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Guide to Preseizure Planning

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Why Preseizure Planning?

"If you fail to plan, you plan to fail." As painful and costly experience confirms, this cautionary advice is particularly applicable to agencies considering seizure of such troublesome assets as real property, ongoing businesses, and even aircraft and boats. The most critical activity in any seizure is *advance planning*. Without it, a successful seizure and subsequent forfeiture of a complex asset require more good luck than any agency has a right to expect.

Using Foresight to Address Problems

Agencies conduct preseizure planning to anticipate problems likely to arise during and after asset seizure. In this way, difficulties can be avoided or at least addressed in advance rather than on a reactive, catch-up basis. Noted below are illustrative problems that should have been addressed by preseizure planning. These problems might well have been foreseen and, as a result, could have caused the agencies to handle seizures differently.

- Under the authority of a proper seizure warrant, an agency seizes a suspected drug dealer's house where exchanges are thought to have occurred between suppliers and buyers of cocaine. An inventory search of the residence subsequent to seizure yields cocaine distribution records. Because the agency did not obtain authorization for entry into the house either in the seizure warrant or in a separate search warrant, the court rules that the search was unreasonable and precludes use of the drug distribution records in criminal prosecution of the suspect and as evidence in support of a civil forfeiture of the real property.
- An agency discovers that it is 1 of 32 owners of seized race horses only after receiving inquiries about when it

is going to pay its share of the bill for the animals' feed and care.

- Officers seize a house having an interior swimming pool. Pipes burst during a cold snap, flooding the home.
- An agency disposes of real property that had been successfully seized and forfeited. Net proceeds remitted to the agency are only 7.5 percent of the sale price. The lion's share is paid to lienholders, who could have been identified prior to seizure. In seizures of boats and aircraft facilitating drug sales, the same agency realizes that it seized major liabilities, not assets, when a court finds that the owners and lienholders are innocent parties, directs the agency to return the property to them, and rules that the owners and lienholders are to compensate the agency for only a fraction of the storage and maintenance costs.

The case described in the accompanying box is a more detailed example of how the absence of preseizure planning can cause a host of legal, financial, and asset management problems for all involved in the asset seizure and forfeiture process. The case described is credited with spurring the development of preseizure-planning policies and procedures at the federal level (and with leading to the coining of the term "preseizure planning" by the United States Marshals Service).

Preseizure-Planning Decisions and Participants

Without a sound investment in preseizure planning, timely and informed "go/no-go" decisions involving complex assets will occur more by chance than by design.

If, in view of anticipated issues and problems, the decision by participants in the preseizure planning process is not to seize the asset, they should immediately evaluate alternatives (noted later) that might achieve much the same result.

The Case for Preseizure Planning

When federal agents seized a Texas horse ranch in 1984, preseizure planning was merely an idea, not the common practice that it is today. The U.S. Marshal had only 24 hours to prepare for that major seizure, which included 150 show horses. Among them was the primary business asset, a stud horse worth \$1 million.

After the seizure, deputy marshals, other federal agents, and forfeiture attorneys spent a great deal of time not only developing forfeiture strategy but also obtaining asset management services.

Numerous problems and tasks had to be addressed. For example, the original complaint's legal description of the seized 110 acres was inaccurate, and the verbal contract with the new ranch manager caused problems throughout the case. Critical security services were needed to guard assets against threats by the original owner/defendant. Appraisal and inventory of valuable horses, ranch equipment, and other assets were necessary to establish legal custody and control.

Personnel spent weeks obtaining the management services necessary to secure business and personal assets then worth \$13 million. That delay and the fragmented, problem-laden approach to securing and managing the property could have been avoided if circumstances had permitted preseizure planning.

After two years of managing the ranch at a cost of \$1.6 million, after numerous out-of-town horse shows to maintain the value of the horses, and after an interlocutory sale of 40 horses to decrease the herd to a safe level and to reduce monthly management costs, the court ordered the ranch returned to its original owner/defendant. On appeal, the defendant retained the property but was ordered to repay the government \$1.1 million for Marshals Service custodial costs.

Although this early forfeiture case caused numerous problems, it highlighted the need for preseizure-planning guidelines for federal agents, attorneys, and marshals. Today, extensive coordination and advance planning occurs throughout federal judicial districts in order to anticipate and avoid legal, financial, and asset management problems before the seizure decision is made.

On the other hand, if participants decide to go forward with the seizure, they must determine how to address and prepare for the various issues and problems identified as affecting the success of not only the seizure but also the subsequent forfeiture. Discussed later, those issues and problems may arise in a number of areas, including postseizure property management and disposal.

Preseizure planning helps ensure that, at an early stage, the varying perspectives of participants in the process are brought to bear on the *pros* and *cons* of seizures of complex assets. What one person may advocate may spell disaster to another.

Participants in preseizure planning should include representatives from all law enforcement agencies involved in the upcoming seizure. The agency's legal advisor, if any, as well as a representative from the state attorney's or local prosecutor's office, as appropriate, should also participate. Their legal advice at the outset is critical. Seizure and subsequent management of complex assets, especially real property and ongoing businesses, constitute a legal minefield. The smallest misstep can destroy months of work.*

If a local or state agency is counting on an upcoming seizure's adoption by a federal investigative agency, the seizing agency should contact that agency during preseizure planning (1) to determine whether the targeted asset will qualify for adoption and subsequent federal forfeiture and (2) to learn how to proceed after the seizure, in terms of requesting adoption by the federal agency and then applying for an equitable share of the forfeited asset.

*Excellent preseizure-planning advice regarding troublesome assets is available to state and local agencies from local offices of the United States Marshals Service.

What Preseizure Planning Is Not

Occasionally, fears may arise that the gathering of information needed for preseizure planning will compromise the secrecy of the accompanying investigation. However, preseizure planning is not a process that forewarns owners of targeted property.

