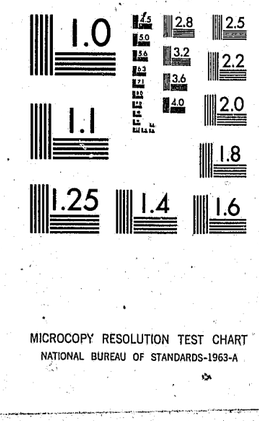
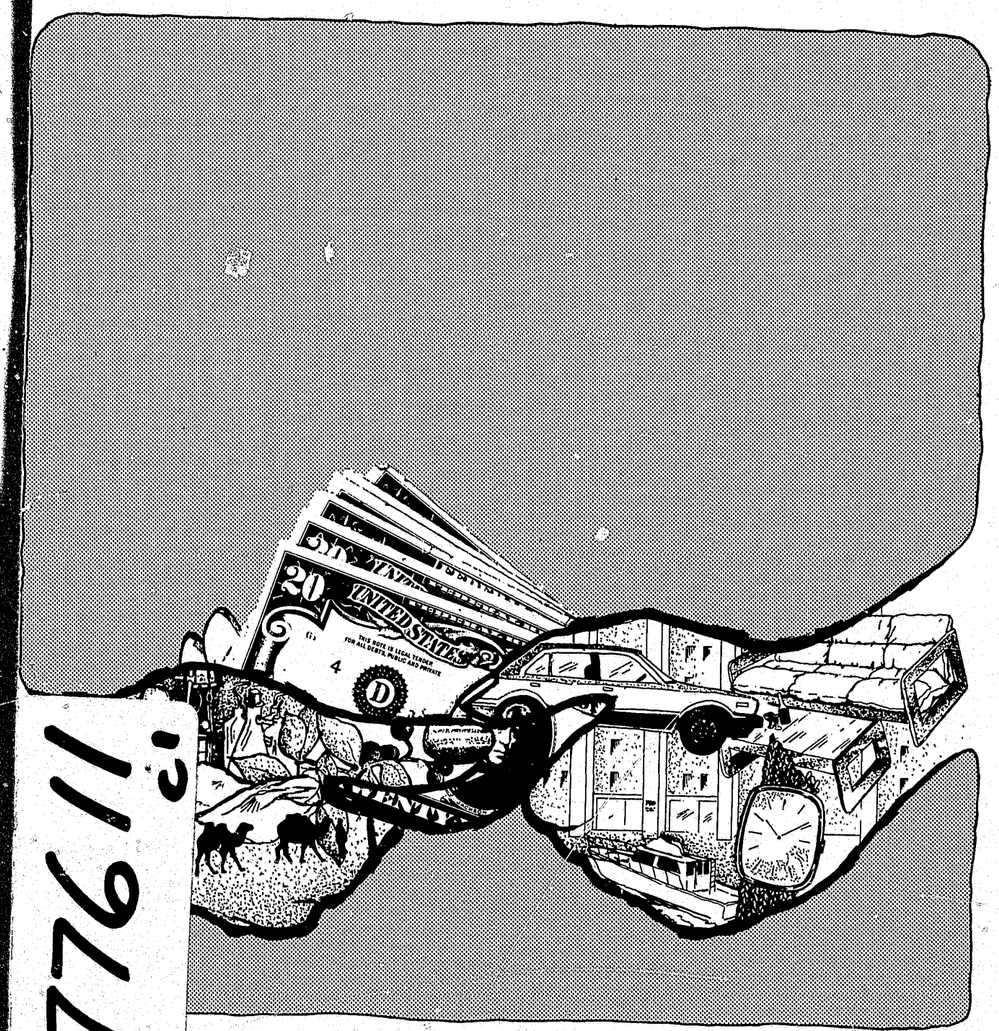


U.S. Department of Justice
Drug Enforcement Administration

Drug Agents' Guide to Forfeiture of Assets



Drug Agents' Guide to Forfeiture of Assets

First Edition

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J.P.B.

H.L.M

SUMMARY OF CONTENTS

CONTENTS

DRUG AGENTS' GUIDE

TO

FORFEITURE OF ASSETS

I. INTRODUCTION

Forfeiture is an ancient doctrine that has survived for thousands of years. It is now an established part of American law. Yet, until recently, it has played a very insignificant role in our struggle with crime. As a result, no books have been written on forfeiture law; no schools offer courses on forfeiture; and few legal experts exist in the area. Only a handful of police, lawyers and citizens are even aware of the concept.

