



Quick Release

A Monthly Survey of Federal Forfeiture Cases

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Criminal Forfeiture / *Lis Pendens* / Damages

- Sixth Circuit holds that filing a *lis pendens* without prior notice and hearing does not violate due process.
- A third party has no reason to object to the filing of a pretrial *lis pendens* because the *lis pendens* applies only to the defendant's forfeitable interest in the property.
- If the prosecutor files a *lis pendens* knowing that there was no factual basis for including the property in the forfeiture count of the indictment, the defendant may be entitled to recover damages.

Defendants were charged under an Ohio statute, patterned after RICO, that contained criminal forfeiture provisions. The indictment contained a forfeiture count that named certain real property allegedly involved in the RICO violation. Once the indictment was returned, the state prosecutors filed the equivalent of a *lis pendens* against the real property to prevent its transfer.

Defendants eventually pled guilty to lesser charges and the charges supporting the forfeiture were dismissed. The *lis pendens* was removed, but Defendants filed an action for damages in federal court against the state prosecutors, alleging that the use of the *lis pendens* had violated their constitutional rights. The Sixth Circuit rejected most of the defendants' arguments, but it remanded the case for further consideration of one issue on which Defendants could conceivably prevail.

First, relying on the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the court held that the filing of a *lis pendens* without prior notice and an opportunity to be heard did not violate Defendants' due process rights. A *lis pendens* does impair an owner's ability to sell his property, may taint his credit rating or make it impossible to obtain a second mortgage, and may have other adverse consequences, the court said, but these consequences do not represent "the sort of 'grievous loss' that necessitates prior notice and an opportunity to be heard." Thus, the lack of prior notice provided no basis for the recovery of any damages.

Second, the court rejected the claim of a third party that her interest in the property was impaired by the *lis pendens*. Because the Government was entitled only to forfeit the interest of Defendants, only their interests were subject to the *lis pendens*. "In

seeking [criminal] forfeiture," the court said, "the state proceeds against the individual property owner, not against the property in which he has an interest; the proceedings are *in personam*, not *in rem*."

Accordingly, the third party's interest simply was not affected by the criminal forfeiture action, and she remained free to sell her interest in the property. Thus, the third party could have suffered no damages as a result of the state action.

Finally, the court addressed Defendants' assertion that the state prosecutor had included the property in the forfeiture count in the indictment knowing that there was no legal or factual basis for the forfeiture. The district court considered the grand jury's inclusion of the property in the indictment as dispositive. "Nothing in the law," the district court said, "requires [the prosecutor] to second-guess the Grand Jury or engage in an independent probable cause investigation despite the Grand Jury's probable cause finding." But the Sixth Circuit disagreed.

A prosecutor, the court held, simply is not "free to encumber a citizen's property interests on the strength of a forfeiture specification procured with knowledge that there was no factual basis for it." Thus, if a prosecutor knowingly includes property in the forfeiture count of an indictment without any basis for belief that the property is subject to forfeiture, and the defendant's property interests are thereby impaired, the prosecutor may not hide behind the grand jury's action when the defendant sues for damages. Accordingly, the court remanded the case to the district court to determine if there was a factual basis for the forfeiture count, and if not, if the prosecutor knew that when she filed the *lis pendens*. —SDC

Aronson v. City of Akron, 116 F.3d 804 (6th Cir. 1997). Contact: Tracy Wertman, Summit County Prosecutor's Office, (330) 643-2800.

Comment: The Sixth Circuit joins several district courts in holding that a *lis pendens* is not the equivalent of a "seizure" for due process purposes under *James Daniel Good*. See *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (filing *lis pendens* is not a taking; no pre- or post-filing hearing required); *United States v. Real Property . . . 429 South Main Street*, 906 F. Supp. 1155 (S.D. Ohio 1995), on remand from 52 F.3d 1416 (6th Cir. 1995) (*lis pendens* and occupancy agreement had no impact on claimant's use and enjoyment of his property; therefore no seizure occurred).

The court's basis for rejecting the third party's claim for damages, however, is unusual. While a criminal forfeiture action is indeed *in personam*, no court, to our knowledge, has ever held that the *lis pendens* obtained by the Government to prevent the alienation of property subject to forfeiture is limited to the defendant's interest in the property. Indeed, most courts will approve the pretrial *restraint* of third-party property in order to preserve the

Government's interest. See *United States v. Jenkins*, 974 F.2d 32 (5th Cir. 1992); *In re Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988); but see *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (court may not appoint receiver to operate corporation where only the defendant's interest in the corporation, not corporation itself, is subject to forfeiture).

The interesting question is usually not whether the Government may file a *lis pendens* against property in which a third party has an interest, but whether, and on what grounds, a third party may challenge the *lis pendens* pretrial. See *United States v. Scardino*, ___ F. Supp. ___, 1997 WL 7285 (N.D. Ill. Jan. 2, 1997) (third party entitled to challenge filing of pretrial *lis pendens* on property held in her name). In this case, however, the Sixth Circuit appears to hold that such issues are irrelevant because the *lis pendens* cannot, in any event, impair the third party's interest. —SDC

Rule 41(e) Motion / Statute of Limitations

- Tenth Circuit holds that a defendant may not use Rule 41(e) to recover property he surrendered to the Government as part of a plea bargain, even though the Government never initiated civil forfeiture proceedings against the property.
- The statute of limitations is an affirmative defense which a defendant who agrees not to contest a civil forfeiture action may not assert.

Defendant pled guilty to drug charges and agreed not to contest the civil forfeiture of certain property. Pursuant to the plea agreement, Defendant sold the subject property and turned the proceeds over to the Government, but the Government never instituted civil forfeiture proceedings against the money.

After waiting for the statute of limitations to run, Defendant filed a Rule 41(e) motion for the return of his money. He argued that even though the Government had possession of his money, it had never acquired ownership because of its failure to commence a forfeiture action. He concluded that the money still belonged to him, and because the expiration of the limitations period meant that the Government could never acquire ownership, it was required to return the money to him.

The Tenth Circuit agreed that the Government could only become the owner of the money through a forfeiture proceeding, and that because no such proceeding was ever initiated, the money still belonged to someone else. But the court nevertheless rejected Defendant's effort to recover the money.

