanville Road was traceable to the original fraud proceeds. *Id.* The fraction of the entire property that was so traceable was therefore much less, given the appreciation of the property and the fact that the down payment represented less than half of the purchase price.

If this had been a "straight proceeds" case, the amount the government would have been able to forfeit would have been the fraction of the real property that was traceable to the fraud proceeds. But, the government charged the purchase of the real property as the money laundering offense, and for forfeiture purposes asked the district court a simple question: What property was involved in the purchase of 1700 Duncanville Road? The answer, of course, was "1700 Duncanville Road."

In other words, the court held that the real property was forfeitable, in its entirety, because the purchase, itself, was a violation of § 1957. "Since the purchase of the subject properties was itself a money laundering transaction under section 1957," the court said, "it is immaterial that claimants may have also used untainted funds for its purchase." *Id.* at 741. The defendant argued strenuously that the forfeiture should be limited to the portion of the real property that was traceable to the food stamp fraud offense—as it would be if the forfeiture were based on a "proceeds" theory.

On appeal, the Fifth Circuit had no problem sustaining the forfeiture of the entire parcel. 250 F.3d 738 (table), 2001 WL 274002 (5th Cir. 2001) (affirming judgment of the district court without written opinion).

The fact that the court can order the forfeiture of the property involved in the offense, in its entirety, is what makes the "subject matter" theory so appealing to prosecutors. If forfeiture in money laundering cases were limited to the proceeds involved in the financial transaction, the government would only be able to forfeit the portion of the property that was traceable to the SUA proceeds. But, if the money laundering offense is a purchase, sale, or exchange, the property involved in that transaction is the subject matter of the offense, and can be forfeited without regard to whether any clean money was commingled with the dirty money involved in the transaction.

VIII. Facilitating property

So far, this article has covered two theories of forfeiture in money laundering cases: 1) the forfeiture of the SUA proceeds; and 2) the forfeiture of "subject matter property," or property other than the SUA proceeds that was part of the financial transaction constituting the money laundering offense. The third theory is much broader, permitting the forfeiture of any property used to "facilitate" the money laundering offense.

As the Eighth Circuit said in *Huber*, "facilitating property" includes property that is external to the money laundering offense—property that is not part of the financial transaction itself—but is nevertheless "involved" in the transaction, in the sense that it makes the offense easier to commit or harder to detect. Facilitating property is defined as anything that makes the underlying crime less difficult or more or less free from obstruction or hindrance. *See United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999); *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997) ("[f]acilitation occurs when the property makes the prohibited conduct 'less difficult or more or less free from obstruction or hindrance.'"). Clean money that is used to conceal or disguise dirty money, and businesses used as fronts for money laundering operations, are examples of external property that facilitate the commission of the money laundering offense, without necessarily being part of the illegal financial transaction.

"Subject matter" property is, by definition, property that is part and parcel of the financial transaction constituting the money laundering offense. The proceeds being laundered, the money that is commingled with those proceeds when they are shifted from one account to another or used to make an investment, the property obtained in a purchase, sale, or exchange—all of those assets are part of the financial transaction itself, and thus are "involved" in the money laundering offense in the sense of being inextricably intertwined with the illegal transaction in a tangible, physical way. One cannot, for example, purchase jewelry without the jewelry being involved in the transaction. Thus, "subject matter" property is forfeitable as "property involved" in the offense, whether it makes the offense easier to commit or harder to detect, or not. *United States v. Huber*, 404 F.3d 1047, 1061 n.11 (8th Cir. 2005).

"Subject matter" property can, of course, facilitate a money laundering offense. Property that is not only part of the financial transaction, but also makes the offense easier to commit or harder to detect, can be forfeited either as the "corpus" of the transaction or as facilitating property. Facilitating property is not limited to things that are physically part of the illegal transaction. It can include anything external to the transaction that the offender uses to commit the crime.

A. The substantial connection requirement

Of course, there are limits on what can be forfeited as facilitating property. Although the theory permits the forfeiture of property that is

external to the money laundering transaction, there nevertheless must be a "substantial connection" between the property and the money laundering offense. *See* 18 U.S.C. § 983(c)(3): "if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense." This is the same "substantial connection" discussed with respect to the forfeiture of facilitating property generally. An early case illustrates the constraint placed of the forfeiture of facilitating property in money laundering cases.

In *United States v. One 1989 Jaguar XJ6*, 1993 WL 157630 (N.D. Ill. May 13, 1993), a would-be money launderer drove his Jaguar to the Chicago airport, where he planned to perpetrate a money laundering offense through misuse of an automatic teller machine. When he attempted to leave the airport parking lot, federal agents seized the car and brought a forfeiture action against it on the ground that it had been used to facilitate the money laundering offense. The district court rejected that theory, holding that the use of the car was too incidental to the money laundering transaction to satisfy the "substantial connection" requirement. *Id.* at *3.

To satisfy the substantial connection requirement, the connection between the property and the offense must be more than merely incidental or fortuitous. The government has to show that the property aided in the commission of the money laundering offense in some substantial way. A car that simply serves as the means of transportation to the situs of the money laundering transaction generally will not qualify, nor will the residence where the laundered cash happens to have been dropped off on a single occasion. But, a car that is used to transport laundered cash in large quantities from one place to another, or a residence that is used routinely as a stash house, would qualify as facilitating property.

The notion of forfeiting facilitating property in a money laundering case comes, of course, from drug cases like *United States v. Rivera*, 884 F.2d 544 (11th Cir. 1989), where livestock on a ranch, used as a cover for a drug operation, was forfeited because it facilitated the drug offense by making the ranch appear to be something that it was not. In that case, the defendant argued that his livestock was not part of the drug operation, but the court held that by providing the defendant's operation with an aura of legitimacy—making the operation appear to be a working ranch when it was really the base for a heroin trafficking business—the livestock made the drug offense easier to commit and harder to detect. *Id.* at 546.

The same is true in money laundering cases. A defendant may argue that property that is external to the illegal financial transaction was not part of the money laundering offense, but if the property made the offense easier to commit or harder to detect—by providing a cover for the illegal activity, or hiding the illegal funds by commingling them with other legitimate property—it may be forfeited as property "involved" in the money laundering offense.

B. Property used to conceal or disguise

The best examples of this theory come from cases where the government established that the defendant committed concealment money laundering, and used legitimate property of some kind to help him conceal or disguise his dirty money. Most often, the facilitating property has been clean money commingled with dirty money in a bank account.

In *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997), a health care provider in Louisiana distributed fraudulently obtained proceeds to numerous bank accounts in other parts of the country, where they were commingled with money from other sources. All together, the defendant mixed approximately half a million

dollars in dirty money with another half a million dollars in clean money in these accounts, before consolidating all of the money in a single bank account in Las Vegas. When he attempted to liquidate the Las Vegas account by converting the entire million dollars to cash, the government seized the money and sought to forfeit all of it as part of the criminal money laundering case. *Id.* at 1132.

The defendant argued that the clean money was not part of the money laundering transaction, but the Fifth Circuit applied the facilitation theory and held that the clean money was subject to forfeiture because it aided the defendant in concealing and disguising the nature, source, location, ownership, and control, of the proceeds of his health care fraud offense. *Id.* at 1135 (entire bank account balance is forfeitable even though less than half the balance was criminal proceeds, if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds; distinguishing cases where commingling of SUA proceeds with untainted funds was merely fortuitous). Quoting from a district court opinion from the Southern District of New York, the panel said the following:

> [L]imiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue.

Id. (quoting *United States v. Contents of Account Numbers 208-06070 and 208-06068-1-2*, 847 F. Supp. 329, 334-35 (S.D.N.Y. 1994)).

Similarly, in *United States v. All Monies*, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991), a district court held that the untainted money in a Peruvian money exchanger's bank account was forfeitable under the facilitation theory because it provided "cover" for the use of that account to launder the proceeds of cocaine trafficking. A number of other cases say the same thing. *See United States v. McGauley*, 279 F.3d 62, 77 (1st Cir. 2002) (withdrawal of $243,000 from various bank accounts that contained commingled funds, of which only $55,000 was fraud proceeds, supported forfeiture of entire amount, because the clean money was used to conceal or disguise the tainted funds); *United States v. Bornfield*, 145 F.3d 1123, 1138 (10th Cir. 1998) (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—disguise—the nature and source of his scheme).

The facilitation theory has been used to forfeit entire businesses that provided the cover of legitimacy for a money laundering operation by allowing the defendant to run criminal proceeds through the business's operating account, or by using the criminal proceeds to add to the business's inventory. For example, in *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000), the Seventh Circuit upheld the forfeiture of a sex-oriented business called Fantasyland, on the ground that the entire business, including its legitimate operations, was used to launder the proceeds of the prostitution and other illegal activities taking place on the premises. Other business forfeitures in money laundering cases have involved car dealerships, a trucking business, and other legitimate retail and wholesale operations that were used as a cover for the money laundering offenses. *See In re Restraint of Bowman Gaskins Financial Group Accounts*, 345 F. Supp. 2d 613, 621 (E.D. Va. 2004) (because entire business was forfeitable as property involved in a money laundering offense, any property derived from the business was forfeitable as well, even if the property is not traceable to the offense, and even if the business is not being forfeited); *United States v. Schlesinger*, 396 F. Supp. 2d 267, 272 (E.D.N.Y. 2005) (following

G.P.S. Automotive; factory that was the "focal point" of defendant's fraud offense was forfeitable under § 982(a)(1), not because it facilitated the fraud but because it facilitated the laundering of the fraud proceeds through the business's operating accounts).

IX. Property involved in the SUA

There is a fourth category of property forfeitable in a money laundering case: property that was not involved in the money laundering offense itself, but was nevertheless central to the underlying scheme of which the money laundering offense was a part. Some courts permit the forfeiture of such property under the money laundering statutes and some do not.