Over the last decade, several events have occurred which are changing this picture. In 1970, Congress passed the first criminal forfeiture statutes in United States history. 18 U.S.C. 1962, 1963; 21 U.S.C. 848. Their purpose is to seize the ill-gotten gains of organized crime figures. In 1978, Congress amended the civil forfeiture sections of federal law to permit the seizure of all monies used in and all proceeds acquired from the illegal drug trade. 21 U.S.C. 881 (a)(6). This is the first United States statute to permit the civil forfeiture of the accumulated profits of criminal activity. And, in 1974, the Supreme Court of the United States reviewed the law of forfeiture and upheld it against constitutional attack.

As a result, drug agents now have a very real, a very powerful, new weapon to strike at the profits of crime. No longer will investigators be restricted to arresting traffickers and seizing drugs. The means now exist to seize the third element of every criminal organization; namely, the illegally accumulated assets of its members.

345-769 0 - 81 - 2

In addition, forfeitures produce vast amounts of revenue. Law enforcement has the potential, through forfeiture, of producing more income than it spends. With tax dollars becoming scarce, forefeiture holds the promise of improving drug enforcement while profiting the public treasury! The long-range implications are enormous.

The immediate challenge, however, is to learn the law of forfeiture and teach it to others who have a need to know. This will not be easy. It will not happen overnight. The process of educating thousands of state and federal agents, prosecutors and judges on a previously ignored area of law will be a long one. The Drug Enforcement Administration hopes this Guide will simplify, and shorten, the educational process.

A. Definition

Forfeiture is the taking by the Government of property illegally used or acquired, without compensating the owner. U.S. v. Eight (8) Rhodesian Statues, 449 F. Supp. 193 (CDCAL. 1978); Mayo v. U.S., 413 F. Supp. 160 (EDILL. 1976); Kahn v. Janowski, 60 A.2d 519 (MD. 1947).

B. History

The concept of forfeiture can be traced as far back as the Old Testament. Chapter 21 of Exodus reveals the religious beginnings of modern forfeiture law:

"28. If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."

Note how Verse 28 subjected the ox to forfeiture (to God by being stoned), without regard to the guilt or innocence of the owner. Forfeiture

NOTES

under Verse 28 did not depend on criminally convicting anyone. If an ox gored someone to death, the owner lost his rights to the ox.

Forfeitures similar to Verse 28 appeared in Roman law as early as 451 B.C.: "if a guadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall...surrender the animal that caused the injury." 7 Twelve Tables 1, translated in 1 Scott, The Civil Law, 69 (1932).

The ancient Greeks also forfeited things involved in certain wrongs. AEschines the Greek (389-314 B.C.) noted: "(W)e banish beyond our borders stocks and stones and steal, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow afar from the body." See Holmes, The Common Law 8(1881).

Even the early Brittons recognized the concept of civil forfeiture: "where a man killeth another with the sword of John at Stile, the sword shall be forefeit as deodand, and yet no default is in the owner." (from a book written in 1530 on the reign of Edward the First of England), cited in The Common Law, above at 24-26.

Readers interested in tracing the history between these ancient laws and our modern forfeiture statutes should refer to Finklestein, The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death And The Western Notion of Sovereignty, 46 Temple Law Quarterly 169 (1973). Also see pages 9 thru 11 of this Guide.

NOTES

NOTES

C. Purpose

Our ancestors created the concept of forfeiture out of a need for revenge - revenge against the offending thing, if not against its owner. Holmes, The Common Law 34 (1881). Over the centuries, the concept of revenge has gradually faded from our laws, but the traditional doctrine of forfeiture remains. Today, forfeiture is used to protect the public from harmful objects, such as adulterated foods and sawed-off shotguns, and it is used to deter crime.

The first seven chapters of this Guide are devoted to "civil" forfeiture law. The eighth discusses "criminal" forfeiture. And the ninth probes the practical problems facing agents investigating cases involving substantial drug-related assets.

NOTES

II. EVIDENCE & DEFENSES

The forfeitability of property depends upon: (1) The scope of the forfeiture statute involved; (2) the kinds of evidence useable to prove forfeiture; and (3) the existence of any defenses. These questions are so interrelated that it is difficult to discuss one, without discussing the others. Nevertheless, we must start somewhere.

Because a knowledge of the evidentiary rules and defenses is fundamental to an understanding of forfeiture, they are discussed first. This provides an overview of the law and facilitates the later use of examples to explain the forfeiture statutes.

NOTES

A. FORFEITURES ARE CIVIL ACTIONS AGAINST PROPERTY

Unless a forfeiture statute expressly requires a conviction, it is considered a civil action against property, totally independent of any criminal action against anyone.

Authorities

S.Ct: Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974).