As an experienced investigator emphasizes, the collection of information needed for preseizure planning "can be done without the defendant ever finding out." The investigator notes, "There are ways we can do this without anybody knowing who we are or what we are doing. . . . There are slews of public documents available without the need of a subpoena." Among other places, those documents may reside with the recorder of deeds, clerk of courts, county taxing authority, state corporation bureau, and state licensing boards and regulatory bodies.

Preseizure planning is neither an end in itself nor a bureaucratic impediment to action. To the contrary, such planning is a means to enhance the chances for a timely and successful seizure and forfeiture by carefully evaluating what should be seized and why; who should seize it, when, and how; and where problems are likely to arise along the way, as outlined in the balance of this publication.

What Should be Seized?

Among the many factors to examine when considering whether to seize a particular asset are the reason for the seizure, the types of forfeiture available subsequent to the seizure, the aspect of the property to be seized, the value of the asset, third-party rights issues, anticipated problems during and after seizure, and alternatives to seizure.

Establish the Rationale for the Seizure

Close examination of the underlying reasons or criteria for seizure is critical. Consideration should not be given to assets whose seizure would conflict with those criteria. The bedrock reason for seizing property is that the requisite standard of proof justifies the conclusion that the asset was used in the commission of a crime, facilitated the commission of a crime, or was acquired (directly or indirectly) with illegal proceeds. Even intent to use the asset in violation of a criminal statute may justify seizure in some jurisdictions.

Given that the required standard of proof is met, the decision of whether to seize may depend on cost-benefit considerations. Seizure should go forward only if the resale value of the asset or its usefulness to the agency sufficiently exceeds anticipated expenses incurred for the management of the property until forfeiture and disposal.

Economics may not be the overriding criterion. For example, an agency should weigh the seizure of a residence containing a clandestine drug laboratory against the environmental problems the agency would inherit as the interim owner of the property. There still may be remedial value in "sending a message"—removing a base of operations of a drug supplier, or neutralizing a hazardous activity in a residential neighborhood (after the site is cleaned up).

Thus, consideration of the "why" of the proposed seizure serves to identify or reexamine assets not only in terms of the legal basis for seizing them but also in terms of other seizure criteria that may reinforce or override an affirmative legal justification.

Determine the Types of Forfeiture Available

Asset seizure involves more than an agency's taking custody and control of property. It is coupled with the reality that the property is subject to forfeiture—the passing of the asset's

title to the government. The types of forfeiture available may affect what assets are seized or whether they are seized at all.

Criminal forfeiture proceedings, referred to as *in personam* actions, are directed against individuals. With some exceptions, agencies may not seize property potentially subject to criminal forfeiture until a criminal trial of the property owner or user yields a guilty finding or plea to a crime that has created the forfeiture liability. Once the prosecutor establishes the defendant's guilt beyond a reasonable doubt, the agency may seize the property in question. However, if a third party, such as a lienholder, raises a timely objection to the proposed forfeiture, the court hears the matter and decides the issue on the basis of the preponderance of the evidence.

The other major type of forfeiture, civil forfeiture, is usually a proceeding against the property, an *in rem* action.¹ When seizing the asset, which occurs prior to the forfeiture proceeding, the agency is, in effect, arresting the asset, not its owner or user. Civil forfeiture, wherein the burden of proof is preponderance of the evidence, may involve either administrative or judicial proceedings.

Administrative forfeiture, sometimes referred to as "summary forfeiture," is usually limited to property whose value is below a statutorily defined amount. The proceeding is relatively efficient and streamlined and may be appropriate when the facts are clear-cut, well documented, and demonstrate that the seizing agency is entitled to a final judgment of forfeiture as a matter of law. If contested validly by an interested party, administrative forfeiture gives way to a judicial proceeding.

Instead of, or in addition to, administrative forfeiture, civil judicial forfeiture is another way by which the agency can perfect its claim to the seized property's title, in this case by court decree. The outcome of a civil forfeiture proceeding does not depend upon whether the owner or user of the property was charged with, or convicted or acquitted of, an underlying

crime. However, information derived from a criminal trial may be of use to the prosecution of the civil forfeiture case.

The seizure of certain assets may be effectively precluded if administrative forfeiture is unavailable, either because it is not authorized by statute or because the seized property does not qualify.

For example, an agency may decide to forgo seizing the personal property in a residence targeted for seizure in the absence of the streamlined procedures offered by administrative forfeiture, which might have involved less time and, therefore, less expense in holding the assets compared to a civil judicial proceeding. Conceivably, the agency might even decide not to seize the residence itself if the wait for a civil judicial proceeding is seen as resulting in excessive asset-management expenses.

Even if speedier criminal forfeiture proceedings were available, the requisite criminal conviction of the property owner or user might not be worth pursuing because of the likelihood that evidence would not meet the burden of proof—beyond reasonable doubt—in contrast to preponderance of the evidence in civil proceedings. Although a civil case does not expose the defendant to incarceration or other criminal penalties, justice can still be served through forfeiture of assets.

Occasionally, a local or state agency may decide that it can initiate or participate in the seizure of a given asset only by turning the case over to federal authorities. That may be achieved either by joining forces with a federal law enforcement agency during the investigative stage or by first seizing the asset and then arranging for the seizure's adoption by a federal investigative agency. (To be considered for an equitable share of federally forfeited assets, local or state agencies that participated in those cases must request this by the timely filing of the appropriate paperwork—Form DAG-71—with the U.S. Department of Justice.)

By transferring a forfeiture case to federal authorities, a state or local agency could pursue assets that otherwise might

be out of reach, either because of insufficient resources to commit to the case (including the costs of managing the seized property) or because of the absence of a state statute authorizing forfeiture of certain types of assets, such as real property.