A number of courts have endorsed this theory of forfeiture. For example, in *United States v. Wyly*, 193 F.3d 289 (5th Cir. 1999), the defendant was a public official who accepted a kickback in return for steering a public construction contract to a particular contractor. The contract was for the construction and operation of a new, privately-owned county jail. The money sent by the public body to the contractor was the SUA proceeds, and the payment of the kickback by the contractor to the defendant was the money laundering offense. *Id.* at 292.

When the defendant was convicted of money laundering, the government sought to forfeit the new jail, itself, as property involved in the money laundering offense. It was clear that, in the traditional sense at least, the jail was not part of the money laundering transaction. It was also clear that without the jail—which was the subject matter of the SUA offense—there would have been no scheme and hence no money laundering. Adopting the latter rationale, the Fifth Circuit extended its earlier decision in *Tencer*, and held that the jail was subject to forfeiture. *Id.*

Other courts have reached similar conclusions in cases involving various types of fraud and theft offenses. *See United States v. Trost*, 152 F.3d 715, 721 (7th Cir. 1998) (SUA proceeds that are *not* moved in the course of the money laundering offense, but are left behind in a bank account, are also involved in the offense; when defendant puts at least $94,000 in embezzled funds in bank account and is convicted of laundering $23,000 in five transactions, entire sum is subject to forfeiture); *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. Matai*, 173 F.3d 426 (table), 1999 WL 61913, at *5, (unpublished disposition) (4th Cir. 1999) (inventory of clothing store is forfeitable as facilitating property where it was used in perpetration of credit card fraud scheme and "provided the mechanism for the money laundering scheme").

Other courts, however, hold that property involved only in the SUA offense, and not part of the money laundering transaction, is not forfeitable under the money laundering statutes. Given the plain wording of the forfeiture statute, there is some force to this view. In *United States v. Iacaboni*, 221 F. Supp. 2d 104 (D. Mass. 2002), the district court held that because the forfeiture allegation in the indictment was based only on the money laundering offense, and not on the underlying gambling offense, property involved only in the gambling, such as the residence where the defendant collected bets from his customers, could not be forfeited. Cases permitting the forfeiture under the money laundering statute in such circumstances, the court said, confused the property involved in the SUA with the property involved in the money laundering. *Id.* at 111. *Accord United States v. Huber*, 404 F.3d 1047, 1059 (8th Cir. 2005) (property involved only in the underlying fraud scheme, but not in the money laundering offense, is not forfeitable under § 982(a)(1)); *United States v. Loe*, 49 F. Supp. 2d 514, 519-20 (E.D. Tex. 1999) (leasing rights that facilitated the underlying insurance fraud scheme were not involved in the subsequent laundering of the fraud proceeds, and so could not be forfeited under § 982(a)(1)); *United States v. Hawkey*, 148

F.3d 920, 927 (8th Cir. 1998) (emphasizing that the property must have been used to facilitate the laundering offense).❖

ABOUT THE AUTHOR

❑**Stefan D. Cassella** is currently detailed as a Special Assistant United States Attorney to the Eastern District of Virginia, United States Attorney's Office. Mr. Cassella is the Deputy Chief for Legal Policy in the Asset Forfeiture and Money Laundering Section (AFMLS). He has been a prosecutor since 1979. He came to the Department of Justice in 1985 and has been involved in forfeiture and money laundering issues since 1989. He handles civil and criminal forfeiture cases, lectures at training conferences on many aspects of money laundering and forfeiture law, and is responsible for legal advice, policy, and legislative issues for the Department. He has published numerous law review articles on forfeiture, a treatise entitled *Asset Forfeiture Law in the United States*, and is the editor of *Quick Release*, the Department's forfeiture newsletter. From 1987 to 1989, he served as Senior Counsel to the U.S. Senate Judiciary Committee. ✠

Developments in International Forfeiture And Money Laundering Cooperation

Linda M. Samuel
Deputy Chief, Asset Forfeiture and Money Laundering Section
Criminal Division

I. Introduction

There is nothing new about criminals committing crimes in one country and stashing their illicitly generated proceeds in another. Indeed, most of the complex money laundering prosecutions, and related forfeiture actions, now have international dimensions. Law enforcement is constantly challenged in their efforts to forfeit and recover foreign-based assets involved in transnational crime. Over the past decade, however, a number of developments have helped to level the playing field for U.S. prosecutors and agents. This article highlights a few of those developments, particularly the government's ability to reach foreign-based assets by seizing funds at correspondent accounts of foreign banks located in the United States in lieu of offshore criminal funds, as well as some of the initiatives taken to recover the proceeds of foreign corruption.

II. International partnerships with foreign jurisdictions

Over the past several years, the Asset Forfeiture and Money Laundering Section (AFMLS) has worked to establish effective international partnerships with foreign jurisdictions. In many instances, AFMLS assisted other countries in the drafting and enactment of forfeiture, money laundering, and mutual legal assistance laws. As a result, they are now better positioned to respond to U.S. requests to freeze, seize, and forfeit property involved in crime.

Importantly, at the same time, the United States also expanded its own international antimoney laundering enforcement and forfeiture capabilities, by providing for the following:

- The direct forfeiture authority for the proceeds of money laundering predicate offenses or specified unlawful activities (SUAs), including several foreign offenses.
- The restraint of forfeitable assets at the request of another country.
- The registration and enforcement of foreign restraining orders and forfeiture judgments.

Foreign criminals, like their American counterparts, often attempt to protect their illegal profits from their own countries' reach by transferring them elsewhere. There are a broad range of foreign offenses, such as those listed below, that constitute SUAs under the U.S. money laundering statute, even where there has been no violation of U.S. domestic law.

- Foreign crimes of violence.
- Bribery of a public official, or the misappropriation, theft, or embezzlement, of public funds, by or for the benefit of a public official.
- Smuggling munitions and export control violations.
- Human trafficking.
- Any offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States.

These now join the existing list of foreign predicate offenses at 18 U.S.C. § 1956(c)(7)(B)(i-iii), which includes the following:

- Narcotics offenses
- Murder
- Kidnapping
- Robbery
- Extortion
- Destruction of property by means of explosive or fire.
- Fraud committed by or against a foreign bank.

Through operational collaboration, capacity building, and improvement of its antimoney laundering and forfeiture regime, the Department of Justice (Department) is committed to establishing an effective, comprehensive, and consistent way to take the profit out of transnational crime.

It is not always practical or possible to conduct prosecutions in each location when a crime is committed in one jurisdiction and the illicit proceeds are located in another. Therefore, the capability of countries to register and enforce foreign forfeiture judgments is a necessary component of any international forfeiture regime. In the United States, the types of enforceable foreign orders include those civil and criminal forfeiture judgments based on "any violation of foreign law that would constitute a violation of an offense for which property could be forfeited under Federal law if the offense were committed in the United States." *See* 28 U.S.C. § 2467(a)(2)(A). This section also allows for the entry of a restraining order based either on evidence in a foreign request or on the enforcement of a foreign restraining order. Additionally, it is possible for the restraint to be maintained until such time as a foreign forfeiture has been obtained in the foreign jurisdiction and transmitted for enforcement. At the request of a foreign jurisdiction, U.S. prosecutors can obtain an ex parte order from the court for the initial restraint against assets of a person arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States, pending the arrival of evidence from the foreign country to support the filing of a forfeiture action under 18 U.S.C. § 981 or under the Controlled Substances Act. *See* 18 U.S.C. § 981(b)(4)(A).

One of the first steps in the international forfeiture process is to identify and locate assets beyond U.S. borders that may be forfeitable, either under an *in rem* civil action or *in personam* criminal action. Typically, this involves making requests under a treaty, convention, executive agreement, or letter rogatory, for bank records that may reveal the movement or location of forfeitable wealth. Bilateral Mutual Legal Assistance Treaties (MLATs), executive agreements, and recent multinational conventions, have helped to regularize international forfeiture cooperation and serve as the vehicle for making requests for, among other things, assistance in forfeiture and money laundering cases. In addition to the multitude of MLATs now in effect with other countries that provide for bilateral cooperation in criminal proceedings and matters related thereto, the United States has ratified several major multilateral conventions that provide for a wide range of assistance in forfeiture and money laundering cases, including the following, among others:

- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention).
- The International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention).
- The United Nations Convention against Transnational Organized Crime (Palermo Convention or UNTOCC).
- The United Nations Convention Against Corruption (UNCAC).

Such conventions obligate the parties to do the following:

- Enact domestic forfeiture and money laundering laws.
- Assist requesting states to identify, trace, seize, freeze, or forfeit property, proceeds, or instrumentalities, located in the requested country involved in the offense covered by the applicable conventions.

Explicitly, these conventions provide that bank secrecy laws cannot serve as a barrier to disclosure of information to a requesting state, and also address how countries should be able to enforce one another's forfeiture judgments

Once having identified foreign-based property subject to forfeiture, the United States may then request the country where the assets are found to freeze or seize such property in anticipation of, or in connection with, forfeiture proceedings in the United States. Such request should be supported by a finding of probable cause. *See Kim v. U.S. Department of Justice*, 2:05-CV-03155-ABC (C.D. Cal. July 11, 2005). When seeking to bring an in rem forfeiture action against foreign-based assets, jurisdiction and venue will be based on 28 U.S.C. § 1355(b)(2). This section is particularly useful in cases where criminal forfeiture is not possible because the defendant is dead or a fugitive, or the foreign country where the property is located cannot forfeit the property under its own laws, but may be able to take other steps that assist the United States forfeiture effort (seize the property, enforce a United States forfeiture judgment, or repatriate the assets). In such cases, once the assets have been civilly forfeited in the United States, the Department can transmit the final civil forfeiture judgment to the foreign country for enforcement or repatriation of the assets.

In a § 1355(b)(2) action, the United States will require assistance from the foreign authorities to enable it to perfect the court's *in rem* jurisdiction over the property so that the U.S. court will have constructive (if not actual) control over the property subject to forfeiture. Such assistance may include restraining the property, providing notice to the property, other individuals, and entities who may have an interest in the property, and arranging for publication of notice of the United States forfeiture action in a newspaper of general circulation where the property is located.