10 Cir: U.S. v. One (1) 1975 Thunderbird, 576 F.2d 834 (1978); Bramble v. Richardson, 498 F.2d 968 (1974).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976); U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976); U.S. v. One 1967 Ford Mustang, 457 F.2d 931 (1972); U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971); U.S. v. Bride, 308 F.2d 470 (1962).

8 Cir: U.S. v. Rapp, 539 F.2d 1156 (1976); Glup v. U.S., 523 F.2d 557 (1975); Compton v. U.S., 377 F.2d 408 (1967).

6 Cir: Epps v. Bureau of Alcohol, Tobacco & Firearms, 495 F.2d 1373 (1974).

5 Cir: U.S. v. 110 Bars of Silver, 508 F.2d 799 (1975); U.S. v. One (1) 1969 Buick Riviera, 493 F.2d 553 (1974); U.S. v. Burch, 294 F.2d 1 (1961).

ALA: Reeder v. State, 314 So.2d 853 (1975).

CAL: People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (1951).

DC: $1,407 v. District of Columbia, 242 A. 2d 217 (App. 1968).

FLA: Knight v State, 336 So.2d 385 (App. 1976).

ILL: People v. Snyder, 52 Ill.App.3d 612 (1977); People v. One 1968 Cadillac Auto, 281 N.E.2d 776 (App. 1972).

IOWA: McReynolds v. Municipal Court of City of Ottumwa, 207 N.W.2d 792 (1973).

NOTES

MD: State v. Greer, 284 A.2d 233 (App. 1971); Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

MASS: Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (App. 1978).

MICH: People v. One 1973 Pontiac Auto, 269 N.W. 2d 537 (App. 1978).

NJ: State v. One (1) Ford Van, 381 A.2d 387 (App. 1977); Kutner Buick, Inc. v. Strelecki, 267 A.2d 549 (Superior 1970).

NM: State v. Ozarek, 573 P.2d 209 (1978).

OHIO: Sensenbrenner v. Crosby, 306 N.E.2d 413 (1974).

PA: Com. v. Landy, 362 A.2d 999 (1976).

SC: State v. Petty, 241 S.E.2d 561 (1978).

SD: State v. One 1966 Pontiac Auto, 270 N.W. 2d 362 (1978).

TENN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

TEX: McKee v. State, 318 S.W.2d 113 (App. 1958).

VA: Com. v. One 1970, 2 Dr. H.T. Linc., 186 S.E.2d 279 (1972).

DISCUSSION

To understand this principle it is helpful to distinguish between legal proceedings in personam and legal proceedings in rem. It is also helpful to distinguish between criminal proceedings and civil proceedings.

1. In Personam v. In Rem

In personam refers to any legal proceeding directed against an individual, that will determine his personal obligations, rights, duties or liabilities.

In rem refers to any legal proceeding directed solely against property, that will determine the ownership of that property.

The differences between these two types of proceedings are very significant:

a. The defendant in an in personam proceeding is a person; the defendant in an in rem proceeding is an object, or property.

b. In personam proceedings may impose personal obligations or liabilities upon the parties to the action; in rem proceedings are limited to determining ownership of property and cannot impose personal obligations on anyone. Freedman v. Alderson, 7 S.Ct. 165 (1886).

c. In personam decisions affect only the parties to the proceedings; in rem decisions affect "the whole world" - including unknown claimants. Van Oster v. Kansas, 47 S.Ct. 133 (1926); Gelston v. Hoyt, 3 Wheat. 247 (1818).

d. The power of a court to issue in personam decisions depends upon its ability to get personal jurisdiction over the parties; the power of a court to issue in rem decisions does not depend upon having jurisdiction over anyone. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878).

In short, in personam and in rem proceedings are distinct legal actions, totally independent of one another. Readers interested in a more detailed analysis of in rem actions should see Fraser, Actions In Rem, 34 Cornell Law Quarterly 29-49 (1948). And see Shaffer v. Heitner, 97 S. Ct. 2569 (1977).

2. Civil v. Criminal

Law is broadly divided into two categories: civil and criminal. The rules of evidence, the rules of procedure, the standards of proof, and the available defenses differ with each category.

Generally, the purposes of civil law are to determine private rights, and to compensate for harm. The purpose of criminal law, on the other hand, is to punish wrongdoers. But this division, although useful, has never been perfect. Punishment can be, and often has been, imposed in civil proceedings. For example, if you deliberately harm someone he can sue you in a civil action for his losses (compensation). He can also demand "punative damages" or "smart money." Punative damages are a civil "fine" intended to punish deliberately harmful conduct. Prosser, Law of Torts, 4th ed. (1971).