Consider All Aspects of the Property

The determination of what to seize should not only reflect consideration of the asset as a whole but also take into account the various issues presented by the physical features of the property. For example, a proposed seizure of a residence may focus on the structure itself; the structure and land; the structure and land and contents of the residence; or all of the foregoing and outbuildings, such as guest house and storage shed.

If a farm or ranch is a seizure target, will the seizure include the livestock, crops, and farm machinery? If the site contains a clandestine lab, what environmental regulations govern clean-up?

When the seizure target is a business, do you seize the business real estate, the business itself (which can constitute an item of property distinct from the realty), selected assets of the business other than realty, or some combination of the above? Or will the seizure focus on someone's interest in the property, such as the owner's but not that of the lienholder?

Examine Factors Related to the Asset's Value

Rare is the seizure decision that does not require a reasonably accurate estimate of: (1) the asset's current market value less liens and liabilities, which determines the owner's net equity in the property, (2) the extent of the suspect's or defendant's ownership interest in the property's net equity, and (3) the rate at which the asset will depreciate (or appreciate) between seizure and disposal.

That information, when combined with anticipated post-seizure costs related to the property, helps define the financial dimension of the seizure. That is, will the value of the asset to

the agency at the time of disposal be enough to justify seizure and related costs?

Perhaps the most complex property on which to place a value is an ongoing business. Its assets may include land, buildings, equipment, inventory, accounts receivable, cash, securities, and the like. Likely liabilities include accounts payable, liens, mortgages, notes, unpaid taxes, and overdue pension contributions.

Questions to ask about a targeted business include: Does the suspect possess a significant ownership interest in the business? Is he or she the sole owner, a partner, or a shareholder? What encumbrances and interests in the real property does the title report reveal? Do others with interests in the business or real property have guilty knowledge of the illegal activity giving rise to the planned seizure? Is the business merely a sham? Is it depending on illegally obtained funds to finance otherwise legitimate-appearing operations?

Other factors that can affect the value of a business and that should be probed during pre-seizure planning include:

- Lease and rental agreements. Can the agency assume, assign, or cancel them?
- Condition of the property. The agency should determine whether the property is contaminated, contains hazardous materials, or is otherwise in violation of safety and health codes.
- Pending litigation against the business.
- Transferability to the agency of licenses, permits, articles of incorporation, etc.
- Impact of the seizure per se on the prospects of the business.

Evaluate Third-Party Issues

Third parties, whether owners, lienholders, or unsecured creditors, having an interest in the targeted property may, upon

its eventual forfeiture, convince the court that they are innocent third parties and, therefore, qualify either for remission (return of the property or equivalent monetary payment) or for mitigation (partial relief). Evaluation of the likelihood of that outcome must be a priority item on the preseizure-planning agenda. Findings in that regard may determine that seizure of a given asset would be unwarranted, especially if the interest of innocent third parties in the property is substantial.

An *innocent* third party is one who was not a participant in the illegal activity giving rise to the planned seizure, neither knew nor should have known of the illegal activity, and did all that reasonably could be expected to prevent the property from violating the law. Generally, the burden of proof is on the third party to establish his or her innocence.

Preseizure identification of the owner of record, for example, may reveal that the targeted asset is held by, or titled to, a nominee, straw, alias, or some other entity in an attempt to hide, conceal, or misrepresent the interest of the actual owner. In such instances, forfeiture may be based upon the involvement and knowledge of the actual owner and not solely upon the knowledge of the alleged "innocent" third party, the *nominal* owner.

Similarly, preseizure investigation may unearth information that the innocent third-party status of a substantial lienholder is highly suspect, inasmuch as a large secured loan to the owner was not preceded by a valid credit check—or even an application.

Even if truly innocent third parties were involved in a case, their combined interest in the targeted property may not be significant, thereby indicating that seizure should proceed since the value of the asset to the agency would be impaired only marginally after satisfaction of the parties' claims.

Consider the Public Reaction to the Seizure

Public relations considerations may constitute a significant factor in an agency's decision of whether to seize a particular asset, especially if the public's perception would be that the financial or material well being of innocent persons had been adversely affected by the seizure.

As noted in another publication in this BJA-PERF series on asset forfeiture (*Forfeiture of Real Property: An Overview*):

Seizure of residential real property [especially when the underlying facts do not subject the owner to arrest], or of a small, personally owned and operated business, can bring negative publicity, even when the seizure is technically correct. Therefore, a seizure that likely will result in the eviction of a family from their home, or in the incidental destruction of a "mom and pop" business, must be considered carefully. Conversely, the seizure of a notorious property, such as a "crack house," can enhance the agency's image.

If the asset targeted for seizure is one that the agency might later retain for its own use, the seizure decision should take into account the possible adverse perception by the public that the *motivation* for seizure was based on less than completely objective criteria, a perception that could be avoided by disposing of the asset through sale.

Negative publicity may be avoided or reduced by noting in the seizure warrant—a public record document—why the agency seized the property and what provisions the agency made to protect innocent third parties.

Anticipate Agency Costs and Involvement After Seizure

Preseizure planning must also take into account the time, effort, and cost likely to be expended on the targeted asset after seizure. In short, the economic bottom line may not justify seizing the property.

Noted in more detail in a later section, agency costs and human resources involvement after the seizure include the following:

- Appraisal and other measures to confirm the property's value, condition and, if a business, its status as a going concern.
- Public notices and legal filings.
- Third-party petitions and claims.
- Property management, including inspection and inventory, storage, security, maintenance, repair, insurance, audits, and oversight of business operations.
- Property disposal.

Look at Possible Alternatives to Seizure

If the foregoing factors, on balance, weigh against seizing an asset, a number of alternatives may be available, although they may not be as swift and effective as seizure. For example, circumstances may justify seeking foreclosure, filing liens, or seeking condemnation.