In both civil and criminal forfeiture cases, the United States will often seek the repatriation of

the property for forfeiture. Such a request may occur in connection with a criminal case, a civil forfeiture case related to the criminal investigation, or as part of an extradition where property (cash, jewelry, and other objects of the offense) was found within the immediate control of the subject at the time of detention. Indeed, U.S. law expressly authorizes courts to direct defendants to return the proceeds and instrumentalities of their crimes to the court's registry, pending a determination of its forfeitability pursuant to 21 U.S.C. § 853(e)(4). Sometimes repatriation can be accomplished through the cooperation of the property's owner or a defendant who agrees to forfeit the property as part of a plea agreement. In some cases, however, it may not be possible to compel the repatriation of assets.

- If the United States previously requested that a foreign jurisdiction restrain an asset and that was done, it cannot be returned to the United States unless a competent authority in the foreign jurisdiction agrees to lift the freeze.
- The property at issue may be subject to domestic proceedings in the foreign jurisdiction.
- Certain countries deem another government's efforts at repatriating assets located in their jurisdiction to be a violation of their sovereignty, and in rare instances, deem any persons who instigate or are involved in that process to be involved in a criminal offense, such as money laundering.

Many countries often do not object to a negotiated voluntary repatriation of assets and allow such transfers to occur as part of a plea or settlement agreement. Some countries, however, will object to court-ordered repatriations because they regard such a "coercive measure" to violate a person's civil rights under their laws. There are also other countries that take the position that a failure to inform them of forfeitable assets located in their jurisdiction is a violation of specific treaty obligations.

In cases where foreign-based property has been forfeited under U.S. law as a result of the criminal conviction of its owner, or a nonconviction based (civil) forfeiture action, the United States may also request that the foreign government give effect to the final forfeiture judgment in one of two ways:

- Enforce the judgment and repatriate the assets to the United States.
- Share the forfeited assets with the United States in recognition of its assistance to the forfeiture.

It is the policy of the United States to encourage international asset sharing and to recognize foreign assistance that facilitates U.S. forfeitures, so far as consistent with U.S. law. International sharing is governed by 18 U.S.C. § 981(i), 21 U.S.C. § 882(e)(1)(E), and 31 U.S.C. § 9703(h)(2), and is often guided by standing international sharing agreements or case-specific forfeiture sharing agreements. The decision to share forfeited assets with a foreign government is a completely discretionary function of the Attorney General or the Secretary of the Treasury. It requires the concurrence of the Secretary of State, and, in certain circumstances, it is a decision that can be vetoed by Congress. To date, the Department, with the concurrence of the Secretary of State, has transferred approximately $240 million with thirty-four jurisdictions in recognition of their assistance in support of U.S. forfeiture cases.

The statutory provisions that authorize the Attorney General and/or the Secretary of the Treasury to transfer forfeited property to a foreign country make international sharing conditional upon the following:

- Direct or indirect participation by the foreign government in the seizure and/or forfeiture of the property subsequently forfeited under United States law.

- Authorization by the Attorney General or the Secretary of the Treasury to transfer all or a portion of the forfeited property to the cooperating foreign country.
- Approval by the Secretary of State of the transfer.
- Authorization in an international agreement (which may be a standing bilateral agreement, such as a MLAT, or a case-specific agreement reached for the purpose of effecting the transfer) between the United States and the foreign country to which the property is to be transferred.
- If applicable, certification under 22 U.S.C. § 2291j(b) [section 481(h) of the Foreign Assistance Act of 1961] of the foreign country in question.

The ultimate decision of whether, and how much, to share in a case in which the seizing agency was a Department law enforcement agency, or an agency that is a participant in the Department Assets Forfeiture Fund, is made, subject to the review by the Secretary of State, the Attorney General, or his designee, based on a recommendation from the Chief of AFMLS. In cases where Internal Revenue Service Criminal Investigation or Department of Homeland Security is the lead seizing agency, international sharing decisions are made by the Treasury Executive Office for Asset Forfeiture.

III. Forfeiture of correspondent bank accounts

All too frequently, crimes are committed in the United States, and criminals are able to find willing jurisdictions to provide safe havens for their illicit proceeds. These authorities may impose substantial obstacles to international cooperation in the investigation and prosecution in money laundering and asset forfeiture cases. If the foreign bank that holds the illicit proceeds has a correspondent account at a U.S. bank, not only the foreign bank, but its clients, can transact business through the U.S. bank. Prior to the passage of Section 319 of the PATRIOT Act, codified at 18 U.S.C. § 981(k), the correspondent account was insulated from forfeiture, even if a client placed illicit proceeds in the account, because the bank was regarded as the "owner" of the funds. The government could not successfully maintain a civil forfeiture action because the foreign bank was, in most cases, an innocent owner. Members of Congress were expressly concerned that even though foreign banks maintain a presence in the United States and conduct business in U.S. dollars, the government was unable to forfeit illicit funds in a correspondent account. These accounts facilitated foreign criminals in the laundering of criminal proceeds and in concealing the money trail from law enforcement. This situation led to the enactment of section 981(k).

Section 981(k) permits the *in rem* forfeiture of funds held in correspondent bank accounts in the United States on behalf of foreign banks, as substitution for criminal funds held on deposit at banks in foreign countries. U.S. prosecutors can now file an *in rem* forfeiture action against the equivalent amount of money that is held in a foreign bank's correspondent account located in the United States, if the government can show that forfeitable funds were deposited into the account at a foreign bank. This enables the forfeiture of criminal assets that were previously beyond the government's reach.

The objective of this powerful provision is not intended to punish foreign banks or to forfeit their assets. To the contrary, the intent of the statute is that the government will seize funds from a foreign bank's correspondent bank account and the foreign bank will, in turn, make itself whole by effecting a setoff against the customer's funds. The account holder agreement with the customer, generally entitles the bank to do this. The onus is on the bank which holds the tainted funds to make itself whole, and its failure to act promptly to redress its loss from its customer can be costly. *See United States v. Funds on Deposit*

in Account No. 890-0057173 Maintained at the Bank of New York by the Union Bank for Savings and Investments Jordan, up to the value of $2,343,905.33, 487 F.3d 8 (1st Cir. 2007) (foreign bank that failed to exercise setoff rights against its customer whose account contained proceeds from telemarketing fraud had not discharged its obligation to its customer prior to the government's seizure action and lacked standing under § 981(k)(4)(B)(ii)(II) to challenge the seizure of funds from its New York correspondent account).

It is irrelevant, for the purpose of § 981(k), whether the foreign funds to be forfeited ever transited through the foreign bank's U.S. correspondent account from which the government seizes the funds. It is not necessary to trace the money in the correspondent account to deposits in the foreign bank (18 U.S.C. § 981(k)(2)). Under the law, for purposes of forfeiture, the criminal funds in a foreign bank account are deemed to have been deposited in the correspondent account in the United States. Two key features of this provision are that the government can seize/restrain, in the correspondent account, up to the value of the criminal funds deposited into the account at the foreign bank (18 U.S.C. § 981(k)(1)(A)).The correspondent bank or the foreign bank do not have standing to contest the action (18 U.S.C. § 981(k)(4)(B)(i)(II)). The law provides for two exceptions, however, which will confer standing on the foreign bank to contest the forfeiture.

- When the foreign bank is alleged to have been the wrongdoer in acts giving rise to the forfeiture (§ 981(k)(4)(B)(ii)(I)).
- Where the foreign bank establishes, by a preponderance of the evidence, that prior to the seizure/restraint of the funds, it had discharged its obligation to the prior owner of the funds (§ 981(k)(4)(B)(ii)(II)).

This includes the foreign depositor closing the account or withdrawing money from the foreign bank, leaving no available balance from which the foreign bank could effect a setoff. These acts must occur *before* the money in the correspondent account is restrained or seized.

This means that the foreign bank whose account will be the subject of the forfeiture proceeding cannot object to the U.S. forfeiture action. Instead, the "owner" of the funds is defined as the account holder at the foreign bank (the one who holds the illicit proceeds) (18 U.S.C. § 981(k)(3) and (4)(B)(i)(I)). Thus, the law redefines who is an owner of the funds for purposes of contesting a forfeiture proceeding and applying the innocent owner defense.

There are consultation and approval requirements that must be satisfied before an action can be filed under 18 U.S.C. § 981(k). Requests to file a § 981(k) action are considered on a case-by-case basis. The use of this provision is not intended to circumvent existing treaties providing for international forfeiture cooperation. The use of this power could very well adversely affect U.S. bilateral or multilateral law enforcement relations. It could also adversely impact international banking and legitimate commerce. Therefore, the use of this provision has been reserved for instances where the foreign jurisdiction is unable or unwilling to provide the requisite forfeiture assistance to the United States. This may occur because the foreign jurisdiction does not recognize the offense at issue and requires dual criminality in order to render assistance. It could also be because the foreign country lacks legislation to enable it to provide the requested forfeiture assistance or the foreign jurisdiction could be one which is not cooperative with the United States on law enforcement matters. Approval authority rests with the Chief of AFMLS. AFMLS, in turn, consults with, and obtains the concurrence of, the Office of International Affairs, as well as the Department of Treasury and the Department of State.

To date, forfeiture actions under 18 U.S.C. § 981(k) have been filed against funds in U.S. based correspondent bank accounts of foreign banks holding criminal proceeds in Belize,

Cambodia, China, Guernsey, Haiti, India, Israel, Jordan, Liechtenstein, Oman, Pakistan, Singapore, Taiwan, and Yemen. The seizures in these cases involved telemarketing fraud, internet fraud, narcotics trafficking, operating as an unlicensed wire remitter, credit card fraud, and internet gaming offenses. Importantly, even though this provision was enacted as part of the PATRIOT Act, its application is not limited to terrorism cases. Section 981(k)(1)(A) provides that "[f]or the purpose of a forfeiture under this section or under the Controlled Substances Act . . . ." Forfeitures under "this section" encompass money laundering forfeitures and includes the forfeiture of proceeds of all specified unlawful activities.