Many statutes are "penal" in nature even though they are civil in form. The federal Controlled Substances Act, for example, contains a $25,000 civil penalty for violations of the law by doctors, pharmacies, drug companies and other drug registrants (21 U.S.C. 842). For an excellent discussion of so-called "civil" punishment, see Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minnesota Law Review 379-500 (1976).

Forfeiture of otherwise legitimate property is a punishment that can be imposed in either civil or criminal actions.

3. Criminal Forfeiture

In ancient times, in England, the property of a convicted felon was forfeited to the King as a form of criminal fine. The proceedings to establish the forfeiture were in personam (against the felon) and their success depended upon proving the felon was criminally convicted. See Calero-Toledo v. Pearson

Yacht Leasing Co., 94 S.Ct. 2080 at 2091 (1974).

In 1790, the first Congress of the United States prohibited these "criminal" forfeitures. (1 Stat. 117, c.9, Sec. 24, now 18 U.S.C. 3563). As a result, criminal forfeitures were unheard of in the United States for 180 years. In 1970, Congress resurrected the concept by inserting criminal forfeiture provisions in two federal statutes: 1) The Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1963); and 2) The Controlled Substances Act, Continuing Criminal Enterprise Offense (21 U.S.C. 848).

Like their ancient predecessors, these two criminal forfeiture provisions are in personam actions against a criminal defendant, and are absolutely dependent upon convicting the defendant of the substantive offense.

4. Civil Forfeiture

There was a second form of forfeiture recognized in old England. It was an in rem proceeding against property which had been involved in some wrong. The proceedings were totally independent of any criminal action taken against the owner. The Palmyra, 12 Wheat. 1, 6 L.Ed. 531 (1827).

All forfeiture statutes were presumed to be civil, in rem proceedings, unless they expressly required a criminal conviction as a condition to forfeiture. In Re Various Items of Personal Property, 51 S.Ct. 282 (1931).

The American Colonies adopted these civil, in rem forfeitures and began applying them to contraband imports and to ships transporting contraband. C.J. Henry Co. v. Moore, 63 S.Ct. 499, 503 (1943); Surrency, The Courts in the American Colonies, 11 Am. Jour. Legal History 253, 261 (1967).

The first Congress of the United States passed civil, in rem forfeitures on pirate ships, ships violating the customs laws, and slave ships. See Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080, at 2092-2093 (1974).

For more than 200 years, Congress has continued to pass civil, in rem, forfeiture statutes on a wide range of property:

8 U.S.C. 1324, Conveyances Transporting "Wetbacks"

15 U.S.C. 257e, Certain Hampers & Baskets

15 U.S.C. 1265, Certain Hazardous Substances

18 U.S.C. 492, Counterfeiting Paraphernalia

18 U.S.C. 1465, Obscene Materials

18 U.S.C. 1952, 1953, Wagering Paraphernalia

18 U.S.C. 2512, Wiretapping Paraphernalia

18 U.S.C. 3612, Bribe Money

19 U.S.C. 1305, Obscene Matter

19 U.S.C. 1497, Undeclared Imports

19 U.S.C. 1591a, Things Illegally Brought into the Country

19 U.S.C. 1595, Conveyances for Illegal Imports

21 U.S.C. 334, Adulterated Food & Drugs

21 U.S.C. 881, Illicit Drugs & Related Items

22 U.S.C. 401, War Materials

26 U.S.C. 5607-5671, Moonshine Paraphernalia

26 U.S.C. 5685, Firearms & Destructive Devices

26 U.S.C. 5763, Illicit Tobacco Paraphernalia

26 U.S.C. 7301-7303, Property Violating the Revenue Laws

31 U.S.C. 1102, Currency Illegally Exported or Imported

33 U.S.C. 384, 385, Pirate Vessels

NOTES

46 U.S.C. 325, Vessels Violating Their Licenses

49 U.S.C. 782, Conveyances Transporting Contraband

Because these forfeitures have the effect, if not the purpose, of punishing owners, they have been referred to as "quasi-criminal" in character. Boyd v. U.S., 6 S.Ct. 524 (1886); One 1958 Plymouth Sedan v. Com of Penn., 85 S.Ct. 1246 (1965); U.S. v. $5,372.85 In Coin & Currency, 91 S.Ct. 1041 (1971); Commonwealth v. Landy, 362 A.2d 999 (PA. 1976). As we shall see, this characterization is relevant only to the application of the "Exclusionary Rule" to forfeitures.

For all other purposes, civil, in rem forfeitures are considered independent civil proceedings. In Re Various Items of Personal Property, 51 S.Ct. 282 (1931).