The presence of hazardous materials or outright contamination may warrant prosecution under environmental statutes or health or nuisance codes. Collection of fines or imposition of temporary restraining orders for those and other reasons is a possibility. Revocation of licenses or permits might also be feasible.

Perhaps sufficient evidence exists to support such civil actions under the state's RICO law legislation as ordering a property owner to divest himself of the asset, imposing restrictions on a person's activities or investments, or ordering dissolution of a business.

Seizing the Asset: Who, When, and How?

Critical during preseizure planning are considerations related to whether one or more agencies will make the seizure, its timing, and its procedures.

Who Makes the Seizure?

Will personnel from just one agency make the seizure, or will it also involve other law enforcement agencies, whether local, state, or federal? A seizure by only one agency requires coordination and cooperation among its components, but it becomes even more difficult (and necessary) to achieve coordination and cooperation in a multiagency effort. Thus, forging interagency agreements at the preseizure stage is imperative in order to avoid misunderstandings that may jeopardize not only the success of the seizure but also future interagency relations.

Top-to-bottom coordination, cooperation, and mutual understanding are essential in areas such as command structure, roles, responsibilities, communications and other procedures, weapons policy, liability, overtime, and asset sharing. Regarding the latter, many agencies use written agreements that spell out the ground rules for asset sharing and often allocate specific assets to specific agencies.

Written asset-sharing agreements are particularly important when dealing with federal agencies. State and local agencies do not automatically qualify for asset sharing when participating in federal cases. Completion of certain federal forms is a must.

Do not overlook determining the need at the seizure site for civilians with special skills—translators, locksmiths, board-up personnel, licensed mechanics, contractors selected to manage the property postseizure, etc.

When to Seize

Proper timing of the seizure involves a number of considerations.

Agencies need not seize forfeitable property immediately or at the first available opportunity. Check applicable law for the maximum allowable period between the last violation that subjects the asset to forfeiture and when seizure must occur. However, such exigent circumstances as protecting life or safety or

preserving evidence from immediate destruction or removal mandate seizure as soon as possible.

Seizure occurs before civil forfeiture proceedings; for property subject to criminal forfeiture, seizure must generally follow a guilty verdict or plea in the criminal case. Nonetheless, in some criminal cases the court may authorize earlier seizure, issue an order to freeze the defendant's assets, or require the accused to post a performance bond prior to the end of the trial especially if the property is likely to deteriorate or the defendant is likely to dispose of the property in an attempt to thwart forfeiture.

But note that an attempt by the owner to transfer seized property to a third party, by sale or gift, does not threaten future forfeiture of the asset if the relation-back doctrine is applicable and if the third party is not an innocent third party because, under those circumstances, the person to whom the asset was transferred does not acquire an ownership interest, and under the relation-back doctrine, the government obtained a legal interest in the property at the moment it was used or acquired illegally. Government perfects a possessory interest and obtains legal title through seizure and forfeiture. (In some states, title vests with the agency upon seizure.)

Once asset seizure occurs, unnecessary delay in initiating forfeiture may constitute a violation of the due process rights of legitimate claimants to the property and might bar efforts to effect forfeiture. On this point, be sure to check applicable law during preseizure planning.

When a planned seizure anticipates civil forfeiture and when a companion criminal investigation or prosecution is expected or ongoing, participants in preseizure planning should carefully evaluate the impact of the seizure and the forfeiture filing, including their timing, on the related criminal case.

For example, some agencies, when practical, seize the property as evidence in the criminal case and file for civil forfeiture later to avoid setting in motion paperwork deadlines for

prosecutors handling the criminal case. However, other agencies warn that waiting to institute forfeiture proceedings until after the asset is no longer needed as evidence may constitute unnecessary delay or result in missed statutorily defined filing deadlines for forfeiture. Again, check applicable law.

If the targeted asset is about to be sold to an innocent third party, seizure might be delayed until after the sale so that the proceeds could be seized, thereby avoiding costly management problems (storage, maintenance, etc.) associated with the presale asset.

The experience of many agencies demonstrates that seizure should be timed to occur in the presence of the owners or tenants of the property, barring overriding safety concerns or other exigent circumstances. Their presence can facilitate entry and quick execution of an occupancy agreement. However, before executing seizure warrants relating to residences (houses or apartments), agencies should determine whether occupants have a constitutional right to notice and hearing prior to seizure.²

How Should the Seizure be Executed?

To avoid taking physical possession of an asset through an actual seizure, an agency may choose to execute seizure through cooperation with federal authorities (discussed on page 14) or by a "constructive" seizure.

Constructive seizure is a "paper" seizure and is effective against property that can be rendered nontransferable by written notice. For example, constructive seizure of real property entails filing notices in the public record, posting the property, and serving notice to owners, others who have an interest in the asset, and occupants, if any. Final disposition of the asset would await the outcome of forfeiture proceedings.

Constructive seizure may include a number of specific conditions to which the owner specifically agrees, such as not to sell or mortgage the property and to pay all custodial expenses,

such as those related to maintenance, repair, storage, and insurance during forfeiture adjudication. The agency thereby reduces its postseizure burden substantially (also helpful in that regard are procedures described later in the section on property management).

When an agency is planning to take physical possession of an asset through actual seizure, the matter of seizure warrants is a top planning priority. Determine whether a seizure warrant is legally required, as would be the case when seizure involves property where a heightened expectation of privacy exists, such as a residence.

As noted in a case cited at the beginning of this publication, a seizure warrant does not necessarily authorize entry or an inventory search upon entry. To enter and search the premises may require a separate writ of entry and/or search warrant, or at least incorporation of entry and search authority into the seizure warrant itself.

Barring exigent circumstances, some agencies obtain seizure warrants whether or not they are legally required. The warrant can help preclude future complications since it has satisfied court concerns for a prior judicial review of the facts and circumstances, has established a framework for judges who may become involved in later stages of the case, and has minimized or eliminated potential civil liability of the seizing officers.