IV. Efforts to combat foreign corruption and kleptocracy

On August 10, 2006, the White House unveiled its national strategy to bring international attention to large-scale corruption by senior-level foreign public officials. The strategy advocates, among other things, the denial of safe havens for corrupt officials and their assets, and calls on the Department to vigorously investigate and prosecute criminal violations associated with foreign official corruption and related money laundering, as well as to forfeit the proceeds of such crimes. The strategy also charges relevant government agencies to protect the integrity of our financial system by creating systemic barriers to prevent tainted assets of corrupt foreign officials from entering the legitimate financial system. This is to be accomplished by using the same regulatory safeguards that are employed in the efforts to combat terrorist financing and money laundering.

- Conduct enhanced scrutiny of banking accounts established, administered, maintained, or managed by or for politically exposed persons, in accordance with 31 U.S.C. § 5318(i)(3).
- Comply with suspicious activity report filing requirements (SARs).
- File Currency Transaction Reports (CTRs) and Currency and Monetary Instrument Reports (CMIRs), and use the designations under Section 311 of the PATRIOT Act and the Presidential Executive Order.

Authority issued pursuant to International Emergency Economic Powers Act, 50 U.S.C. § 1701, et seq., the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (codified in scattered sections of 50 U.S.C.), the United Nations Participation Act, as amended, 22 U.S.C. § 287(c), and/or 3 U.S.C. § 301 to impose economic sanctions.

The Department is working with the Department of State and other agencies to implement this strategy. For example, AFMLS has spearheaded a number of G8 projects designed to help victim states recover illicitly acquired assets. One such initiative is the G8 commitment to deploy joint teams of forfeiture-related mutual legal assistance experts and provide case-specific coordination, in appropriate grand corruption cases, at the request of victim countries whose assets have been secreted abroad. At AFMLS's urging, the G8 also agreed to convene regional asset recovery workshops to exchange information and best practices with potential victim countries on international financial investigation techniques and mutual legal assistance procedures to recover and, as appropriate, return assets to victim states.

Perhaps most importantly, AFMLS and several United States Attorneys' offices have initiated litigation to recover stolen state funds and other proceeds of foreign official corruption, and have returned proceeds of corruption to victim countries in a transparent and accountable way. The United States has also ratified the UNCAC, which became effective in December 2005. UNCAC provides mechanisms for international cooperation against corruption, imposes obligations on parties to adopt measures to prevent, criminalize, and combat corruption, and establishes a framework for the recovery and disposition of assets that corrupt officials placed

outside their home countries. Under Article 57 of the Convention, there is now a mandatory obligation to return embezzled public funds to the victim country when a country chooses to enforce that victim country's forfeiture order.

Fortunately, the Department has greater tools available to pursue these types of asset recovery cases and comply with its international obligations. For instance, the United States has expanded the list of predicate offenses at 18 U.S.C. § 1956(c)(7)(B)(iv) to include an offense against a foreign nation involving "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official." This provides a legal basis for criminal prosecutions against persons involved in money laundering related to foreign corruption, as well as criminal and civil forfeiture of property involved in such offenses. The Attorney General's statutory discretionary authority to restore forfeited assets to victims, and to share forfeited assets with foreign governments, gives the United States flexible authority to return forfeited assets that were involved in a corruption offense against another country. Pursuant to 28 U.S.C. § 2467(a)(2)(A), the United States can recognize the forfeiture judgments rendered by courts of countries with which it has entered into an agreement providing for forfeiture-related assistance, and treat such judgments as if they had been entered by a court in the United States, where they are based on "any violation of foreign law that would constitute a violation of an offense for which property could be forfeited under Federal law if the offense were committed in the United States." Thus, prosecutors have a number of tools they can use to bring foreign corrupt officials to justice and ensure that the United States does not serve as a safe places for these kleptocrats to hide their illicit wealth.

V. Conclusion

As criminal activity becomes increasingly transnational and criminal assets move easily from one jurisdiction to another, international law enforcement cooperation is essential, particularly in the forfeiture arena. The Department is actively engaged in forfeiting proceeds of U.S. crimes located beyond U.S. borders, as well as the proceeds of foreign crimes located in the United States. Much of the work in developing standards in this area is handled by the International Programs Unit (IPU) of AFMLS. The IPU performs numerous responsibilities in this area, including handling litigation and providing case support and legal advice to AUSAs and foreign officials in international money laundering and asset forfeiture investigations and proceedings. It initiates litigation relating to the execution of restraining orders and foreign judgments pursuant to incoming requests from foreign jurisdictions. IPU attorneys participate in negotiations and consultations with foreign governments concerning forfeiture cooperation and international asset sharing. The IPU assists in the development of U.S. governmental policy in international forfeiture and money laundering matters, through participation in interagency working groups and international organizations and bodies. For instance, the IPU represents the Department in a number of high-level bilateral and multilateral forums on forfeiture, money laundering, and terrorist financing matters, including the Financial Action Task Force and its regional bodies, the European Union, G8, Organization of American States, Camden Asset Recovery International Network, and bilateral initiatives with Mexico and Colombia. IPU attorneys also provide technical assistance to foreign governments and international organizations on the drafting and implementing of money laundering and asset forfeiture legislation and the training of domestic and foreign law enforcement.

IPU attorneys are striving to improve the enforcement of U.S. asset forfeiture and money laundering laws and enhance cooperation with foreign jurisdictions. Questions regarding international forfeiture and money laundering matters should be directed to the International Programs Unit of AFMLS at 202-514-1263.❖

ABOUT THE AUTHOR

❑**Linda M. Samuel** is currently the Deputy Chief of the Asset Forfeiture Money Laundering Section in the Criminal Division.✠

A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law

Craig Gaumer
Assistant United States Attorney
Southern District of Iowa

Asset forfeiture is, in simple terms, *"[s]omething to which the right is lost by the commission of a crime of fault or the losing of something by way or penalty."* BLACK'S LAW DICTIONARY at 332 (Abridged Fifth Edition).

I. Introduction

Two of the primary goals of a federal prosecutor are to convict those who violate federal criminal law and to ensure that the guilty are properly punished. Some prosecutors are rumored to consider forfeiture laws a hurdle to surmount, when trying to accomplish these goals. If the mere mention of the word "forfeiture" makes some prosecutors a little anxious, discussion of "civil forfeiture" may well trigger a panic attack in attorneys concerned that a parallel civil case may interfere with their prosecution. Nothing could be further from the truth.

Federal civil forfeiture law is a prosecutor's secret weapon, a valuable tool used to guarantee that wrongdoers do not reap the financial benefits of criminal activity or continue to use the tools of their illegal trade. Federal prosecutors can, and should, use civil forfeiture to enhance criminal cases and further the Department of Justice's (Department) goal of effective law enforcement.

This article provides federal prosecutors with an introduction to civil forfeiture law and explains how it can be used to augment the war on crime.

II. A brief history

Borrowing from English common law, *see, e.g., Austin v. United States*, 509 U.S. 602, 611-13 (1993), our First Congress created the initial federal forfeiture statutes in 1789, to authorize the forfeiture of cargo and ships involved in customs violations. Eventually these statutes were expanded to include vessels involved in piracy and slave trafficking. *See, e.g., United States v. Bajakajan*, 524 U.S. 321, 340-41 (1998). Under these laws, the government brought civil forfeiture actions against the property itself. They did not require a suit against the property owner. *See* Stefan D. Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES 29 (JurisNet 2007). This aspect of the civil forfeiture system endures today. Over time, Congress expanded the scope of the civil forfeiture laws to reach property used to commit crimes involving taxes on alcohol and distilled spirits, counterfeiting, gambling, drug trafficking, and smuggling. *See Id.* at 31-33.

The government's civil forfeiture authority, and the number of civil forfeiture cases brought,

increased dramatically in 1978 and 1984, when Congress rewrote the federal drug forfeiture statutes in two significant ways. First, it authorized the government to forfeit the *proceeds* of drug crimes. 21 U.S.C. § 881(a)(6) (1978). Second, it gave the government the ability to forfeit property used to facilitate drug crimes. 21 U.S.C. § 881(a)(7)(1984). Instead of forfeiting only contraband and property used to commit certain violations, the government suddenly had the ability to take the profit out of drug crimes and "any property that made the crime easier to commit or harder to detect." *See* Cassella at 34 (citing *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990)).

The foregoing history illustrates that, contrary to the misconception held by some, civil forfeiture is not a novel process, but is rather a powerful tool with deep roots in America's law enforcement tradition.

III. Overview of civil forfeiture statutes

The Department of Justice asset forfeiture program has three primary goals:

> (1) to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities;
>
> (2) to enhance cooperation among foreign, federal, state, and local law enforcement agencies, through the equitable sharing of assets recovered through this program; and, as a by-product,
>
> (3) to produce revenues to enhance forfeitures and strengthen law enforcement.

United States Attorneys' Manual (USAM) § 9-118.010 (Statement of Goals and Purposes).

This article deals with the first goal, namely how the civil forfeiture statutes can be used to reach the proceeds or property used to commit federal crimes.

Those involved in federal civil (or criminal) forfeiture cases know that some sort of preforfeiture planning, including a determination of whether the assets targeted meet Department equity thresholds, is required in all but the most extraordinary cases. This process is described in detail in Chapter 1 of the Department's Asset Forfeiture Policy Manual, which is available from the publications unit of the Asset Forfeiture And Money Laundering Section (AFMLS). ASSET FORFEITURE AND MONEY LAUNDERING SECTION, DEPARTMENT OF JUSTICE, ASSET FORFEITURE POLICY MANUAL (2007).

There is no single, all-encompassing federal forfeiture statute. The volume of existing statutes, however, covers an extraordinarily broad range of activities.

The federal civil drug forfeiture statute is 21 U.S.C. § 881. This statute authorizes the forfeiture of the following eleven classes of property.

> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired, in violation of Subchapter I of Chapter 13 of Title 21.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting, any controlled substance or listed chemical, in violation of Subchapter I of Chapter 13 of Title 21.
>
> (3) All property which is used, or intended for use, as a container for property described in paragraphs (1), (2), or (9).
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment, of property described in paragraphs (1), (2), or (9).
>
> (5) All books, records, and research, including formulas, microfilm, tapes, and data, which are used, or intended for use, in

violation of subchapter I of Chapter 13 of Title 21.

(6) All moneys, negotiable instruments, securities, or other things of value, furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of Subchapter I of Chapter 13 of Title 21, as well as all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities, used or intended to be used to facilitate any such violation.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of Subchapter I of Chapter 13 of Title 21 punishable by more than one year's imprisonment.

(8) All controlled substances which have been possessed in violation of Chapter 13 of Title 21.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of Subchapter I of Chapter 13 of Title 21.

(10) Any drug paraphernalia.

(11) Any firearm used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), and any proceeds traceable to such property.

21 U.S.C. § 881(a). While the scope of section 881(a) is limited, by its terms, to violations of Subchapter I of Chapter 13, 21 U.S.C. §§ 801-904, it is made equally applicable to violations of Subchapter II of Chapter 13, 21 U.S.C. §§ 951-971, through incorporation under 21 U.S.C. § 965.

Though section 881 is not quite as broad as its criminal counterpart, 21 U.S.C. § 853, in reaching facilitating property, it nevertheless covers the forfeiture of proceeds of all Title 21 crimes, conveyances used to commit such crimes, and all real property involved in felony violations of Title 21.

The other most-commonly used civil forfeiture statute is 18 U.S.C. § 981, which likewise provides a wide spectrum of forfeiture authority. The following property is subject to forfeiture pursuant to § 981(a):

- Any property, real or personal, involved in a transaction or attempted transaction, in violation of the federal money laundering and illegal money transmitting business statutes (§§1956, 1957, or 1960 of this title), or any property traceable to such property.
- Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from specific offenses against a foreign nation, or any property used to facilitate such an offense.
- Any property, real or personal, which constitutes, or is derived from proceeds traceable to a violation of such Title 18 crimes as section 215 (receipt of commissions or gifts for procuring loans), numerous counterfeiting offenses in Chapter 25, section 542 (entry of goods by means of false statements), section 545 (smuggling goods into the United States), section 656 (theft, embezzlement, or misapplication by bank officer or employee), section 657 (lending, credit, and insurance institutions), certain Chapter 40 offenses (related to explosive materials), various Chapter 47 fraud and false statement crimes, or any offense constituting a "specified unlawful activity," as defined in

18 U.S.C. § 1956(c)(7), or a conspiracy to commit such offense.

- Any property, real or personal, which represents, or is traceable to, the gross receipts obtained, directly or indirectly, from specific crimes involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.
- Any property, real or personal, which represents, or is traceable to, the gross proceeds obtained, directly or indirectly, from a violation of specific motor vehicle offenses.
- Almost any conceivable asset held by, or used by, any individual, entity, or organization, engaged in planning, supporting, perpetrating, or concealing any federal crime of terrorism (as statutorily defined in 18 U.S.C. § 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, and the proceeds of such a crime, as well as all assets of certain persons engaged in international terrorism.

18 U.S.C. § 981(a)(1)(A)-(G).

A leading authority on asset forfeiture law in the United States estimates that section 981(a)(1)(C) permits the forfeiture of the proceeds of more than 200 different state and federal crimes, enumerated either in its text, or incorporated by reference from the federal money laundering statutes. (18 U.S.C. § 1956(c)(7)) or Racketeer Influenced and Corrupt Organization (RICO) (18 U.S.C. § 1961(l) (except for currency reporting offenses in violation of Subchapter II of Chapter 53 of Title 31, United States Code—for which civil and criminal forfeiture is authorized under 31 U.S.C. § 5317(c)). Stefan D. Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES 5 (JurisNet 2007).

Prosecutors should note that firearms used to commit federal offenses can also be civilly forfeited in many cases. Some law enforcement personnel may not know that firearms and ammunition involved in federal crimes do not constitute contraband *per se* and must be forfeited, or formally abandoned, before they may be properly disposed of. It is the policy of the United States to forfeit all firearms and ammunition involved in federal crimes, and the AFMLS's A Guide To The Forfeiture Of Firearms And Ammunition lists numerous ways to do so, depending on the nature of the offense. ASSET FORFEITURE AND MONEY LAUNDERING SECTION, DEPARTMENT OF JUSTICE, A GUIDE TOT HE FORFEITURE OF FIREARMS AND AMMUNITION (2006)

The foregoing discussion of civil forfeiture authority is not exhaustive. Many other statutes authorize the civil forfeiture of property. AFMLS's website, available to Department components, includes a "Forfeiture in a Box" chart that attempts to list all federal forfeiture statutes, and can be used to determine if a specific crime gives rise to civil forfeiture. Further, the appendices of AFMLS's Selected Federal Asset Forfeiture Statutes contains a comprehensive list of federal statutes that authorize civil or criminal forfeiture. ASSET FORFEITURE AND MONEY LAUNDERING SECTION, DEPARTMENT OF JUSTICE, SELECTED FEDERAL ASSET FORFEITURE STATUTES (2007).

Once a federal prosecutor determines that there is civil forfeiture authority for the crime in question, the government is not required either to seek an indictment or obtain a criminal conviction before commencing a civil forfeiture action. Indeed, in a civil forfeiture case, property is subject to forfeiture "even if its owner is acquitted of-or never called to defend against criminal charges." *See, e.g., United States v. Property Identified as 3120 Banneker Dr., N.E.,*

Washington, D.C., 691 F. Supp. 497, 499 (D.D.C.1988). The government simply files a civil action in rem against the property itself, and then generally must prove, by a preponderance of the evidence, that the property is forfeitable under the applicable forfeiture statute. Civil forfeiture is independent of any criminal case, and because of this, the forfeiture action may be filed before indictment, after indictment, or even if there is no indictment. Likewise, civil forfeiture may be sought in cases in which the owner is criminally acquitted of the underlying crimes, as previously noted, or where the jury "hangs" in the related criminal case, regardless of whether or not the government opts to reprosecute.

The government can file a civil forfeiture directly or bring a civil forfeiture after a federal agency starts an "administrative forfeiture" in which a "claim" is filed. Administrative or nonjudicial forfeiture is a legally sanctioned process, as old as the nation, by which a federal law enforcement agency with statutory forfeiture authority may seize and forfeit property without involvement of a U.S. Attorney's office (USAO) or judicial official of any kind. Property eligible for administrative forfeiture consists of the following:

- Personal property valued at less than $500,000.
- Monetary instruments (as defined in 31 U.S.C. § 5312(a)) regardless of value.
- Conveyances involved in controlled substance violations.
- Imported smuggled goods.

See 19 U.S.C. § 1607 (incorporated by reference in the most commonly used civil forfeiture statutes). Most federal agencies participating in forfeiture enforcement have administrative forfeiture authority. A few, however, lack such authority (Food and Drug Administration's Office of Criminal Investigations, Diplomatic Security Service, Defense Criminal Investigative Service) and all of their forfeitures must be done judicially, except where a fellow agency with statutory authority agrees to conduct an administrative forfeiture on their behalf.

An administrative forfeiture is preceded by seizure, based upon probable cause, of the property eligible for forfeiture. *Id.* The seizing agency, if it has administrative forfeiture authority, then publishes a notice of seizure and intent to forfeit the property, once a week for three successive weeks, in a newspaper of general circulation within the district of seizure. The agency also sends written notice to anyone known to the government who may have an interest in the property to be forfeited within the statutory "notice deadlines." *Id.*; 18 U.S.C. § 983(a). The notices identify the seized property, the statutory forfeiture authority rendering the property subject to forfeiture, the federal agency conducting the administrative forfeiture, and directs anyone wishing to judicially contest the forfeiture to file a "claim" with the seizing agency within the deadline stated in the notice. 19 U.S.C. § 1607. For the required contents of a valid claim, *See* 18 U.S.C. § 983(a)(2)(C).

If no one files a claim to the property within the stated deadlines, an employee with the seizing agency simply executes a Declaration of Administrative Forfeiture and this declaration has the same force and effect as a judicial decree of forfeiture. *See generally* 19 U.S.C. § 1609. On the other hand, if a valid claim is filed with the agency within the stated deadlines, the case must be referred to a USAO for commencement of a judicial forfeiture action, civil or criminal, within ninety days, unless the government obtains a timely extension. *See generally* 18 U.S.C. § 983(a)(3).

Administrative forfeitures thus offer an efficient and expedient means of forfeiting eligible property in uncontested cases. Prosecutors need to be aware of this nonjudicial process and should always check with the seizing agency to determine if a particular property has been administratively forfeited before proceeding to seek criminal forfeiture of the property or

agreeing to release the property to a defendant as part of a plea bargain. As to the latter possibility, prosecutors should be aware that once property is declared administratively forfeited, it becomes the property of the United States and an agreement to return the property to a private person might well constitute a violation of federal law.

IV. Civil forfeiture procedure

Civil forfeiture procedures are largely governed by four sources.

- First, Title 18 U.S.C. § 983, which became effective October 23, 2000, establishes "[g]eneral rules for civil forfeiture proceedings" that apply to proceedings under all forfeiture statutes, except for those listed in section 983(i).
- Second, the authority set forth in section 983 is supplemented by the procedural provisions of the "customs laws," (19 U.S.C. §§ 1602-1621) which are incorporated by express reference into most of the commonly used federal civil forfeiture statutes. *See, e.g.*, 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d). With the exception of actions under the statutes listed in section 983(i), these procedural provisions of the "customs law" apply only insofar as they are applicable and not inconsistent with the provisions of Section 983. *See, e.g.*, 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d).
- Third, the Supplemental Rules For Admiralty Or Maritime And Asset Forfeiture Claims—which are generally found immediately after the Federal Rules of Civil Procedure—are the primary procedural rules governing civil forfeitures. As of December 1, 2006, Supplemental Rule G replaced the parts of Rules C and E that previously governed civil forfeiture cases with a new nine-part rule that applies only to civil forfeiture. The old parts of Rule C and E that applied to civil forfeiture cases have been repealed.
- Finally, the Federal Rules of Civil Procedure apply to civil judicial forfeiture actions "except to the extent that they are inconsistent with [the] Supplemental Rules." Supplemental Rule A.