NOTES

B. PROBABLE CAUSE IS ENOUGH TO BEGIN A CIVIL FORFEITURE

A preliminary showing of "probable cause" to believe property was used illegally is all that is needed to start a forfeiture action. Proof beyond a reasonable doubt is not required. A prima facie case is not required. The same probable cause standard used to arrest, search or seize is enough to begin a forfeiture.

Authorities

19 U.S.C. 1615
S.Ct: One Lot of Emerald Cut Stones v. U.S., 93 S.Ct. 489 (1972); Brinegar v. U.S., 69 S.Ct. 1302 (1949); Locke v. U.S., 7 Cranch (US) 339, 3 L.Ed 364 (1813).

10 Cir: U.S. v. One (1) 1975 Thunderbird, 576 F.2d 834 (1978); Bramble v. Richardson, 498 F.2d 968 (1974); U.S. v. One 1950 Chevrolet, 215 F.2d 482 (1954).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (1976); U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976); U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: U.S. v. Milham, 590 F.2d 717 (1979); U.S. v. Rapp, 539 F.2d 1156 (1976); U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974); Compton v. U.S., 377 F.2d 408 (1967); U.S. v. One 1961 Lincoln Continental, 360 F.2d 467 (1966); Ted's Motors v. U.S., 217 F.2d 777 (1954).

7 Cir: U.S. v. One 1957 Lincoln Premiere, 265 F.2d 734 (1959); U.S. v. One 1949 Pontiac Sedan, 194 F.2d 756 (1952).

6 Cir: U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978); U.S. v. One 1965 Buick, 392 F.2d 672 (1968); Colonial Finance Co. v. U.S., 210 F.2d 531 (1954).

5 Cir: U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); U.S. v. One 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (1974); U.S. v. One (1) 1971 Chevrolet Corvette, 496 F.2d 210 (1974); Bush v. U.S., 389

NOTES

F.2d 485 (1968); Rubin v. U.S., 289 F. 2d 195 (1961); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); W.E. Dean & Co. v. U.S., 171 F.2d 468 (1948).

3 Cir: U.S. v. One 1964 Ford T-Bird, 445 F.2d 1064 (1971); U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).

2 Cir: Commercial Credit Corp. v. U.S., 58 F.2d 195 (1932); And see U.S. v. One 1974 Cadillac Eldorado, 575 F.2d 344 (1978).

1 Cir: U.S. v. Davidson, 50 F.2d 517 (1931); U.S. v. Blackwood, 47 F.2d 849 (1931).

DC: $1,407.00 v. District of Columbia, 242 A.2d 217 (App. 1968).

ILL: People v. One 1965 Oldsmobile, 284 N.E. 2d 646 (1972).

MD: Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

NJ: State v. McCoy, 367 A.2d 1176 (1976).

PA: Com. v. Landy, 362 A.2d 999 (1976).

SC: State v. Petty, 241 S.E.2d 561 (1978).

TENN: Lettner v. Plummer, 559 S.W.2d 785 (1977).

NOTES

DISCUSSION

In a criminal case, the government must prove the defendant's guilt "beyond a reasonable doubt." In certain exceptional non-criminal cases, a party must prove his cause by "clear, strong and convincing evidence." In the vast majority of civil actions, a party can prove his case by a simple "preponderance of evidence." These three standards of proof are merely legal terms for "almost certainly true," "highly probably true," and simply "probably true." McCormick, Handbook of the Law of Evidence, Sec. 339 (1972); McBaine, Burden of Proof: Degrees of Belief, 32 Calif.L.Rev. 242 (1944).

Proof Beyond A Reasonable Doubt	=	Almost Certainly True
Clear-Convincing Evidence	=	Highly Probably True
PREPONDERANCE OF EVIDENCE	=	PROBABLY TRUE

With the exceptions of the States of Texas and Oklahoma (Amrani-Khaldi v. State, 575 S.W.2d 667, Tex.App. 1978; 63 OKLA.STAT. Sec.2-506G), all federal courts and virtually all state courts use the "preponderance of evidence," or "probably true," test in civil forfeiture proceedings. The government has the initial burden of showing "probable cause" to believe the property is forfeitable. If this showing is contested, the court or jury is left to determine which side's evidence is more convincing, or more "probable." Nothing more is required. Neither "proof beyond a reasonable doubt," nor "clear and convincing evidence" is required to prove a civil forfeiture.

This "probable cause" standard of proof in civil forfeiture cases was adopted by the federal government as far back as 1790 when the first Customs Laws were written (1 Stat. 678). It remains unchanged in existing federal forfeiture statutes (19 U.S.C. 1615).