Furthermore, the warrant and warrant application can contain provisions governing postseizure management of the asset (dealing with anticipated management problems may be facilitated through provisions in the warrant), issues related to potential claimants, and civil-liability protection of third parties who cooperate with officers by turning over such items as keys to the property as well as the property itself. In effect, the warrant can double as a planning document—with teeth. (See the article on seizure warrants by Cameron Holmes in the spring 1992 issue of *Asset Forfeiture Bulletin* for more information on the value and multiple uses of seizure warrants.)

Physical safety of personnel making the seizure is a paramount consideration. During pre-seizure planning, identify likely hazards, chemicals, weapons, explosives, animals, etc., and proceed accordingly.

Plan each step of the seizure, such as effecting entry, securing the property, inspecting (including photographing or videotaping) its general condition and plain-view contents, searching for items or evidence specifically named in the seizure warrant or other warrant, processing items seized as evidence, leaving a copy of the warrant with the owner (or tenant), posting a copy of the warrant or other documents, and notifying by phone appropriate legal personnel of the seizure so they can immediately file documents (such as *lis pendens*) that will reduce the opportunity of the owner to counteract the forfeiture process.

What Are Likely Postseizure Issues, Problems, Costs?

Alluded to earlier were various postseizure concerns whose cost and other demands should be factored into the decision of whether to seize a given asset. They include measures needed to confirm the pre-seizure estimate of the asset's value and condition, notices and filings, third-party dealings, and property management and disposal.

Confirming Asset Value and Condition

In addition to its own inspection of seized property, the agency should plan for an independent appraisal of the fair market value of each asset "as is, where is." The appraisal will determine how accurate the pre-seizure estimate of asset value was and, therefore, whether the seizure still makes economic sense. If the value is below average for that type of asset, the appraiser may be able to estimate the cost involved to bring the property to average market value. Many agencies specify periodic reappraisals of seized property.

The appraiser may also indicate how fast the asset can be expected to depreciate or appreciate. Linked to appraised value are bonds that must be filed in conjunction with a challenge to the forfeiture and with the use of the asset prior to forfeiture.

In the case of seized businesses that will be ongoing, the agency should plan to confirm immediately after seizure the continued validity of licenses, permits, leases, insurance, and other regulatory or contractual items affecting the ability of the business to continue operations. Also essential is postseizure confirmation of assets, liabilities, and the like.

Notices and Filings

As indicated above regarding real property, expeditious filing of a notice of *lis pendens* with the registrar of deeds or other appropriate recorder is critical, because it alerts prospective purchasers to the pending forfeiture action and to the primacy of the seizing agency's possessory interest in the property. Be sure to check on the type of information that should be included on the notice, such as the names of owners, interest holders, and lienholders; copies should be sent to each party by certified mail as well as to the tax assessor.

At preseizure planning, designate who will file the complaint or petition that initiates the forfeiture case and identify what documents should accompany the complaint, such as a copy of the warrant, the related affidavit, and if appropriate and available, the occupancy agreement (see Appendix).

Determine the types of notices that must be advertised in a newspaper, such as notice of the seizure, intent to forfeit, and applicable procedures (how to file a claim or to contest the forfeiture, for example).

When a business is seized, in addition to the foregoing notices and filings, plan on contacting or giving notice to employees, debtors, suppliers, customers, state agencies, and anyone else who is necessary for the continued operation of the business or who will be affected by its closure.

Third-Party Petitions and Claims

As discussed earlier, anticipation of dealing with likely third-party issues is an important component of preseizure planning. Handling those issues involves time, cost, and paperwork.

In some states, innocent third parties may petition the executive branch to "pardon" the forfeited property. The pardon may take the form of a remission or mitigation. The former may result in the return of the property to the petitioner or a payment equal to the petitioner's actual interest in the property. Mitigation can result in the return of the property to the petitioner upon payment of a monetary penalty.

Third parties may also contest the pending forfeiture by filing a claim and appropriate bond with the court. The burden of proof, which rests with the claimant, would be preponderance of the evidence.

Property Management

The cost, time, and hassle associated with managing seized property may well tip the scales in favor a decision to forgo seizure in a particular case or to explore various methods, described at the end of this section, by which to delegate and otherwise reduce the agency's involvement in asset management. Thus, careful evaluation of the agency's property management options is a critical element of preseizure planning.

A fundamental goal of property management is to maintain the value of the seized asset throughout the forfeiture process for the sake of all interested parties. For example, failure to manage the asset in a competent manner may make the seizing agency liable for at least part of the amount by which the asset depreciated while in the agency's custody.

Proper storage, maintenance, and repair of complex assets are basic, but often difficult, property management functions. For example, one agency directs that when uncertain about the type of care required by a seized boat or ship, personnel should hire a marine surveyor to assess the situation and advise on

proper storage and maintenance. Personnel are to place boats having other than wooden hulls in dry storage. The initial expense of doing this is substantial, but it will result in greatly reduced monthly expenses.

Seized aircraft are illustrative of assets with maintenance pitfalls, as noted by one agency's caution: "It is absolutely necessary that the aircraft log books be secured. Loss of these logs requires that the aircraft be dismantled and inspected to determine its condition prior to recertification. This is an expensive process and reduces the value of the aircraft considerably."

If long-term storage for vessels and aircraft is anticipated, special preparation of their engines and other mechanical parts may be necessary.³

Security measures to protect assets against theft, vandalism, and other risks may include alarms, fencing, guards, lock replacement, and a key-control system. Terminating unnecessary utilities and winterizing is often advisable for vacant buildings, whose entrances and windows may have to be boarded.

A review of insurance should assess the adequacy of coverage against fire, storm, theft, vandalism, and various liability risks.