Rule 41(e), the court held, may be invoked only by persons who are entitled to lawful possession of property. The Government's failure to perfect its title to the property in this case does not mean that Defendant is automatically entitled to possession. To the contrary, by the terms of the plea agreement, Defendant surrendered his right to possess the property. Thus, Rule 41(e) affords Defendant no grounds for relief.

Moreover, Rule 41(e) is an equitable remedy. Defendant received the full benefit of the plea bargain that required him to surrender his property to the

Government. His motion seeking return of the property violates that agreement. Thus, Defendant does not have the "clean hands" necessary to merit equitable relief.

Finally, Defendant has no right to raise the statute of limitations as a ground for objecting to the Government's continued possession of the property. The statute of limitations is an affirmative defense. In agreeing not to contest the civil forfeiture of his property, Defendant agreed not to assert any

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affirmative defenses. Accordingly, the Government is now free, notwithstanding the expiration of the limitations period, to commence a civil forfeiture action, and Defendant is barred from objecting to it.

—SDC

United States v. Grover, ___ F.3d ___, 1997 WL 405338 (10th Cir. July 21, 1997). Contact: AUSA Charlotte Mapes, ACO01(cmapes).

Criminal Forfeiture / Abatement

- **Seventh Circuit holds that criminal forfeiture does not abate upon the death of the defendant; funds already forfeited need not be refunded to the defendant's estate even though his death before his appeal was final means that his criminal conviction will be vacated.**

Defendant was the leader of the organized crime family in Chicago. Upon his conviction on RICO charges, he was ordered to pay a \$50,000 fine and to forfeit \$137,500 which represented the proceeds of his racketeering activity. Defendant paid both amounts while his appeal was pending, but he died before the appeal was resolved.

Defendant's counsel moved the court of appeals to vacate Defendant's conviction and to refund the fine and amount forfeited to Defendant's estate. The **Seventh Circuit** agreed that because Defendant died before his appeal was resolved, the criminal conviction abated. Therefore, the court remanded the case to the district court with instructions to vacate the conviction and dismiss the indictment as to Defendant. But the court refused to order the fine and the amount forfeited to be refunded.

The fine and forfeiture, the court said, served to deprive Defendant, during his lifetime, of "a small fraction of the millions of dollars [Defendant] raked in from his illegal activities." Just as time already served in prison is a punishment imposed during a defendant's lifetime that cannot be erased upon his death, a monetary penalty that Defendant paid while alive need not be refunded just because his death causes his criminal conviction to abate. Accordingly, even though the criminal conviction must be vacated, the Government is not required to refund the forfeited money to Defendant's estate.

—SDC

United States v. Zizzo, ___ F.3d ___, 1997 WL 422786 (7th Cir. July 29, 1997). Contact: AUSA Mark Vogel, AILN01(mvogel).

Comment: In *United States v. Oberlin*, 718 F.2d 894 (9th Cir. 1983), the Ninth Circuit held that a criminal forfeiture proceeding abated upon the post-verdict suicide of the defendant. The Seventh Circuit in *Zizzo* does not mention *Oberlin*, but the two cases do appear, at least superficially, to be in conflict. Conceivably, *Zizzo* is distinguishable because the defendant had paid the forfeiture judgment before he died, allowing the court of appeals to analogize the forfeiture to "time served" which cannot be "refunded" when a

conviction is vacated. Trying to enforce a criminal forfeiture judgment after the defendant has died and his conviction has been vacated might be another matter.

In any event, the Department of Justice is trying to resolve this issue legislatively by asking Congress to add a provision to the criminal forfeiture statutes specifying that criminal forfeiture orders do not abate upon the death of the defendant. See Section 512 of H.R. 1745, the Forfeiture Act of 1997.

—SDC

CMIR / Double Jeopardy / Delay / Appointment of Counsel

- *Ursery* applies to CMIR forfeitures under section 5317; there is no double jeopardy violation where civil forfeiture follows conviction under Section 5316.
- Five-year delay in filing a civil forfeiture action did not violate due process where the Government promptly commenced administrative forfeiture proceedings after seizing the property, and claimant first filed, but then withdrew, his claim and cost bond.
- In a CMIR case, the Government is entitled to forfeit the entire amount being transported, not just the difference between that amount and what the claimant declared on the CMIR form.
- The court may appoint counsel in a civil forfeiture case, but only if the claimant first demonstrates a likelihood of success on the merits; a claimant who was convicted of the underlying criminal offense cannot make that showing.

Defendant, who was bound for Nigeria, attempted to board an airplane at JFK airport with over \$800,000 in cash concealed in his luggage and elsewhere. When he declared only \$60,000 of this amount on the CMIR form, he was arrested by the U.S. Customs Service.

Ultimately, Defendant pled guilty to a violation of 31 U.S.C. § 5316 (CMIR violation) and was sentenced. Meanwhile, Customs commenced an administrative forfeiture proceeding against the currency under section 5317 (and other statutes). Defendant first filed a claim and cost bond, but then withdrew it, causing some confusion that resulted in Customs' neither referring the case to the U.S. Attorney nor completing the administrative forfeiture. Finally, several years later, Defendant (by now a prisoner filing *pro se*) filed a civil action for the return of his property, in response to which the Government filed a civil forfeiture action in the district court.

In a series of pleadings, Defendant opposed the forfeiture action on double jeopardy grounds, claimed that his due process rights were violated by the Government's delay in commencing the forfeiture action, and requested that counsel be appointed to represent him in the civil case. At the same time, the Government filed a motion for summary judgment in

the forfeiture case, asserting that Defendant's guilty plea to the section 5316 offense established the basis for the civil forfeiture.

First, the court rejected the contention that a section 5317 civil forfeiture action, following a criminal conviction for a CMIR offense under section 5316, constitutes double jeopardy. In *United States v. Ursery*, 116 S. Ct. 2135 (1996), the Supreme Court held generally that civil forfeitures do not constitute punishment for double jeopardy purposes, but did not rule specifically with respect to forfeitures under section 5317. The district court, however, found that *Ursery's* reasoning applied fully to section 5317 forfeitures.

Second, the court held that the nearly five-year delay between Defendant's arrest and the filing of the civil forfeiture action did not violate Defendant's due process rights. The Government acted promptly in commencing the administrative forfeiture following Defendant's arrest, and the subsequent delay was due largely to the confusion Defendant created by first filing and then withdrawing his claim and cost bond. Moreover, Defendant did not take any action to recover his property for several years, at which point the Government did file the judicial action.