What is "probable cause?" The heart of all definitions of probable cause is "a reasonable ground for belief of guilt." It exists where:

> "...the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (3 Cir. 1956) (citing Brinegar v. U.S.).

The tests for determining probable cause are the same for arrests, searches, and seizures. See DEA's Drug Agents' Guide to Search and Seizure pages 33-51 (1978), for a detailed discussion of these rules.

Although governments need only show probable cause, they dare not show less. Seizing or keeping property without probable cause is unconstitutional. All seizures of private property must be based upon probable cause to believe that it is forfeitable, or that it is needed as evidence. U.S. v. Premises Known as 608 Taylor Ave., 584 F. 2d 1297 (3 Cir. 1978); McClendon v. Rosetti, 460 F.2d 111 (2 Cir. 1972); Fell v. Armour, 355 F. Supp. 1319 (MD TENN. 1972).

EXAMPLES

1. You telephone a drug dealer at his city home and ask him to sell you heroin. After agreeing on an amount and a price, he asks you to meet him at a bar just outside the city where the transaction will take place. You drive to the bar, enter and order a drink. Within twenty minutes, he enters the bar, and the two of you walk to the mens' room to make the exchange. Afterward, you place him under arrest for distribution of heroin. His car is parked outside in the bar's parking lot. Transportation of drugs for the purpose of sale subjects a conveyance to forfeiture under both state and federal law. Is his car seizable for forfeiture?

   Yes. Probable cause to believe the car transported the heroin is enough to seize it for forfeiture. To show probable cause, you need only show facts and circumstances which make it "probably true" that the dealer used his car to transport the heroin to the bar. You need not show it is "highly probably true" (clear and convincing evidence), nor "almost certainly true" (proof beyond a reasonable doubt). Here, you have no direct evidence to show the car transported drugs: no one saw heroin in the car, and no one saw the car driven to the bar. But the circumstantial evidence is very strong. How else could the dealer have gotten to the bar? If he had some other means of transportation, why would his car be parked outside? Most reasonable people would conclude it is at least "probably true" that he used the car to transport the heroin. Therefore, it is seizable for forfeiture. See U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (3 Cir. 1956); U.S. v. One 1949 Pontiac Sedan, 194 F.2d 756 (7 Cir. 1952); and U.S. v. One 1975 Linc. Cont., 72 F.R.D. 535 (SDNY.1976).

2. On two occasions you meet with W, at a bar in Minneapolis, Minnesota, where he sells you small amounts of heroin. At the third meeting, W asks you to drive him to a local motel. He explains that his longtime source of drugs is a man from Wisconsin. His source has just been indicted in Wisconsin so he's fled to Minnesota and is living at the motel. Once at the motel, W asks you to wait in the car. Other officers follow W as he enters the motel and goes to M's room. When W leaves the room, he walks directly back to your car and gives you the heroin. You drive W away from the motel and place him under arrest. You obtain a warrant to search M's room. While executing the warrant you find a large amount of money (some of which is government funds), a large amount of heroin, and a sophisticated torsion balance used for measuring drugs. You arrest M. The motel manager informs you that M has a van with Wisconsin tags parked at the motel. Is the van forfeitable?

   Yes. Probable cause to believe M's van transported the heroin is enough to seize it for forfeiture. Although you have no direct evidence to show M transported drugs in his van, there is enough circumstantial evidence to conclude it is "probably true." Clearly, M is an out-of-state drug supplier who is conducting drug sales out of his motel room. Common sense would lead most reasonable people to

345-769 O - 81 - 4

NOTES

believe that M used his van to bring the drugs from Wisconsin. The van is seizable for forfeiture. See U.S. v. Milham, 590 F.2d 717 (8 Cir. 1979).

3. You meet with F at his home. He agrees to sell you heroin which he claims to have in his immediate possession. He does not show it to you. Instead, he says the deal cannot take place in his home. He insists you follow him to an apartment across town where the transaction will take place. You agree. Following F's instructions, you drive him to an alley behind a low rent apartment complex. He asks you to accompany him inside to make the deal. You refuse. You demand the sale take place in the alley. F goes into the apartment for several minutes. As he returns, a pink Cadillac suddenly pulls into the alley. F's wife and young children are in the Cadillac. F walks over and leans into the open window of the Cadillac and talks to his family. At one point, he reaches his hand into the car. Finally, F comes back to you, reaches into his pants pocket and gives you the heroin. You place him under arrest. Is the pink Cadillac seizable for forfeiture?