Inspection of the property for safety and environmental hazards is a must. Indeed, consider wording the seizure warrant so that it directs release of the property and notification of environmental authorities if it harbors hazardous waste or toxic material. Otherwise the agency may become liable for clean-up costs or at least find itself holding property whose value has plunged. Of particular concern in this regard are such properties as metal-plating shops, gasoline stations with obsolete underground storage tanks, paint manufacturers, dry cleaners, chemical concerns, warehouses, and drug-processing sites.

If the agency decides to allow residents or tenants of a seized property to continue to occupy it, an occupancy agreement should be executed. This agreement specifies the terms

of occupancy, such as occupancy on a month-to-month basis, monthly mortgage and utility payments by occupants, maintenance of sufficient insurance coverage by the occupants, and permission for the agency to inspect the property periodically.⁴

Consider delaying a decision on occupancy until inspection and appraisal of the property and examination of the terms of current leases, if any. The agency should develop criteria governing the occupancy decision during pre seizure planning, if not before. Reasons for not permitting occupancy include illegal activity by the occupants, serious safety code violations or contamination, presence of weapons or booby-traps on the property, probable interference by occupants with the agency's ability to manage and conserve the property, and the danger posed by occupants to law enforcement officials or to public health and safety.

Similarly, the agency seizing an ongoing business must decide whether to continue its operations or to close it. If the agency cannot make that decision during pre seizure planning, at least the criteria on which to base such a property management decision should be developed at that time. Factors to consider include, the presence of criminal or other illegal activity, availability of competent management, adequacy of business records, impact of the seizure upon key personnel and customers, amount of cash on hand, cash flow situation, status of accounts receivable and payable, availability of supplies necessary to continue operations, and serious safety or environmental violations.

Responsibilities related to property management, such as the foregoing, frequently discourage agencies from seizing complex assets. However, a number of alternatives exist that can substantially relieve agencies of that burden.

One previously discussed possibility is constructive seizure. Another alternative is to hire a property management contractor to manage, on behalf of the agency, some or all of the seized real or personal property. This would eliminate the need

to develop an in-house capability yet enable the agency to retain control of the asset and its disposition. As one contractor quipped, "Why buy a cow when milk is so cheap?"

For example, Arizona officials contracted with a property management firm in order to centralize seized property management responsibility for both real and personal property. Among the firm's services are appraisal, storage, maintenance, security, inventorying, recordkeeping and accounting, and property disposal through sale or other means.

The services of that contractor are available to any seizing agency or prosecutor at any level of government from any part of Arizona—for that matter, from any part of the nation. (See Appendix for a sample property management contract.)

Such a contractor would function as a substitute custodian. Others whom the agency could select to act in that capacity are a trustee or receiver, someone then associated with the property, or even a claimant or defendant. That could be defined in the seizure warrant, along with the substitute custodian's responsibilities.

Instead of a substitute custodian for a given asset, consider a substitute asset, called a substitute *res*. For example, the seized property would be released to the claimant in exchange for a bond whose value is equal to that of the seized property. If the money is deposited in an interest-bearing account, it appreciates in contrast to the original asset, which would have incurred storage and maintenance costs and perhaps depreciated. The party prevailing in subsequent legal proceedings receives the money.

A court-ordered interlocutory sale of the seized asset is another way to avoid the property management burden in certain circumstances. Such a sale occurs after seizure but before the court has decided whether to permit forfeiture of the property. Sale proceeds become the substitute *res*. An interlocutory sale may be possible under the following circumstances:

- The asset is perishable or liable to deterioration, decay, or injury.
- The expense of keeping the property is disproportionate or excessive.
- The release of the property is subject to unreasonable delay.

A "quick release" procedure may be available for assets whose postseizure value is so much lower than previous estimates that proceeds from its sale are unlikely to cover property management costs. For example, if the asset's value approximates an innocent owner's interest, consider quick release of the asset to that person and termination of forfeiture proceeding.

Property Disposal

Prompt disposal is a key factor in preserving the value of seized assets, according to many agencies. In some instances, concern by title insurers and mortgage lenders regarding possible title defects resulting from the forfeiture process has caused a decline in the value of real property and/or lengthy sales delays. Agencies should check whether they have the authority to avoid such a problem by guaranteeing reimbursement to purchasers in the event of such defects.

Delays in disposing of properties with unique or special characteristics should be anticipated during preseizure planning. For instance, the sale of historically significant properties may entail a special approval process by a governmental commission.

Property disposal may be by real estate broker, auction, sealed bid, or negotiated sale. Occasionally, the destruction or junking of seized property is necessary.

Checklist of Questions to Address During Preseizure Planning

The following questions constitute a preseizure planning checklist and reflect, in summary fashion, many of the points discussed earlier.

Determining Whether and What to Seize

Does seizure meet the requisite burden of proof, such as probable cause?

Do cost/benefit considerations justify the seizure?

Do other factors, such as the seizure's punitive value, override financial considerations?

What types of forfeiture are available and how might that affect the seizure decision?

How might a civil forfeiture affect a related criminal case and vice versa?

Should the asset as a whole be seized or just one of its components or aspects, such as someone's interest in the property as opposed to the property itself?

What factors related to the asset's value should be reviewed before seizure. Examples include net equity in the property, the extent of the suspect's or defendant's ownership interest in it, and the impact that seizure per se might have on the continuing profitability of a business targeted for seizure.

Are claims on the asset by innocent third parties substantial?

What would be the public reaction to the seizure?

Would an alternative to seizure (such as seeking condemnation of the property or revocation of needed licenses or permits) be the better course?

Deciding Who Conducts the Seizure, When, and How

If more than one agency will make the seizure, have the necessary interagency agreements covered such areas as command structure, responsibilities, weapons policy, and asset sharing?

Has legal advice been sought about all phases of the seizure and forfeiture?

What special skills will be needed at the seizure site—for example, those of a translator, locksmith, or mechanic?