On the merits of the forfeiture action, the court held that the Government was entitled to summary judgment. The court began by noting that in a section 5317 case, "the government is not required to prove that the person who allegedly failed to comply with the reporting requirement of section 5316(a) either had actual knowledge of, or intended 'willfully' to violate that requirement." Instead, "the government need only show that the [person transporting the currency] knowingly transported currency in excess of \$10,000 without disclosing it on the currency reporting forms."

Defendant's guilty plea to the section 5316 offense was sufficient to meet the Government's burden regarding the forfeitability of the property under this standard. Indeed, the guilty plea estopped Defendant from contesting this issue. Therefore, there was no material fact in dispute and the Government was entitled to summary judgment. The court added

that the Government was entitled to the *entire* amount that Defendant was attempting to transport, and not just the difference between that amount and the \$60,000 that Defendant did declare on the CMIR form.

Finally, the court rejected Defendant's request for the appointment of counsel. Courts may appoint counsel in civil cases, the court said, but only if, as a threshold matter, the party demonstrates "a likelihood of success on the merits." In light of Defendant's conviction on the section 5316 charge, Defendant could not satisfy this threshold requirement and his request was denied. —SDC

United States v. U.S. Currency (\$883,506), 96-CV-1004 (CBA) (E.D.N.Y. July 23, 1997) (unpublished). Contact: AUSA Richard Molot, ANYE12(rmolot).

Ancillary Proceeding / Constructive Trust

- Defendant has no forfeitable interest in real property, even if it is titled in his name, if he is merely a nominee and another person is the true equitable owner of the property.

Defendant pled guilty to money laundering and agreed to forfeit whatever interest he had in certain real property that was titled in his name. The district court entered a preliminary order of forfeiture transferring title to the property to the Government.

In the ancillary proceeding, Defendant's nephew filed a claim asserting that although the property was titled in Defendant's name, Defendant was merely a nominee and that he (the nephew) was the true equitable owner of the property. The Government moved to dismiss the claim on the ground that an equitable interest does not provide a basis for relief under 21 U.S.C. § 853(n), which requires the claimant to establish a *legal* right, title or interest in the forfeited property.

Relying on *United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992), the court held that an equitable interest, such as a constructive trust, is a "legal interest" within the meaning of section 853(n). Therefore, the court denied the Government's motion to dismiss and held a hearing on the merits of the nephew's claim.

At the hearing, the nephew established that he and his sons operated a grocery business on the subject property, made all mortgage payments and paid all taxes on the property, and had made numerous improvements. He also established that the property was titled in Defendant's name solely as a convenience to obtain financing on a loan. The court held that these facts satisfied the requirements of a

constructive trust under New York law, and accordingly found that the nephew was the true owner of the property and that Defendant had no interest in the property that could be forfeited. The court thus granted the nephew's claim and vacated the order of forfeiture.

—SDC

United States v. Herbawi, No. 95-CR-06040 (W.D.N.Y. July 16, 1997) (unpublished). Contact: AUSA Bradley Tyler, ANYW01(btyler).

Comment: There are a number of things worth noting about this case. First, because it is a criminal forfeiture case, the nephew's involvement in, or knowledge of, his uncle's use of the subject property to perpetrate the money laundering offense of which he was convicted was irrelevant. If this had been a civil case, the nephew would have had to establish an innocent owner defense under 18 U.S.C. § 981(a)(2).

Second, the court follows the majority rule in holding that an equitable interest is sufficient to assert a claim upon which relief can be granted in an ancillary proceeding. Not all courts agree, however. See *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (constructive trusts are *not* cognizable "legal interests").

Also, note that whether an equitable interest is grounds for relief under Section 853(n) is a question of federal law. But once the court holds that an equitable interest may be recognized, it properly uses state law to determine whether the claimant has, in fact, established the existence of such an interest. See *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (when claim is filed in the ancillary proceeding, court looks to state law to see what interest the claimant has in the property, and looks to the federal

statute to see if that interest is subject to forfeiture); *United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (constructive trust is cognizable under section 853, but claimant failed to satisfy the elements of a constructive trust under state law).

Finally, note that this case is the flip side of the more common situation where the defendant is the real, equitable owner of property that is titled in the name of a nominee. The Government may forfeit such property from the defendant, and generally prevails against the claims filed by such nominees in the ancillary proceeding. See *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996) (house forfeited from defendant based on evidence establishing that defendant's uncle, whose name appeared on the deed, was a mere straw); *United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996) (real property forfeited from defendant even though it was titled in father's name and girlfriend's name); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (property forfeited as substitute assets even though title held by third-party nominee). It therefore follows that if the *defendant* is merely a nominee, he has no interest in the property that can be forfeited and the claims of the true owners must be recognized in the ancillary proceeding. —SDC

Criminal Forfeiture / Alter Ego Theory / Ancillary Proceeding

- The district court may ignore the corporate form and order the forfeiture of the assets of a corporation that is the *alter ego* of the defendant, based on evidence submitted by the Government as part of its application for a preliminary order of forfeiture.
- The *alter ego* corporation may challenge the determination to ignore the corporate form in the ancillary proceeding, but it must do so by alleging facts sufficient, if true, to require the court to reverse its preliminary finding.
- If the *alter ego* corporation fails to allege facts sufficient to challenge the application of the *alter ego* theory, the preliminary ruling will stand, and the corporation's claim will be dismissed for lack of standing.

In its preliminary order of forfeiture, the district court found that a corporation was the *alter ego* of the defendant and that its assets were subject to forfeiture to the United States in the criminal case. Claimant, a liquidator standing in the shoes of the *alter ego* corporation, filed a petition in the ancillary proceeding stating that the corporation was a separate entity and not the *alter ego* of the defendant, and that therefore its assets should not have been forfeited. Claimant also contended that its due process rights were violated when the court entered the preliminary order based on the *alter ego* theory without giving the corporation an opportunity to be heard.

The district court held that it is appropriate for a court to consider whether to ignore the corporate form and order the forfeiture of the assets of an *alter ego* corporation at the time it enters a preliminary order of forfeiture. Such a finding is properly made on the basis of the Government's showing that the *alter ego* theory should apply. Here, the Government made the requisite showing in the form of an affidavit submitted along with its application for the entry of the preliminary order.