A civil forfeiture begins when the government files a verified complaint alleging that the property in question is subject to forfeiture pursuant to the applicable forfeiture statute. Supplemental Rule G(2). The complaint must state the basis for subject matter jurisdiction, in rem jurisdiction, and venue, and identify the statutory basis for forfeiture. Supplemental Rule G(2)(b), (e). If the property was seized and is tangible, the complaint must identify its location at the time the case is filed. Supplemental Rule G(2)(d). Civil forfeitures are subject to a slightly higher fact pleading standard than the typical "notice pleading" requirement applicable to most federal civil litigation. A forfeiture complaint must state enough detailed facts to "support a reasonable belief that the government will be able to meet its burden of proof at trial." Supplemental Rule G(2)(f).

Supplemental Rule G(4) also details the government's duties to provide notice to known potential claimants, as well as notice by publication. These provisions are of exceptional importance as proper notice is a matter of constitutional due process.

If the forfeiture action concerns real property, 18 U.S.C. § 985 dictates the process to begin the case. Supplemental Rule G(3)(a). While section 985 provides the primary authority for dealing with real property, any procedure not addressed in section 985 in a case involving real property should be taken in accordance with section 983, Supplemental Rule G, or the Federal Rules of Civil Procedure. For personal property, Supplemental Rule G(3) details the case initiation process.

Claimants are required to file timely and verify claims to property named in the complaint, Supplemental Rule G(5)(a), and then an answer to

the forfeiture complaint. Supplemental Rule G(4)(b)(ii)(C); 18 U.S.C.§ 983(a)(4)(B) (an answer to the complaint must be filed not later than twenty days after filing the claim). Supplemental Rule G(4)(b)(ii)(B) indicates that the deadline for filing a claim is at least thirty-five days after the notice is sent, while the Civil Asset Forfeiture Reform Act (CAFRA) establishes a thirty-day deadline. 18 U.S.C. § 983(a)(4)(A). If a claimant was provided direct notice of the action, the claim must be filed by the time set forth in Supplemental Rule G(4)(b), or within thirty-five days of when the notice was sent, unless the court, for good cause, sets a different time limit. Supplemental Rule G(5)(a)(ii)(A); Supplemental Rule G(4)(b). If the claimant received notice by publication, he or she has thirty days after publication in a newspaper or sixty days from publication on the internet. Supplemental Rule G(5)(a)((ii)(B). Supplemental Rule G(5)(a)(ii)(C) contains additional deadlines for filing the claim in unusual situations. A claimant must file and serve an answer or motion under Federal Rule of Civil Procedure 12 within twenty days after filing a verified claim. Supplemental Rule G(5)(b).

Thereafter, the case proceeds to civil discovery, typically undertaken by both sides, motion practice (which could include a motion to dismiss by claimant, a motion by the government for lack of standing by the claimant, and a motion for summary judgment on the merits), and trial (unless complete summary judgment has been granted). Supplemental Rule G(8) governs, in part, motion practice in civil forfeiture cases. While the law is unclear as to whether a jury trial is guaranteed by the Seventh Amendment of the U.S. Constitution, Rule G(9) provides that trial is "to the court unless any party demands trial by jury under [Federal Rule of Civil Procedure] 38." At trial, the government bears the burden of proof to establish the forfeitability of the property by a preponderance of the evidence, except in cases under statutes listed in section 983(i). 18 U.S.C. § 983(c). One significant difference and advantage of civil forfeiture over criminal prosecutions and forfeitures is that the government has no burden of proving, in its case in chief, that a claimant had a criminal state of mind (intent, knowledge, or willfulness); rather, and as discussed more fully below, the burden is on the claimant to prove that he or she had an innocent state of mind as an affirmative defense.

After the government meets its burden of establishing the nexus between the property and the offense that forms the basis for the forfeiture, the trial is not over. Congress enacted a uniform innocent owner defense that applies in all civil forfeiture cases, except those under statutes listed in 18 U.S.C. § 983(i). *See* 18 U.S.C. § 983(d). The innocent owner defense is, as noted above, an affirmative defense and is designed to protect the interests of the truly innocent owner. A claimant asserting it must establish, by a preponderance of evidence, both an ownership interest in a defendant property and his or her innocence regarding the property's forfeitability. 18 U.S.C. § 983(d)(1).

There are two types of innocent owner defenses under section 983(d): one applicable to persons who owned the property when the illegal activity was occurring, and the other applicable to persons who acquired their interest in the property after the illegal conduct occurred. Persons who owned an interest in defendant property as the illegal activity was occurring must prove, by a preponderance of the evidence, one of the following:

> They did not know of the illegal conduct or, if they did know, that upon learning of the conduct they did all that reasonably could be expected, under the circumstances, to terminate the illegal use of the property, including giving timely notice of the conduct to law enforcement and revoking, or making a good faith attempt to revoke, permission of those engaged in the illegal conduct to continue using the property or taking other reasonable steps to discourage or prevent such illegal use.

18 U.S.C. § 983(d)(2). Persons who acquired an interest in the defendant property only after the illegal conduct occurred must prove that they qualify as a bona fide purchaser for value of the interest and that, at the time they acquired the interest, they did not know and were reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(3) (an extremely limited, and rarely established, exception to the "bona fide purchaser requirement" is found in 18 U.S.C. § 983(d)(3)(B)). The innocent owner defense under 18 U.S.C.§ 983 is unavailable as to property that qualifies as contraband or other property that is illegal to possess. 18 U.S.C. § 983(d)(4).

Ultimately, if the government establishes the forfeitability of the property and no claimant succeeds in proving the elements of an innocent owner defense, where applicable, or some other affirmative defense to forfeiture, the court will enter judgment for the government and clear title to the property will pass to the United States. Title 18 § 983(d)(5) sets forth various alternatives open to a court when there are multiple ownership interests in an item of property, some of which are found to belong to innocent owners and others not.

One additional affirmative defense to forfeiture involves a challenge that the forfeiture is constitutionally excessive under the Excessive Fines Clause of the Eighth Amendment. Such a challenge requires the court to determine—at the end of the case, but before entering judgment—if full forfeiture of the property would be "grossly disproportional," after weighing the value of the property to be forfeited against "the gravity" or seriousness of the criminal activity supporting the forfeiture. *See generally United States v. Bajakajian*, 524 U.S. 321, 322 (1998). For purposes of civil forfeiture litigation, this constitutional standard is codified in 18 U.S.C. § 983(g), which applies in all civil forfeiture actions except those under the statutes listed in 18 U.S.C. § 983(i). Even as to civil forfeiture cases brought under the latter statutes or criminal forfeiture cases, the legal standards and procedures governing challenges to forfeiture under the Excessive Fines Clause should not deviate, in any material sense, from those set forth in 18 U.S.C. § 983(g).

Though the end goal is the same, civil forfeiture is very different from criminal forfeiture. Civil forfeiture is limited solely to a showing by the government that proceeds or property are "tainted," meaning derived from, or used in, committing criminal activity supporting forfeiture. Unlike criminal forfeiture, there is no provision for the forfeiture of substitute assets if the wrongdoer has spent, sold, or hidden the property involved in the crime. Also, there is no ability to obtain a money judgment reflecting the total proceeds generated by the criminal conduct.

V. Concerns and advantages

A. Parallel proceedings

The term "parallel proceeding," as used in case law and legal academic literature, refers to two lawsuits, one civil in nature and the other criminal, in which the federal government and its opponent are litigating (or investigating) related, but not necessarily identical, controversies. The Department recognizes that federal prosecution must coexist and be reconciled with related civil and administrative litigation, each pursuing its own legitimate goals. The Department also realizes that a deferral or judicial stay of civil and administrative remedies until after the completion of a parallel criminal proceeding—a traditional response of prosecutors wary of the complications that come with parallel proceedings—may greatly diminish, or eliminate, the United States's ability to effectuate financial recoveries and take other important remedial actions. There is also a concern that each type of proceeding be confined to its proper purpose, and that the processes of one type of proceeding not be improperly exploited to obtain an advantage otherwise unavailable, or to achieve goals more

appropriately, and perhaps justly, accomplished through the other type of proceeding.

To prevent any such improper exploitation of parallel proceedings, the *United States Attorney's Manual* requires each USAO to have a "parallel proceedings policy," and to conduct training in this area. *USAM* § 1-12.000 Coordination of Parallel Criminal, Civil, and Administrative Proceedings. The USAM specifically requires Assistant United States Attorneys (AUSAs) to coordinate parallel proceedings by taking the following steps:

- Conduct timely assessment of the civil and administrative potential in all criminal case referrals, indictments, and declinations.
- Conduct timely assessment of the criminal potential in all civil case referrals and complaints,
- Conduct effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies.
- Conduct early and regular communication between civil and criminal attorneys regarding *qui tam* and other civil referrals, especially when the civil case is developing ahead of the criminal prosecution.
- Coordinate, when appropriate, with state and local authorities.

There is nothing inherently bad or inappropriate about pursuing parallel proceedings. *See, e.g., United States v. Kordel*, 397 U.S. 1, 2-6 (1970) (approving government's pursuit of parallel civil and criminal proceedings against defendant); *Abel v. United States*, 362 U.S. 217, 228-29 (1960) (absent a showing of bad faith, mere cooperation of different branches of the Department enforcing different areas of law—one administrative and one criminal—is neither illegitimate nor unconstitutional). Close and continuing coordination of parallel proceedings between the criminal and civil AUSAs—and/or agency officials in charge of any parallel administrative proceeding—is essential to avoiding any ethical issues or tactical problems that might otherwise arise from such proceedings.