What legal deadlines are applicable to the seizure's timing?

What is the maximum delay permitted between seizure and initiation of forfeiture?

If the targeted asset is about to be sold, should seizure be delayed until then so that the proceeds can be seized instead?

When are tenants or owners of the targeted property likely to be on the premises?

Is a constructive seizure warranted?

Is a seizure warrant desirable? If so, should it contain provisions governing postseizure management of the asset?

Is a writ of entry or search warrant necessary?

Addressing Postseizure Issues, Problems, and Costs

Who will appraise the seized property?

How will the ability of a seized business to continue operations be determined?

Who will file the *lis pendens* against real property and when?

Who will file the complaint or petition that initiates forfeiture action and when?

What notices must be advertised?

What third-party issues are likely to arise? Who are the innocent third parties, if any?

How is the agency prepared to handle the various aspects of property management, such as storage, maintenance, repair, insurance, security, occupancy agreements, safety and environmental concerns, and measures required to ensure that seized businesses continue to operate?

Should the agency use a property management firm or other substitute custodian?

Is a substitute *res* feasible?

Is an interlocutory sale advisable?

If needed, is a procedure available for the quick release of seized assets?

What barriers, if any, might delay the prompt disposition of the property?

What method of property disposal is most appropriate given the nature of asset?

Conclusion

Most preseizure plans reflect, in part, incomplete and imperfect knowledge. Preseizure planning is not an exception. So agencies should anticipate changing their plans once new or more accurate information becomes available—either during the seizure or postseizure stage.

Plan your work, but be flexible.

End Notes

¹Readers in those states having civil *in personam* forfeiture proceedings, such as Arizona, Hawaii, and Louisiana, should check with legal advisors during preseizure planning about the possible advantages of pursuing this type of forfeiture in relation to the asset targeted for seizure.

²*Cf. U.S. v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990); *United States v. James Daniel Property Titled in the Name of James Daniel Good*, __ F.2d __ (9th Cir. 1992), 1992 W.L. 80965; *Richmond Tenants Organization, Inc. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992).

³To perfect a seizure warrant against aircraft, the seizing agency must not only post the warrant and affidavit on the airplane but also file them with the Secretary of Transportation, Federal Aviation Administration (Aircraft Registration Branch, Oklahoma City, Oklahoma) in accordance the statutory requirements of 49 U.S.C. 1403; *Cf. United States v. One 1951 Douglas DC-6 Aircraft*, 525 F. Supp. 13 (W.D. Tenn. 1979, *aff'd*, 667 F.2d 502 (6th Cir. 1981), *cert. denied*, 462 U.S. 1105 (1983)). To perfect a seizure warrant against a vessel, the seizing agency must not only post warrant and affidavit in the ship's wheelhouse but must also file them with the Secretary of Transportation, U.S. Coast Guard Vessel Documentation and Tonnage Survey Branch (Central Computerized Ownership Records), Washington, DC, in accordance with 46 U.S.C. 31301, *et seq.*

⁴An occupancy agreement authorized by the United States District Court does not create a landlord-tenant relationship under state law. Rather, an occupancy agreement is a license subject to revocation by the district court for violations of its conditions when those conditions contained in the occupancy agreement are not followed. *United States v. Real Property in South Portland, Maine*, 758 F. Supp. 772 (D.Me. 1991).

APPENDIX
Real Property Management Agreement
(For Forfeited Property)

This agreement is entered into by the State of Arizona hereafter referred to as "Owner," and BLUE CHIP REALTY, Inc., a licensed Arizona real estate broker, hereafter referred to as "Contractor," and shall become effective and binding upon the parties when a copy is accepted in writing by Contractor's Designated Broker and sent to Owner.

1. Owner hereby agrees to employ Contractor as Property Manager for property located in various Counties throughout Arizona, consisting of various parcels.
2. BLUE CHIP shall serve as Owner's sole Contractor with the sole and exclusive right to rent, lease, operate, and manage the property on behalf of the Owner for a term of five months terminating January 31, 1990. Owner or Contractor may cancel this Agreement anytime upon 30 days prior written notice. Sale of the property shall serve to terminate this Agreement upon close of escrow.
3. Contractor shall have authority to negotiate tenants' rental rates and security deposits for the property, based upon prevailing local market rates and rental practices, subject to owner-supplied guidelines. Contractor may not execute leases for terms in excess of six months without Owner's written permission. Contractor shall have authority to accept payment of all rents and deposits on behalf of Owner in the form of personal checks, subject to collection, and to disburse deposits to tenants upon lease termination.
4. Owner is aware all monies collected will be deposited upon receipt in Contractor's Property Management Account(s) prior to distribution to Owner.

5. Contractor agrees to send Owner computer-generated monthly reports no later than the 10th of the month for the preceding month, based upon generally accepted accounting procedures, together with all net rental income received in excess of the required minimum property account balance. Contractor will hold tenants' refundable deposits as provided by law. Owner agrees to pay Contractor compensation as set forth in this Agreement and authorizes Contractor to deduct same from Owner's property account balance when due. As a part of its management services, Contractor shall prepare an annual operating budget within 30 days of the execution of this Agreement and submit same to Owner for approval for occupied commercial income properties and multifamily properties with more than 12 units.
6. Owner authorizes and directs Contractor to advertise the above property for rent or lease, to display "FOR RENT" signs on the property, to collect rents and other charges as they become due, to terminate tenancies when necessary or desirable to do so, to sign and serve notices in his own name or in the name of the Owner and to receive notices and process of service on behalf of Owner, to institute and prosecute actions for eviction where permitted by law or to hire an attorney when authorized by owner, to bring suit to recover rent and damages and, when expedient to do so, and to settle, compromise, and release such actions of suits or reinstate such tenancies as Contractor and Owner may deem advisable.
7. Contractor shall be responsible for the prompt payment of Owner's normal property operating expenses from the rent receipts and Owner's funds on deposit.
8. Contractor is authorized and directed by Owner to hire, supervise, pay, and discharge all employees, independent contractors and service personnel required for the operation, repair and maintenance of the property. Any employee shall be the employee of the Contractor who shall be solely responsible for the payment of appropriate employment and

unemployment taxes. At all times during the term of this Agreement, or an extension thereof, Contractor's relationship to Owner shall be as an Independent Contractor for the purpose of providing property management services and no partnership, joint venture, or other type of contractual relationship is implied or permitted.