It is true that the *alter ego* corporation had no opportunity to be heard before the preliminary order was entered. Only the Government and the defendant were parties to the proceeding at that time. But there is no due process violation as long as the

alter ego corporation has an opportunity to challenge the court's preliminary order and its determination to ignore the corporate form in the ancillary proceeding.

To challenge the court's preliminary finding, however, the claimant must do more than simply assert that it was a separately incorporated entity and that the *alter ego* theory does not apply. To the contrary, the claimant must allege facts sufficient, if assumed to be true, to refute the Government's evidence that the corporation was indeed the *alter ego* of the defendant. Asserting that a corporation was incorporated as a distinct entity is not enough.

Because Claimant failed to assert any facts that would have been sufficient to cause the court to reverse its preliminary finding that the corporation was the *alter ego* of the defendant, the court held that its preliminary determination to ignore the corporate form was correct. Accordingly, because the defendant's *alter ego* lacks standing to contest a forfeiture order in the ancillary proceeding, see 18 U.S.C. § 1963(1)(2) (anyone *other than the defendant* may file a petition), the court dismissed the claim for lack of standing. —SDC

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banco Central Del Uruguay), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Aug. 26, 1997). Contact: AUSA Bob Dalton, ATXE01(bdalton).

Ancillary Proceeding / Pleading Requirements

- The district court will grant a motion to dismiss a third party petition in a criminal forfeiture case if the petition fails to comply with the pleading requirements of the forfeiture statute.

The district court entered a preliminary order of forfeiture that contained a list of various bank accounts and other assets that the defendant was ordered to forfeit. Claimant filed a third-party claim in the ancillary proceeding that read as follows: "Petitioner has not yet been able to determine in which forfeited properties it has interests. As soon as petitioner is able to make this determination it will supplement this claim." No supplement was ever filed.

The Government moved to dismiss the petition for failure to comply with the pleading requirements of 18 U.S.C. § 1963(l)(3). That statute requires a third-party claim to be "signed by the petitioner under

penalty of perjury" and to set forth "the nature and extent of the petitioner's right, title and interest in the property." Because the petition failed to comply with either requirement, the court granted the Government's motion and dismissed the claim.

—SDC

United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Aug. 26, 1997). Contact: AFMLS Assistant Chief Stefan D. Cassella, CRM07(cassella).

Ancillary Proceeding / Use Immunity

- The entry of an order of forfeiture against property in which a third party claims an interest, and the resulting ancillary proceeding, constitute a "criminal case" against the third party for purposes of the use immunity statute, 18 U.S.C. § 6002.
- The district court must conduct a *Kastigar* hearing to determine if a claimant's immunized testimony was used to obtain an order forfeiting property in which he asserts an interest.

Among the assets included in the order of forfeiture in a criminal case was a condominium that Claimant had purchased with the defendant's funds. The Government asserted that the condominium was the property of the defendant and was properly included in the preliminary order of forfeiture, but Claimant asserted that he was the true owner and filed a claim in the ancillary proceeding.

Claimant was himself a defendant in a related criminal case (he was convicted), and had given immunized testimony on behalf of the Government in still another criminal case, but Claimant was not a defendant in the case in which the order of forfeiture was entered. Hence, Claimant was able to claim an interest in the forfeited condominium as a third party.

In the petition he filed in the ancillary proceeding, Claimant alleged not only that he had an interest in the property pursuant to 18 U.S.C. § 1963(l)(6)(A) and (B), but also that the order of forfeiture should be vacated as to the condominium unless the United States could prove that it had not relied on his immunized testimony in obtaining the order of forfeiture. The Government responded that the attorneys who handled the instant criminal case and who obtained the order of forfeiture were unaware of the immunized testimony and had not relied on it. The Government also asserted that even if they had relied on the immunized testimony it would not matter because the use immunity statute, 18 U.S.C. § 6002, only bars the use of immunized testimony "against the witness in any criminal case."

In the Government's view, an order forfeiting the defendant's property is not an action "against" a third-party who asserts an interest in the property. It is an action against the defendant. The third party's only role is to participate in the ancillary proceeding where he will recover his property if he succeeds in demonstrating a superior interest. Thus, section 6002 should not bar the Government from using the third party's immunized testimony to obtain the preliminary order of forfeiture.

The court rejected the Government's view and held that section 6002 applies to the entry of a criminal forfeiture order forfeiting property in which an immunized third party asserts an interest. The court acknowledged that "the intent of criminal forfeiture is to forfeit the property of the defendant," and not the property of any third party. Nevertheless, the court held, if a third party faces the potential loss of property in which he asserts an interest if he fails to meet his burden in the ancillary proceeding, the proceeding is "potentially punitive" as to the third party. Thus, the entry of the preliminary order and the subsequent ancillary proceeding must be considered a "criminal case" against the third party for purposes of section 6002.

Accordingly, the court held the third party petition in abeyance until it could conduct a *Kastigar* hearing at which the Government would be required to prove that it did not rely on any of Claimant's immunized testimony in obtaining the order of forfeiture. —SDC

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Amjad Awan), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Aug. 26, 1997).
Contact: AUSA Bob Dalton, ATXE01(bdalton).

Comment: This decision is disturbing because of its implications for a variety of issues regarding third-party rights in criminal forfeiture cases. If the entry of an order of forfeiture against the defendant in a criminal case, and the subsequent ancillary proceeding involving third-party claims, are considered a "criminal case" against any third party who asserts an interest in the property for purposes of section 6002, they could be considered criminal cases against the third party for other purposes. For example, a third party, citing the potentially punitive effect of a ruling against him in the ancillary proceeding could insist on the right to a trial by jury on his third-party claim, or the right to prior notice and a hearing before the U.S. Marshal seizes any property from the defendant in which the third party asserts an interest, or the right to court-appointed counsel. See discussion of the jury trial issue in *United States v. Messino, infra*.

The Government is considering whether to ask the court to reconsider its ruling in this case. In our view, an ancillary proceeding is not a "case," civil or criminal, "against" anyone. It is a proceeding, akin to an equitable action to quiet title, at which the ownership of the property in question is determined. A judicial finding that one is *not* the owner of property, is not the same as the entry of a punitive judgment against that person. One cannot be "punished" by the loss of a property right that does not exist.