Parallel civil forfeiture and criminal proceedings, if done properly, may serve as a valid and invaluable tool to preserve tainted property, where the government is not yet ready to indict the owner but does not want the property to be sold or otherwise transferred, damaged, dissipated, or hidden. If the property is eligible for administrative forfeiture, the government may seize the property and either commence a timely administrative forfeiture proceeding against it, or obtain *ex parte* extensions of the commencement deadlines, as provided in 18 U.S.C. § 983(a)(1)(B) and (a)(1)(C), while continuing to hold the property as the criminal investigation proceeds. If no such extension is obtained (or if one is allowed to expire and not renewed) and a timely and valid claim is filed in response to the notice of administrative forfeiture, the government may do one of the following:

- Seek to extend the ninety-day limit on filing its civil forfeiture complaint, as provided in 18 U.S.C. § 983(a)(3)(A).
- File a timely civil forfeiture complaint and then move for a stay of the civil forfeiture action, as provided in 18 U.S.C. § 981(g) or 21 U.S.C. § 881(g), until the criminal investigation and any resulting prosecution are completed. (If no timely or valid claim is filed in response to the notice of administrative forfeiture, of course, the property will simply be declared administratively forfeited and there will be no impact on the parallel criminal investigation and/or prosecution.)

If the property in question is personal property that is ineligible for administrative forfeiture, the government may file a civil forfeiture complaint, and seize the property with a warrant of arrest in rem (discussed below) if it is not already in government custody, and seek to stay the action under the authorities cited above.

If the property in question is real property, the government generally will not seize the property prior to its forfeiture. *See* 18 U.S.C. § 985(b)(1)(A). The government may file a forfeiture complaint against the property, however, and immediately file a notice of *lis pendens* in the local land records, as provided by 18 U.S.C. § 985(b)(2). (Notices of *lis pendens* are not restraining orders, but are simply a form of "buyer beware" notice warning potential purchasers or transferees that the real property in question is subject to litigation. They are placed in the local land records so that anyone doing a due diligence title search on the property will be on notice of the litigation. The notices are creatures of state law and the government must fully conform with the relevant state law in all respects, including any laws governing expiration and renewal of such notices. Most states require litigation involving the real property to be commenced and pending before the notice of *lis pendens* is filed; however, a few permit the filing of such a notice in good faith anticipation of commencing such litigation.) The government may then seek to stay the civil forfeiture action as provided by the authorities cited above. Alternatively, and in very rare and limited circumstances, the government may seek to seize and take custody of the real property in advance of forfeiture and even in advance of filing its complaint. Seizures, such as this, require that any owners and lessees, and perhaps any other residents on the property, be given notice and an opportunity to be heard either prior to the seizure or, if exigent circumstances exist, with reasonable promptness following the seizure. *See* 18 U.S.C. § 985(d)-(e); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993).

Finally, as to any property, real or personal, the government may, in lieu of seizure, seek a restraining order against the property pursuant to 18 U.S.C. § 983(j) while it pursues a parallel criminal investigation or prosecution. While personal property is generally seized pending forfeiture, restraining orders may prove quite useful, together with the filing of a notice of *lis pendens*, to more firmly secure real property against waste, transfer, and failure to make mortgage, insurance, or tax payments, before commencement or during the pendency of a civil forfeiture action. Section 983(j)(1)(A) provides that a restraining order may be obtained without a hearing, upon the filing of a forfeiture complaint. In the case of real property, however, the law is unclear whether entry of such an order might sufficiently impair the owner's right to the use and enjoyment of the real property as to require notice and a hearing under the *James Daniel Good Real Property* decision cited above.

A restraining order may be obtained even *prior* to filing the forfeiture, as provided in 18 U.S.C. § 983(j)(1)(3). Indeed, a precomplaint temporary restraining order (TRO) may be obtained *ex parte* upon demonstrating probable cause for forfeiture of the property and that giving notice will jeopardize the availability of the property for forfeiture. 18 U.S.C. § 983(j)(3). Such an *ex parte* TRO is valid for only ten days unless it is extended by the court upon a showing of good cause or by consent of the parties, or converted to a preliminary restraining order after affording the owner with notice and opportunity for a hearing, as provided in 18 U.S.C. § 983(j)(1)(B). Alternatively, the government may skip the TRO and move directly for entry of a precomplaint preliminary restraining order after affording the owner with notice and opportunity for a hearing. *Id.* A precomplaint preliminary restraining order is valid for ninety days unless extended for good cause shown or by the filing of the forfeiture complaint. 18 U.S.C. § 983(j)(2).

There may be other situations where the government wants to pursue parallel proceedings (where the owner of the property is a fugitive or dies prior to any conviction becoming final so that any criminal forfeiture against the owner "abates" or is nullified). Though parallel proceedings need to be carefully coordinated, there is nothing to prohibit them, and they should even be encouraged in some circumstances.

B. Use of grand jury materials

Prosecutors are often concerned that they will violate the grand jury secrecy rule, FED. R. CRIM. P. 6(e), by sharing information with their civil counterparts, or using grand jury information, themselves, in a civil forfeiture case. Congress acted to allay this concern, specifically with regard to civil forfeiture enforcement, by amending 18 U.S.C. § 3322 in 2000. Section 3322(a) permits prosecutors and other persons authorized by law to possess and use grand jury information to "disclose that information to an attorney for the government for use in . . . connection with any civil forfeiture provision of Federal law." 18 U.S.C. § 3322(a)(1), (2). While the statute itself places no limitations on how the civil forfeiture attorney may "use" grand jury information following such disclosure, the AFMLS' Interim Legal Advice Memo 02-1, after legal analysis of the issue, concludes as follows:

> Under the ... [2000] amendment to 18 U.S.C. § 3322(a), criminal AUSAs may now disclose grand jury information to civil forfeiture AUSAs. This information may be used by the civil AUSAs in their complaints, restraining orders, any other pleadings filed in a civil forfeiture case, and as evidence at trial, without getting a [Rule 6(e)] disclosure order. However, neither criminal nor civil AUSAs may disclose grand jury information to seizing agency attorneys to use in administrative forfeiture proceedings, or to employees of government contractors such as Dyncorp who may be assisting in the preparation of a civil forfeiture case without obtaining a judicial [Rule 6(e) disclosure] order.

ASSET FORFEITURE AND MONEY LAUNDERING SECTION, DEPARTMENT OF JUSTICE, INTERIM LEGAL ADVICE MEMO 02-1 (2002).

A court order is still recommended, if not required, for such a disclosure to a claimant. In *United States v. John Doe I*, the U.S. Supreme Court condoned the conduct of a Department attorney who handled a grand jury investigation concerning a matter and, without a court order, personally made continued use of information obtained from the grand jury materials in the civil phase of the same dispute. 481 U.S. 102 (1987). Crucial to the Court's decision was the fact that the attorney did not disclose any of the information to any other person, and the attorney properly sought a court order before disclosing grand jury information to government attorneys in the Civil Division.

C. Discovery

Where there is no pending parallel criminal case or investigation or any immediate prospect of one, the ability to use the wide array of civil discovery tools, such as depositions, interrogatories, requests for production, and requests for admission, is an invaluable aspect of civil forfeiture litigation. Criminal prosecutors and law enforcement agents, however, may be concerned over the prospect of defense counsel exploiting broad civil discovery to gain an otherwise unavailable advantage, if a civil forfeiture action is filed while they are pursuing a parallel criminal investigation and/or prosecution.

This concern is hardly misplaced. A parallel civil case can interfere with an ongoing criminal investigation or trial, given the broad discovery opportunities available to both sides in the civil case. It affords the targets of the criminal investigation, or defendants in a criminal prosecution, a chance to obtain information unavailable under criminal rules of procedure. *See, e.g., Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962). Civil discovery by the defense may impede a criminal investigation or prosecution in a number of ways, such as the following:

- Cause informants or prospective witnesses to refuse to cooperate for fear of disclosure.
- Enable a prospective or actual defendant to hide or destroy evidence, identify undercover agents, informants, or witnesses, and attempt to suborn the perjury of persons to be called

> before the grand jury or as witnesses for the government in any criminal prosecution.

See, e.g., Douglas Oil v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979), *quoted in United States v. Sells Engineering* , 463 U.S. 418, 424 (1983). A criminal investigation may also be harmed if civil depositions are used to discover the substance of testimony the deponent previously gave before the grand jury. The court in *Peden v. United States, 512 F.2d 1099*, 1104 (Ct. Cl. 1975), well summarized the dangers inherent in affording defense counsel the opportunity to depose or cross-examine prosecution witnesses in a parallel civil deposition or hearing held in advance of a related criminal prosecution.

> The main utility . . . of having the [deposition or] hearing in advance of the criminal trial was the opportunity of cross-examining the witnesses the Government was going to use at the criminal trial, including the undercover agents. . . .
>
> Certainly, a ... [deposition or] hearing that is in the nature of a dress rehearsal for a criminal trial, in which all the Government witnesses testify and are cross-examined at length, but the defendant to be does not, is potentially a big lift to the criminal defense and could well be decisive in securing an acquittal, if anything could.

Cooperation and coordination between prosecutors and civil litigators are the keys to avoiding such dangers. By the same token, alert defense counsel should be concerned at the prospect of the government using civil discovery to request documents, evidence, and admissions from the defense, and to take the civil deposition of the target of a criminal investigation, the defendant in a criminal prosecution, or potential defense witnesses. While deponents may assert their Fifth Amendment privilege against compelled self-incrimination in response to deposition questions or discovery requests in a parallel civil case, the fact finder in the civil case may be able to draw an "adverse inference" from the assertion of the privilege. This "adverse inference doctrine" is discussed in greater detail below.