9. Contractor shall have the authority to enter into contracts for the purchase of goods, services and supplies required for the operation of the property which Contractor shall deem advisable and necessary. Contractor warrants that all vendor contracts shall contain a 30-day cancellation clause and be automatically canceled upon the sale of the subject property. Contractor shall use due diligence to obtain the best possible prices for comparable worth work and shall seek competitive bids when good business practice would indicate that bids are appropriate.
10. In consideration of Contractor's diligent performance of the duties and obligations imposed upon him by this Agreement, including Contractor's promise to use his best efforts to obtain and maintain a high level of occupancy at a rental rate substantially comparable to the prevailing market rate. Owner agrees to compensate Contractor according to the terms set forth below and authorizes Contractor to deduct same when due from Owner's funds on deposit with Contractor. Compensation shall be reviewed annually by parties.
11. For the rental or leasing of the property, or a unit thereof in the case of a multi-unit property, including the initial property inspection, lease, review, tenant interview, and computer set-up preparation of the rental or lease agreement and all services performed by Contractor leading up to the decision of tenant to enter into such agreement, the showing of the property to prospective tenants, preparation of the tenant rental application and processing if the tenancy, Contractor shall be compensated during the first year of this Agreement as follows:

Contractor will receive a one-time leasing and set-up fee per unit of 1/2 of one month's rent.

12. Owner shall pay Contractor, and Contractor shall receive a monthly Management Fee equal to 10% of gross rents, min. \$50/mo., on rented property. All fees to be paid out of gross rent.
13. Vacant or unimproved real property shall incur no management fee, except for out-of-pocket maintenance expense.
14. Contractor shall retain all late fees and returned check charges as compensation for the task of pursuing delinquent tenants, including the time and expense of bringing judicial actions in small-claims court when required to collect back rents and/or damages collected by Contractor. Attorney's fees, when incurred, shall be paid by Owner.
15. Prior to accepting any person or persons, Contractor shall obtain, at tenant's expense, a credit report from a credit reporting service to which Contractor subscribes.
16. If Owner requests Contractor to undertake work exceeding the usual or normally recurring management duties, a fee shall be agreed upon before the work is authorized. "Normal management" does not include property modernization and/or major refurbishing programs, refinancing, fire restoration and supervision of construction, presenting petitions to planning and zoning committees, personal representation in property tax appeals, advising on proposed new construction and/or additions, or other real estate counseling. Such fees may be expressed either as a percentage of the cost of the work to be undertaken, or based upon an hourly rate as agreed by the parties.
17. Unless otherwise agreed to in writing, Contractor shall not be responsible for the payment of real estate mortgages, property taxes, insurance, or other liens and encumbrances on the property.

18. If it shall become necessary for Owner or Contractor to give notice, such notice shall be in writing and sent by first class or certified mail to the addresses shown below. The parties to this Agreement shall each be responsible to give the other notice of any change of mailing address. Owner shall reimburse Contractor for long distance telephone charges, postage and copying charges incurred on behalf of Owner in the management of his property.
19. This Agreement was drafted by Contractor.
20. If the subject property is occupied at the time this Agreement is signed, Owner shall provide Contractor with the original copy of the existing lease or rental agreement, and any other contracts or commitments which Contractor shall be obligated to pay on behalf of Owner. Owner shall also transfer to Contractor all refundable tenants' deposits as indicated in the existing lease(s).
21. Owner will provide Contractor with two keys each for all locks on the property or authorize rekeying at Owner's expense.
22. Owner is hereby notified that Contractor/Broker is a signator to the Affirmative Marketing Agreement of the National Association of Realtors, which agreement prohibits discrimination in rental housing based on age, sex, race, color, creed, or place of national origin.
23. The subject property may be offered for rent furnished. If furnished, Owner should attach an inventory list of furnishings.
24. Upon expiration or cancellation of the Property Management Agreement, Contractor agrees to turnover to Owner or Owner's designee, all records and monies then in Contractor's possession. Further, Owner or Owner's representative shall have the right at all times and without prior notice during normal business hours to inspect the books and records pertaining to Owner's properties, which records are

maintained at Contractor's accounting office in Suite 2d,
1785 West Highway 89A, Sedona, Arizona.

25. Owner is entering into this Agreement in reliance upon the property management expertise and business reputation of Contractor, BLUE CHIP REALTY, INC. For this reason this Agreement is not assignable by Contractor; however, Owner can freely assign his interest herein without limitation.
26. This Agreement is subject to the provisions of the Amended Agreement with Independent Contractor for Management Services.
27. In the event of any conflict of interpretation and the above Amended Agreement . . . the terms and conditions of the Amended Agreement with Independent Contractor for Management Services shall control.

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

(date)

BLUE CHIP REALTY, INC.

(date)

About the Author

William Falcon is a criminal justice researcher, editor, and writer who specializes in the topics of white-collar crime, organized crime, and narcotics enforcement. Among his major publications are: *Police Guide on Organized Crime* (LEAA, 1971) and *Handbook on White-Collar Crime* (U. S. Chamber of Commerce, in cooperation with the National District Attorneys Association, 1974). Currently, he helps prepare standards and policy manuals for the Commission on Accreditation for Law Enforcement Agencies (CALEA) and resides in Rapidan, Virginia.