Alternatively, even if *Kastigar* did apply to ancillary proceedings, it should be limited to the proceeding itself, and not to the issuance of the preliminary order of forfeiture. In any event, we think that prosecutors should strongly resist the notion that a criminal forfeiture order, or the ancillary proceeding, is punitive as to a third party for any reason. —SDC

Ancillary Proceeding / Jury Trial / Substitute Assets

- Third party's appeal from the denial of his petition in the ancillary proceeding must be dismissed as moot, if the underlying criminal conviction is reversed and the order of forfeiture is vacated.
- Summarizing the arguments without deciding the issue, the Seventh Circuit says the application of the Seventh Amendment jury right to the ancillary proceeding is a "thought-provoking" issue that is likely to arise again.
- Appellate court also suggests that an order granting a motion to substitute assets is defective if the court doesn't find that the requirements of section 853(p) have been satisfied, and that the defendant is the owner of the substitute property.

Defendants were convicted of various drug offenses, and the district court entered an order forfeiting certain assets and a sum of money. When the Government sought the forfeiture of additional assets in substitution for the sum of money, the court granted the motion.

Claimants then filed petitions in the ancillary hearing asserting superior ownership interests in both the directly forfeited assets and the substitute assets. The district court, following a hearing, found that none of the claimants had satisfied his burden of proof on the ownership issues and denied the claims. Claimants appealed.

While the appeal was pending, the **Seventh Circuit** reversed Defendants' underlying convictions and vacated the forfeiture order. Accordingly, the court held that Claimants' appeals were moot and had to be dismissed. "Under § 853(k) and (n), third parties cannot petition the court for an adjudication of their interests in property subject to criminal forfeiture until after preliminary orders of forfeiture have been entered. Because there are no forfeiture orders left for these third parties to challenge, [their] appeals are dismissed."

However, the court found that the issues raised by Claimants were "thought-provoking" and "likely to arise again." Therefore, the court went to some length to "flag these tricky questions" and to hint at how they might be resolved.

Most important, Claimants argued that they had a Seventh Amendment right to a jury trial in the ancillary proceeding. The court did not reveal how it would rule on this question, but it cited two unpublished cases in which other courts have rejected the Seventh Amendment argument, and it laid out the Government's argument in some detail.

Claimant's also challenged the forfeiture of the substitute assets on the ground that in granting the Government's motion, the court had failed either to make a factual finding that any of the five alternative criteria in section 853(p) had been satisfied, or to find that the substitute property belonged to Defendants. These omissions, Claimants argued, meant that the order of forfeiture as to the substitute assets was "invalid," and that Claimants therefore never should have been faced with the burden of establishing a superior ownership interest. The Court of Appeals characterized this as "a strong argument."

Finally, Claimants challenged the district court's reliance on section 853(n)(5), which instructs the court to consider evidence from the criminal case in resolving third-party claims. Reliance on this provision, Claimants asserted, violated their rights because they were not parties to the criminal trial. The appellate court gave no clue as to how it viewed this issue.

—SDC

United States v. Messino, ___ F.3d ___, 1997
WL 473280 (7th Cir. Aug. 20, 1997). Contact:
AUSA Matt Schneider, AILN02(mschneid).

Comment: The disposition of this important case is frustrating and disappointing. The district court opinions rejecting the third-party claims are frequently cited by the Government on a number of issues that arise in ancillary proceedings, and we were looking forward to their affirmance by the Seventh Circuit. See *United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996); *United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995). Also, this case appeared to be an outstanding opportunity finally to obtain a published opinion rejecting the Seventh Amendment jury trial argument. Our consolation is that at least the arguments that we have repeatedly made on this issue are set forth in the opinion, and the unpublished

cases are cited. Copies of the unpublished opinions in *United States v. Duboc* (*Petition of F. Lee Bailey*) and *United States v. Henry*, are available from the Asset Forfeiture and Money Laundering Section.

The opinion also contains a clear word of warning that, in the Seventh Circuit at least, the Government must be certain, in requesting the forfeiture of substitute assets, to present the district court with evidence from which it can find: 1) that the requirements of the substitute assets statute, 21 U.S.C. § 853(p), have been satisfied; and 2) that the defendant had an ownership interest in the substitute property.

—SDC

Ancillary Proceeding / Standing / Wire Transfers

- **General, unsecured creditors lack standing to challenge a criminal order of forfeiture.**
- **To determine what legal interest the intended beneficiary of an incomplete wire transfer has in the transferred money, the court must look to the law of the place where the transfer took place.**
- **Under New York law, the intended beneficiary of a wire transfer that is not completed has no interest in the property. Only the originator of the transfer has an interest, but that interest is only an unsecured debt.**

Claimant, a corporation in the Republic of the Maldives, sold a quantity of frozen fish to a buyer in Thailand. When the fish were delivered, the buyer, who owed the Claimant approximately \$966,000, instructed his bank to send that amount to the Claimant's bank. Because the buyer's bank (in Thailand) did not have a corresponding relationship

with the Claimant's bank (in the Maldives) the wire transfer of the funds had to go through a series of three intermediary banks, one of which, unfortunately for all concerned, was the defendant, Bank of Credit and Commerce International (BCCI).

The wire transfer proceeded through the intermediary banks in a series of steps, all of which

took place in New York. The next-to-last step was the transfer of the money to BCCI's bank account in New York. BCCI, however, never executed the final transfer of the money to Claimant's bank. When BCCI's assets in New York were forfeited, Claimant filed a petition in the ancillary proceeding, claiming that it was the true owner of the money in the defendant's account.

To determine whether Claimant would prevail, the district court had to determine two things: 1) what interest did Claimant have in the subject property, if any; and 2) whether that interest was sufficient to support a claim under federal forfeiture law. To answer the first question, the court looked to New York law governing wire transfers under Article 4A of the Uniform Commercial Code. It determined that when a wire transfer is not completed because of the failure of an intermediary bank to execute a payment order, the intermediary bank is obligated to refund payment to the sender. It owes nothing to the intended beneficiary. Thus, Claimant, as the intended beneficiary of the wire transfer, never acquired any interest in the funds as a matter of state law, and

accordingly it could not recover any interest under federal forfeiture law.