No. You need probable cause to believe the heroin came from the Cadillac before you can seize it for forfeiture. The facts show three possible sources of the drug: (1) F could have obtained it at his home and had it in his possession the entire time; (2) F could have picked up the heroin from the apartment while he was alone inside; and (3) F could have obtained the heroin from the Cadillac when he reached into the car's window. Of these three possibilities, the first seems most likely. F stated at the start that he had the drugs on him but wanted to make the exchange away from his home. When you arrived at the apartment, he asked you inside to complete the sale. Why would he ask you inside if he didn't have the drugs? And, it seems unlikely a drug dealer would unnecessarily involve his young children in a drug transaction. To a reasonable mind, the evidence points to F having possession of the heroin before the Cadillac arrived. It is not "probably true" that the drugs came in the car. Therefore, the Cadillac cannot be seized for forfeiture. See U.S. v. One 1974 Cadillac Eldorado, 575 F.2d 344 (2 Cir. 1978).

NOTES

4. You have a warrant to arrest S. He is a local banker who has been indicted as a financier of a large drug ring. You locate S driving his Rolls Royce. You arrest him and impound his car for safekeeping. No contraband is found on S, nor in his car. Within a few days, S's lawyer calls you and asks to make arrangements for return of the Rolls Royce. Angrily, you tell him the car will not be returned because it is possible evidence and might also be forfeitable. Several days later, S's lawyer comes to your office with a release signed by the prosecutor, certifying that the car is not needed as evidence and that the prosecutor's office does not object to its return. The lawyer also presents evidence that S is the true owner of the car and that the lawyer is authorized to take possession. Although you suspect that S might have bought the car with illegal profits, you have absolutely no evidence to prove it. Probable cause for forfeiture clearly does not exist. Must you return the car? Can you be sued if you refuse?

Yes, to both questions. Seizing or keeping property without probable cause is unconstitutional. All seizures of private property must be based upon probable cause to believe it is forfeitable, or that it is evidence of a crime. Here the car is not evidence. And there is no showing of probable cause to forfeit. Although you legally took temporary custody of the car for safekeeping, you must now return it. Refusal to return it is unlawful. See McClendon v. Rosetti, 460 F.2d 111 (2 Cir. 1972).

NOTES

C. HEARSAY IS ADMISSIBLE TO ESTABLISH PROBABLE CAUSE

Hearsay evidence is admissible in a forfeiture proceeding to the same extent that is is admissible in any other "probable cause" hearing. It includes admissions of owners, declarations of persons in control of the property, statements of co-conspirators, and even tips from confidential informants.

Authorities

S.Ct: Dobbins Distillery v. U.S., 96 U.S. 395 (1878); and see U.S. v. Harris, 91 S.Ct. 2075 (1971).

10 Cir: Interstate Securities Co. v. U.S., 151 F.2d 224 (1945).

9 Cir: Ivers v. U.S., 581 F.2d 1362 (1978); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (1976); D'Agostino v. U.S., 261 F.2d 154 (1958).

8 Cir: U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974); Ted's Motors v. U.S., 217 F.2d 777 (1954).

6 Cir: U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978).

5 Cir: Bush v. U.S., 389 F.2d 485 (1968); Turner v. Camp, 123 F.2d 840 (1941).

2 Cir: Commercial Credit Corporation v. U.S., 58 F.2d 195 (1932).

ALA: (CONTRA) Reeder v. State, 314 So.2d 853 (1975).

CAL: People v. One 1948 Chevrolet Convertible, 290 P.2d 538 (1955).

ILL: People v. Macias, 234 N.G.2d 783 (1968).

NM: In Re One 1967 Peterbilt Tractor, 506 P. 2d 1199 (1973).

PA: (CONTRA) Com. v. Landy, 362 A.2d 999(1976)

TENN: Lettner v. Plummer, 559 S.W.2d 785 (1977).

DISCUSSION

Put simply, "hearsay" is generally something a witness has heard from a source outside of court, which he repeats in court in an effort to prove the truth of what the source said. Rule 801 of the Federal Rules of Evidence (28 U.S.C.) defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The danger of admitting hearsay into evidence is that it frequently is untrustworthy: (1) The true source of the information was probably not under oath when he spoke; (2) the judge and jury cannot evaluate his truthfulness by watching and listening to him speak; and (3) the source is not available in court to be cross-examined about what he said. For these reasons, courts have traditionally prohibited hearsay, except when it is needed and the circumstances provide some assurance it is trustworthy.

The Federal Rules of Evidence follow this approach. Rule 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Probable cause to seize for forfeiture, like probable cause to search and arrest, is frequently based upon hearsay, such as:

1. Admissions of owners,
2. Declarations of persons in control of seized property,
3. Statements of co-conspirators, and
4. Tips from confidential informants.