Finally, allegations of government misconduct might also arise if the parallel proceeding is not properly coordinated between criminal and civil investigators or case managers. In *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), a criminal conviction was reversed after the court found that evidence elicited with the defendant's consent had been obtained by the government following an IRS revenue agent's assurance that no "special agent" was involved in the matter. The court found that this assurance, while literally true (a special agent had been involved at an earlier point, but had withdrawn by the time the assurance was given by the revenue agent), was both "sneaky" and "shocking," because the revenue agent knew, at the time he gave the assurance, that the audit he was conducting was not a routine civil audit. The audit had been undertaken at the request of the Department's Organized Crime and Racketeering Section, and the assurance therefore created the misimpression that the inquiry was for a civil, and not a criminal, inquiry. The holding in *Tweel* is limited to situations where there is an affirmative misrepresentation as to the criminal nature of an investigation. *See, e.g., United States v. Hrdlicka*, 520 F. Supp. 403, 409-10 (E.D. Wis. 1981) (court suppressed evidence obtained by Department of Agriculture agent who misrepresented scope of investigation). Courts have declined to extend *Tweel's* sanction to situations where the agent merely failed to inform the subject of the possibility of criminal sanctions. See, e.g., *United States v. Powell*, 835 F.2d 1095 (5th Cir. 1988). In addition, the principles announced in Tweel do not apply in undercover investigations. *See Jones v. Berry*, 722 F.2d 443, 447 n.5 (9th Cir. 1983); *United States v. Irvine*, 699 F.2d 43, 45-46 (1st Cir. 1983).

In response to these myriad problems and dangers, and for the benefit of both sides in a civil forfeiture case, Congress has provided that any

party to a civil forfeiture case brought under the two most commonly used civil forfeiture statutes may seek to stay the civil forfeiture action pending completion of a related criminal investigation or prosecution. *See* 18 U.S.C. § 981(g) and 21 U.S.C. § 881(i). These provisions are frequently used to avoid the problems and pitfalls presented by parallel proceedings. In fact, insofar as most claimants or defendants do not wish to be deposed or subjected to government discovery requests while they are subject to a criminal investigation or prosecution, defense lawyers are often the first proponents of such motions, or readily agree to such a motion once filed by the government. Assets seized or restrained by the government before a civil forfeiture action is stayed typically remain under restraint, or in government custody, for the duration of the stay. A rare exception may occur where a claimant is able to meet the very difficult burden of establishing that the property should be released pending forfeiture for undue hardship under the conditions stated in 18 U.S.C. § 983(f).

D. Fifth Amendment and adverse inference

In a criminal case, a prosecutor cannot hail the target of an investigation before the grand jury or call to a jury's attention the fact that a defendant has refused to testify in a criminal case, and the jury is prohibited from factoring this into their deliberations. *Cf. Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (defendant has a right to a jury instruction to the effect that no adverse inference can be drawn from his failure to take the witness stand). If a defendant in a criminal case decides not to testify, the privilege prohibits the prosecutor, *see, e.g., United States v. Robinson*, 485 U.S. 25, 31 (1988), the trial judge, *see, e.g., Lakeside v. Oregon*, 435 U.S. 333, 338-41 (1978), and even counsel for codefendants, *see, e.g., United States v. Coleman*, 7 F.3d 1500, 1505-06 (10th Cir. 1993), from commenting on the decision.

A different set of rules apply, however, in civil cases. A party or person called as a witness at a hearing, trial, or deposition, in a civil case, cannot refuse to testify on Fifth Amendment grounds, but he or she may refuse to answer any specific questions that might tend to be incriminating. The court, or the jury as fact finder, however, can consider the party's failure to answer critical questions, on Fifth Amendment grounds, in making its decision. Indeed, the Supreme Court held in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), that an adverse inference may be applied in a civil case whenever a witness declines to answer questions based on an assertion of the constitutional privilege against self-incrimination.

E. Broad seizure authority

One of the main advantages of civil forfeiture is that it has less stringent standards for obtaining a seizure warrant. To obtain a criminal forfeiture-related seizure warrant, a prosecutor must establish probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture. He or she must also convince the court that a protective or restraining order under 21 U.S.C. § 853(e) may not be sufficient to assure the availability of the property for forfeiture. *See* 18 U.S.C. § 853(f). Moreover, seizure warrants are entirely unavailable under 18 U.S.C. § 1963, the RICO criminal forfeiture statute (although, as discussed directly below, counsel may effect a seizure of the same property by commencing a parallel civil forfeiture action and obtaining either a seizure warrant or warrant of arrest in rem in the civil case).

In a civil forfeiture action, by contrast, the government may seize personal property, even prior to filing the complaint, through a seizure warrant obtained simply upon showing probable cause to believe that the property to be seized is subject to forfeiture. *See* 18 U.S.C. § 981(b)(2) (also incorporated by reference in 21 U.S.C. § 881(b)). Alternatively, the government may file the civil forfeiture complaint and then seize the defendant property through a warrant of arrest in rem. Supplemental Rule G(b)(3).

F. The "Ken Lay" rule

In July 2006, convicted criminal defendant and former Enron executive, Ken Lay, died as he was awaiting sentencing for ten counts of fraud and conspiracy. The criminal forfeiture to be imposed in the case was in personam. Consequently, it was legally "abated" or nullified upon his death, and the court had to vacate Lay's convictions and the indictment against him. *United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. 2006). Months later, however, prosecutors filed a civil forfeiture case against properties in Lay's estate alleged to be traceable to over $12 million in purported proceeds of the fraud scheme. This is but one illustration of the enormous value of, and the advantages inherent, in civil forfeiture's in rem nature. There can be no criminal forfeiture if a defendant is acquitted or dies, but as the *Lay* case so vividly illustrates, civil forfeiture requires neither a conviction nor even a living owner.

G. The "fugitive disentitlement" statute

Another advantage of the in rem nature of civil forfeiture is that it may be employed to forfeit the property of persons who are absent from the proceeding because they are fugitives from justice in a criminal proceeding. *See* 28 U.S.C. § 2466. This statute was enacted, effective April 25, 2000, in order to revive application of the so-called "fugitive disentitlement doctrine," a judge-made rule that had often been applied in civil forfeiture cases. In 1996, the Supreme Court ruled that the doctrine no longer applied in such cases. *See Degen v. United States*, 517 U.S. 820 (1996). However, the Degen Court left open the possibility that Congress could revive the doctrine as to civil forfeiture action through statutory codification, which it ultimately proceeded to do with the adoption of 28 U.S.C. § 2466.

The doctrine authorizes courts to "disallow" a person who is a fugitive, as defined in the statute, in any related criminal investigation or prosecution, from pursuing a claim in a civil forfeiture action or a third-party petition in an ancillary proceeding in any criminal forfeiture case. *Id.* To qualify as a fugitive under the statute, the person, after receiving notice or having knowledge that a warrant or process had been issued for his or her apprehension, purposefully leaves the United States, declines to enter or reenter the United States to submit to its jurisdiction, or otherwise evades the jurisdiction of the court in which a criminal case is pending against him or her. *Id.* The sole exception is where the person is confined, or held in custody, in another jurisdiction for criminal conduct committed in that jurisdiction. *Id.* Section 2466 also applies to the claim of any corporation, if any majority shareholder or individual filing the claim on behalf of the corporation qualifies as a fugitive under the statute. 28 U.S.C. § 2466(b).

Thus, the fact that a person is a fugitive in a criminal case may bar his or her criminal prosecution and, therefore, any prospect of criminal forfeiture, but it has no effect, whatsoever, on the government's ability to pursue an in rem forfeiture against the fugitive's property. If the fugitive retains counsel to file a claim and answer to challenge the civil forfeiture action, the government can simply file a motion to dismiss the claim and answer and for entry of summary judgment as to the interest claimed by the fugitive owner, pursuant to 28 U.S.C. § 2466.

VI. Conclusion

There are many advantages to civil forfeiture cases. Civil forfeiture laws make it easier to seize potentially forfeitable personal property than their criminal forfeiture counterparts. Civil forfeiture cases do not require the criminal conviction of the owner (or anyone else) as a prerequisite to forfeiture. They provide the government with greater discovery tools and afford the government a right to depose and otherwise take broad civil discovery from the wrongdoer, other claimants, or any witnesses for the defense. Invocation of a witness's Fifth Amendment right against self-incrimination, either at trial or in the course of civil discovery, may support the drawing of an

adverse inference against the witness by the fact finder in a civil forfeiture case.

The primary downside to civil forfeiture is the risk that broad civil discovery poses to both sides in any related criminal investigation or prosecution. This risk is usually avoided in civil forfeiture actions by obtaining a statutory stay of the civil case pending completion of any related criminal investigation or prosecution. Finally, civil forfeitures may be pursued against the property of owners who have died or are fugitives from justice in a related criminal matter. In short, prosecutors need not fear civil forfeiture. To the contrary, they should welcome it as another powerful and highly effective tool in their arsenal to accomplish complete justice, both personal and economic.❖

ABOUT THE AUTHOR

❑**Craig Gaumer** is an Assistant United States Attorney, Civil Division, in the Southern District of Iowa. He previously served in both the Civil and Criminal Divisions in the District of South Dakota. He was a member of the National Bankruptcy Fraud Working Group, past member of the Executive Office for United States Attorneys (EOUSA) Civil Bankruptcy Working Group, and past member of EOUSA's Bankruptcy Fraud Working Group. Mr. Gaumer has taught numerous Office of Legal Education courses in civil bankruptcy and bankruptcy fraud. He was a former Adjunct Professor of Law, Advanced Bankruptcy Practice, University of South Dakota.✠

NOTES

NOTICE

The Department of Justice Main Library and the Office of Enforcement Operations (OEO), Criminal Division, in cooperation with the Office of Policy and Legislation, Criminal Division, would like to announce the merging of their legislative history collections. The OEO legislative history collection described in the January 2007 USA Bulletin will be consolidated with the collection in the Main Library. All future requests for legislative history research should be made by calling the Main Library Reference Desk directly at (202) 514-3775.

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