Moreover, the court noted that if anyone had an interest in the funds, it was the buyer in Thailand to whom BCCI owed a debt under New York law. But even if the buyer had filed a claim, it would not have prevailed. If a claimant's only interest in property, as a matter of state law, is a general, unsecured debt, its claim in the ancillary proceeding will fail, because federal forfeiture law does not recognize such debts as a "legal interest in the property forfeited," as required by 18 U.S.C. § 1963(1)(2). Accordingly, even if the sender had filed the claim instead of the intended beneficiary, the result would have been the same.

—SDC

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of State Trading Organization), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Aug. 26, 1997). Contact: AFMLS Attorney Stefan D. Cassella, CRM07(cassella).

Comment: This case illustrates how a court must resolve a complex issue of state property law before it can apply a relatively straightforward principle of federal forfeiture law.

The wire transfer in this case was extraordinarily complex, and it took a long time for the court to break the transaction down into its constituent parts before determining what interest, if any, the intended beneficiary of the transaction had in the transfer. Once the court determined that, under state law, the intended beneficiary had no interest in the property, it

was a simple matter to find that the beneficiary had no legal interest cognizable under federal law.

Similarly, the court determined that even if the originator of the wire transfer had filed the claim, or if the beneficiary's claim were considered derivative of the originator's claim, federal law would still provide no relief, because as a matter of state law, the originator had no interest in the property greater than that of an unsecured creditor, and federal law does not recognize the rights of unsecured creditors in forfeited property.

—SDC

Administrative Forfeiture / Notice / Section 888

- While 21 U.S.C. § 888(b) offers no set guidelines for ensuring that notice in an administrative action is timely, the Government's initiation of notice within 21 days after seizure constitutes notice furnished at the "earliest practicable opportunity."

Claimant purchased a GMC Jimmy, commissioned the installation of a hidden compartment, and transported eight kilos of cocaine in the vehicle's compartment to Detroit. There, he was arrested by FBI agents, who seized the vehicle and initiated administrative forfeiture proceedings by sending notice to Claimant at various locations. The notices were sent within 21 days after the seizure.

Claimant, who was tried and convicted for drug-related felonies, filed a claim and cost bond in response to the notice. The Government filed a timely complaint, and, upon receiving no responsive pleadings, a Motion for Summary Judgment. The claimant then filed a Motion to Dismiss the Civil Complaint, citing lack of adequate notice of the administrative forfeiture pursuant to 21 U.S.C. § 888(b).

The Court granted the Government's uncontested Motion for Summary Judgment based upon a finding that the claimant failed to show, by a preponderance of the evidence, that the vehicle was not subject to forfeiture.

In arguing his Motion to Dismiss, the claimant asserted that the 21 days it took the Government to

initiate notification of the administrative forfeiture did not comport with the section 888(b) requirement directing that the Government furnish written notice "at the earliest practicable opportunity after determining ownership." Noting the split in authority with regard to interpretation of this statute, the Court chose to follow the "broader" approach, allowing that the notice requirement is satisfied when the Government's actions are "reasonably calculated to provide notice." The Court reasoned that the "realities" of law enforcement—in this case the arrest, criminal prosecution, and logistics of seizure—must be considered in an analysis of whether an agency expeditiously notified potential claimants under section 888(b). On the basis of the facts in this case, the Court denied claimant's motion, while recognizing that this issue must be analyzed on a case by case basis.

—WJS

U.S. v. One 1990 GMC Jimmy, VIN: 1GKEV18K4LF504365, ___ F. Supp. ___, 1997 WL 450665 (E.D. Mich. Aug. 6, 1997).
Contact: AUSA Bruce C. Judge, AMIE/1(bjudge).

Discovery

- District court grants Government's motion to stay discovery in a civil forfeiture action pending resolution of a related grand jury investigation.

The United States District Court for the Southern District of Texas granted the Government's motion to stay discovery in a civil forfeiture case pending the

completion of the related criminal investigation and, if an indictment is issued, pending resolution of the ensuing criminal action.

In its motion and affidavit, the Government explained that a Grand Jury is investigating matters described in the Government's civil forfeiture complaint and that it is likely that the grand jury will be asked to return an indictment against at least one of the claimants in the civil forfeiture action. Discovery has not commenced in the civil action, and if it does, the Government is concerned that its criminal case will be adversely impacted. For example, through civil discovery, the targets of the criminal investigation will learn the names of cooperating witnesses and persons with knowledge of relevant facts, they will have advance notice of the nature and substance of expert testimony, and will be able to identify the documentary evidence amassed in the criminal investigation. None of this information ordinarily would be available at this stage of the criminal investigation or under the Federal Rules of Criminal Procedure.

The Government also argued that the mandatory disclosures required by the Federal Rules of Civil Procedure would jeopardize the Grand Jury's

investigation and the United States' prosecution efforts by prematurely revealing the identity of witnesses, facts, investigatory materials, cooperating witnesses and other information. Although no indictment has yet been returned, the court held, a stay is mandated. When the private interests in civil litigation and the public interests in criminal prosecution compete, the latter must be given priority. To allow civil discovery to proceed in this situation, would be an open invitation to subvert the civil rules into a device for obtaining pretrial discovery against the Government in criminal proceedings. —MSB

United States v. Funds On Deposit In Account No. 143000680 At Sterling Bank, No. H-97-1537 (S.D. Tex. August 14, 1997) (unpublished).
Contact: AUSA Michael B. Schwartz,
ATXS02(mschwartz).

Comment: This case is significant because courts have been generally reluctant to stay civil forfeiture proceedings when the related criminal case is still at the grand jury stage. See *United States v. Account #87303569 in the Name of Down East Outfitters, Inc.*, 1996 U.S. Dist. LEXIS 14555 (E.D.N.C. 1996) (stay denied; unindicted defendant has right to early judicial

determination of claim to recover property; but dicta suggests gov't may be entitled to a protective order). Note that the statutory provisions regarding stays in civil cases, see e.g., 18 U.S.C. § 981(g), apply only once an indictment has been returned. A pre-indictment stay therefore must be sought under some other authority, most commonly Fed. R. Civ. P. 26.

—SDC

Administrative Forfeitures / Petitions for Remission or Mitigation / Due Process / Notice

- **Ninth Circuit grants right to judicial review of administrative forfeiture of vehicles by Immigration and Naturalization Service (INS). Failure to contest the forfeiture by filing a claim and cost bond does not constitute a waiver of Fourth, Fifth and Eighth Amendment rights.**

Ten plaintiffs, as representatives of a putative class, filed a civil action against the INS and one of its regional commissioners. Each of the plaintiffs owned a vehicle which had been seized and forfeited by the INS pursuant to 8 U.S.C. § 1324(b) for transporting illegal aliens into the United States in violation of 8 U.S.C. § 1324(a).

The complaint alleged constitutional violations under the Fourth, Fifth, and Eighth Amendments stemming from the seizure and administrative forfeiture of their vehicles and INS' denial of full administrative relief in the form of return of the vehicles. It was undisputed that, in each instance, the plaintiff-owner received from INS timely notice of seizure and intent to forfeit pursuant to 8 C.F.R. § 274.8. Copies of the pertinent statutes and regulations were attached to the notice.

The notice explained the right of owners to seek judicial relief by filing a claim and cost bond, to seek waiver of the bond requirement, and/or to seek administrative relief from the INS. Each of the plaintiff-owners elected to pursue administrative relief and bypass the opportunity to force commencement of a judicial forfeiture action.

INS administrative procedures afford owners two procedures for seeking administrative relief: (1) a "personal interview" with an immigration officer at which the owner has the "right" to "present evidence" regarding the validity of the seizure, the validity of the forfeiture, or the "innocence" and non-negligence of the owner (8 C.F.R. § 274.5(c)); and/or (2) the filing of a petition for remission or mitigation (8 C.F.R. §§ 274.15-174.16). It is unclear whether each of the plaintiffs availed themselves of both of these remedies. In each case, however, relief was denied in full or the

forfeiture was mitigated.

The plaintiffs claimed to represent a class consisting of all persons who have had vehicles seized for forfeiture and denied full administrative relief by INS over the last five years or to whom this happens in the future. The district court dismissed most of the constitutional claims on grounds of waiver and/or lack of jurisdiction; it entered summary judgment for the Government on the merits of some claims. A divided panel of the **Ninth Circuit** (per Judge Reinhardt; Judge Reavley dissenting) reversed.

The majority, noting that plaintiffs were not seeking review of the merits of INS' administrative determinations but rather were challenging INS procedures, held that such a challenge may properly be brought in federal court. It further held that plaintiffs, by electing to rely exclusively on administrative options, had not waived their constitutional claims. The majority asserted that, to rule otherwise, would give an agency free rein to decide petitions for administrative relief in an unconstitutionally arbitrary and discriminatory manner. It also found no evidence that the plaintiffs, in electing to bypass the judicial option, were sufficiently on notice that in doing so they were effecting a knowing, voluntary and intelligent waiver of their constitutional claims. Moreover, the fact that plaintiffs were, at the outset, afforded the opportunity to seek judicial relief, either exclusively or in addition to the administrative procedures, was held not to insulate the administrative procedures from judicial review.

The majority held that the district court further erred in determining that the plaintiffs' constitutional claims were too insubstantial to invoke federal jurisdiction. The majority found it "evident" that the

Fourth Amendment claims—that INS uses the term “probable cause” in an arbitrary and standardless manner and fails to apply constitutionally-mandated standards for determining whether probable cause exists—were “not insubstantial on their face.” The majority reversed summary judgment on the merits of the Eighth Amendment claims because the standard employed by the district court did not comport with the standard subsequently adopted by the Ninth Circuit in *United States v. Real Property Located in El Dorado*, 59 F.3d 974 (9th Cir. 1995).

As to the Due Process claims, the majority rejected the district court’s conclusion that plaintiffs were entitled only to notice of the seizure and an explanation of their options for seeking relief, timely processing of their petitions, and the actual exercise of agency discretion in resolving the petition. It held that owners were entitled to: (1) post-seizure notice containing a somewhat detailed statement of the actual and legal basis for the seizure; (2) post-seizure access to the evidence to be used against them, including the seizing officer’s reports and “related documentation” in INS’ internal files; and (3) a somewhat detailed statement of the reasons for denying petitioners full relief.

The majority opined that these procedures would not be burdensome since “all that . . . would be required” is disclosure of information already in the agency’s possession. Moreover, the majority did not foreclose the possibility of imposing additional due process requirements, noting that it did not purport to discuss “all of the plaintiffs’ due process claims” and directing that those claims be resolved on remand.

Judge Reavley, dissenting, opined that because the plaintiffs received adequate notice of their right to seek judicial redress, pursuant to the statutory scheme, and failed to avail themselves of that right, their claims were properly dismissed whether the grounds are couched in terms of waiver, lack of jurisdiction, or sovereign immunity. —HSH

Gete v. Immigration and Naturalization Service, ___ F.3d ___, 1997 WL 431837 (9th Cir. Aug. 4, 1997).

Comment: The Asset Forfeiture and Money Laundering Section believes that the majority opinion is wrong on several bases and has recommended to Civil Division’s Appellate Section that further review in the form of either a petition for *en banc* rehearing or petition for *certiorari* be sought. The Asset Forfeiture and Money Laundering Section contends that courts lack jurisdiction to review agency procedures fully committed by law to the agency’s discretion except to ensure that fundamental due process (notice, timeliness, and actual exercise of discretion) is afforded. This rule of non-reviewable agency discretion in affording relief from forfeiture was first recognized by the Supreme Court in *United States v. Morris*, 100 Wheat. 246 (1825).

The Asset Forfeiture and Money Laundering Section further contends that the *Gete* majority errs in imposing unprecedented disclosure and decisionmaking procedures as a matter of due process. The law is that notice is fully adequate if it informs persons of a pending deprivation of a constitutionally-protected property interest and advises them of where, when, and before whom any dispute may be considered. See *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14-15 (1978). There is no right to more detailed notice.

Owners also have no right to the disclosure of investigative reports and related INS internal files. Not only are such reports and files subject to a qualified privilege against disclosure, but the Supreme Court has held that agency procedures similar to

those currently employed by INS afford due process. See *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979). Such reports and files are also irrelevant to the issues presented in resolving a petition for remission or mitigation. Similarly, there is no due process requirement that INS state in detail its reasons for denying administrative relief. See *Morris*, *supra*.

The majority's rulings on the generalized Fourth and Eighth Amendment claims are in conflict with *Linarez v. DEA*, 2 F.3d 208 (7th Cir. 1993) (Fourth Amendment claims) and *Litzenberger v. United States*, 89 F.3d 818 (Fed. Cir. 1996) (Eighth

Amendment claims) and are otherwise baseless and not subject to generalized resolution. A memorandum fully explicating these contentions is available from the Asset Forfeiture and Money Laundering Section. The Asset Forfeiture and Money Laundering Section also believes that *Gete* may be inapplicable to other seizing agencies to the extent those agencies rely solely on petitions for remission and mitigation and do not afford owners a procedure similar to the "personal interview" option which INS affords to owners pursuant to 28 C.F.R. [sec.] 274.5. —HSH

Excessive Fines

- To challenge a civil forfeiture on Excessive Fines grounds in the Eighth Circuit, the claimant has the burden of making a threshold showing of "gross disproportionality."

Claimant-husband was discovered cultivating marijuana on real property belonging to another person. He was arrested and the police seized 30 marijuana plants found inside plastic bags recently delivered to the site. Police then searched the personal residence of Claimant and his wife (who also filed a claim), and seized approximately 265 marijuana plants (200 of which were "cuttings"—small pieces cut from more mature plants and replanted), 138 bags of marijuana weighing 6.6 pounds, discarded bags of leaves and stems, drug cultivation and distribution paraphernalia, and a key payment notice for a safety deposit box.

Marijuana cigarettes were found in the wife's purse, and a search of the safety deposit box resulted in seizure of \$40,000.

A civil forfeiture action was commenced against the residential real property under 21 U.S.C. § 881(a)(7). After Claimant-husband pleaded guilty to federal charges of cultivating the 30 marijuana plants seized at the time of his arrest (other charges relating to the marijuana found at the residence were

dismissed), the district court entered summary judgment of forfeiture, rejecting the claimants' challenge to the forfeiture under the Excessive Fines Clause. The **Eighth Circuit** affirmed.

First, the panel rejected the argument that, in asserting a challenge to forfeiture under the Excessive Fines Clause, owners are required to make a threshold showing of "gross disproportionality" only in criminal cases. It pointed to the civil forfeiture decision in *United States v. One 1970 36.9' Columbia Sailing Boat*, 91 F.3d 1053 (8th Cir. 1996), in which the court had applied the "excessiveness" standard articulated in the criminal forfeiture case of *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1876 (1996). It held that to satisfy this requirement of "gross disproportionality," an owner must demonstrate an excessiveness so great that the punishment is more criminal than the crime (citing *United States v. Hines*, 88 F.3d 661 (8th Cir. 1996)).

The panel further held that the district court did not err in granting summary judgment of forfeiture. It found that it was reasonable to infer that claimants used their home in furtherance of a substantial enterprise for cultivating, storing, and distributing marijuana. It ruled that the 200 recently replanted "cuttings" indicated the extent and duration of the enterprise. The panel further noted that the quantities of marijuana found in the residence would have justified imposition of a maximum statutory fine of \$250,000 and a range of fines under the sentencing guidelines of \$10,000 to \$100,000. The value of the property, \$60,000, fell well within this range.

The panel rejected the wife's protestations of excessiveness based on her "innocence," finding that all that transpired within the residence was undeniably accepted and condoned by both claimants. It held that the Government's failure to present evidence

regarding value of the drugs was irrelevant given the claimants' failure to make the threshold showing of "gross disproportionality," but added that the value of drugs can be a "critical factor" in considering the Government's evidence of just proportionality. Finally, it held that the factors it had considered were fully consistent with the standard enunciated in *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994), a case on which the claimants had placed primary reliance.

—HSH

United States v. Premises Known as 6040 Wentworth Avenue South, ___ F.3d ___, 1997 WL 488923 (8th Cir. Aug. 25, 1997).

Comment: It is difficult to quarrel with the favorable result in this case. The Asset Forfeiture and Money Laundering Section notes only that the "proportionality" standard applied by the panel differs in several respects from the standard now being advocated by the United States in the pending Supreme Court case, *United States v. Bajakajian*, No. 96-1487. For example, the value of the property is not a consideration under the standard primarily urged by the Government in

Bajakajian. And, under no circumstance, would the value of the drugs be a valid consideration. Counsel are urged, until *Bajakajian* is decided, to argue their cases consistent with controlling circuit law but to respectfully disagree with any factors on which the controlling standard deviates from that urged by the Government in *Bajakajian*. Copies of the Government's brief in *Bajakajian* are available from the Asset Forfeiture and Money Laundering Section.

—HSH

Quick Notes

■ Standing

Victims of a wire fraud scheme filed claims in a civil forfeiture proceeding brought against the assets of the defendant. Following the standing rules developed in criminal forfeiture cases, the court held that fraud victims are unsecured creditors who lack standing to contest the civil forfeiture of the defendant's assets. The victims' remedy is to file remission petitions with the Attorney General.

United States v. All Funds in Account Number 200968405, No. CV-97-0757 (E.D.N.Y. July 23, 1997). Contact: AUSA Elliot M. Schachner, ANYE12(eschach).

■ Rule 41(e) Motion

The Fourth Circuit joins other appellate courts in holding that the district courts are divested of jurisdiction over a civil forfeiture action once the Government initiates administrative forfeiture proceedings, unless the claimant files a claim and cost bond. Thus, Claimant's lawsuit against the United States for the return of her property was properly dismissed for lack of subject matter jurisdiction. The court also noted, in *dicta*, that the district court may review an administrative forfeiture action to consider whether the claimant was afforded due process, but only after the administrative forfeiture proceeding is complete.

Ibarra v. United States, ___ F.3d ___, 1997 WL 424051 (4th Cir. July 30, 1997). Contact: AUSA Richard Kay, AMD01(rkay).

■ Summary Judgment

The Government is not entitled to summary judgment in a civil forfeiture case just because it is able to show that the subject property—two vehicles—was purchased with a large quantity of cash by a person with a prior record as a convicted drug trafficker. Whether the cash was in fact drug proceeds, or was the proceeds of legal gambling activities, as Claimant contended, was a material issue of fact that must be determined by a jury.

United States v. One 1991 Chevrolet Corvette Convertible, ___ F. Supp. ___, 1997 WL 399232 (W.D. Tenn. Mar. 17, 1997). Contact: AUSA Christopher Cotten, ATNW01(ccotten).

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