Sometimes this hearsay is trustworthy enough by itself to establish probable cause; but usually it must be combined with other information to meet the probable cause standard. Aguillar v. Texas, 84 S.Ct. 1509 (1964); Spinelli v. U.S., 89 S.Ct. 584 (1969); Draper v. U.S., 79 S.Ct. 329 (1959). Too often, no one piece of information creates probable cause. Only by adding everything together, including hearsay, is probable cause established.

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Chief Justice Warren Burger recognized this in Smith v. U.S.:

> Probable cause is the sum total of layers of information and synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers, but the laminated total. 358 F.2d 833 (D.C. Cir. 1966).

If, as we have already discussed, probable cause is all that need be shown to begin a civil forfeiture, and if hearsay is often an inseparable part of that probable cause, then hearsay evidence must be admissible to establish probable cause for forfeiture. Unfortunately, this logical conclusion seems to conflict with the general rule against admitting hearsay in judicial proceedings. Can this conflict be resolved?

There is no conflict if the hearsay fits within one of the traditionally recognized exceptions to the hearsay rules. A listing of these exceptions can be found in Rules 801, 803 and 804 of the Federal Rules of Evidence. A detailed discussion of the application of the hearsay rules to drug law enforcement can be found in DEA's Drug Agents' Guide to the Law of Evidence (1981). For example, if the hearsay consists of "admissions" made by an owner or person in control of seized property, there is no conflict. Admissions by party opponents or their agents have always been an exception to the hearsay rules. F.R.Ev. 801(d)(2). Admissions by owners, drivers, leasees, bailees, and so forth, are admissible in civil forfeiture proceedings to establish probable cause. See Dobbins Distillery, Interstate Securities Co., Ivers, One 1972 Toyota Mark II, Ted's Motors, Turner v. Camp, and Commercial Credit Corp. cited above. Also see 55 ALR 2d 1272 (1955).

Similarly, if the hearsay consists of statements by a co-conspirator made during the course, and in the furtherance, of a criminal conspiracy involving the seized property, there is no conflict. Statements of co-conspirators are another well-recognized exception to the hearsay rules. F.R. Ev. 801 (d)(2); U.S. v. One 1975 Ford Ranger XLT, 463 F. Supp. 1389 (EDPA 1979); U.S. v. One 1975 Linc. Cont., 72 F.R.D. 535 (SDNY 1976).

NOTES

The real conflict arises when the hearsay used to establish probable cause to seize for forfeiture does not fit any recognized exception to the hearsay rules. Hearsay from a previously reliable source can establish probable cause. McCray v. Illinois, 87 S.Ct. 1056 (1967). Yet this form of hearsay is not a recognized exception to the hearsay rules of evidence. Hearsay from so-called "good-citizen-informants" can be used to establish probable cause. Edmondson v. F.B.I., 402 F.2d 809 (10 Cir. 1968); U.S. v. McCrea, 583 F.2d 1083 (9 Cir. 1978); U.S. v. Swihart, 554 F.2d 264 (6 Cir. 1977); U.S. v. Robertson, 560 F.2d 647 (5 Cir. 1977). But again, the traditional evidence rules contain no exception for confidential good-citizen informants. The list goes on.

It seems logical to resolve this conflict by admitting hearsay to establish probable cause for forfeiture. As already noted, the Federal Rules of Evidence exclude hearsay evidence "...except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." (F.R.Ev. 802, underlines added). By Act of Congress, the governments' initial burden of proof in a civil forfeiture action is simply to show "probable cause." 19 U.S.C. 1615. Nothing in this statute, nor in its one-hundred ninety year history, indicates that "probable cause" in a forfeiture proceeding is meant to be a unique term of art. The presumption is that when Congress used the term it attributed to it its ordinary and accepted meaning. 2-A Southerland, Statutory Construction, Sec. 45.08 (4th ed. 1973). Probable cause in a civil forfeiture proceeding is the same probable cause standard used to conduct all arrests, searches and seizures. To the extent probable cause can be based upon hearsay, that hearsay must be admissible, by Act of Congress, in a civil forfeiture action. U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (6 Cir. 1978); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (9 Cir. 1976); Ted's Motor's v. U.S., 217 F.2d 777 (8 Cir. 1954).

The Evidence Rules do not exist in a vacuum; they must be read in the light of the statutory standard of proof in civil forfeiture proceedings.

Beyond this legal analysis, there are sound reasons for permitting hearsay in civil forfeiture actions. First, one of the purposes behind the

NOTES

hearsay rules is to preserve a defendant's right to confront and cross-examine the source of evidence against him. In criminal cases, this right of confrontation is guaranteed by the Sixth Amendment to the United States Constitution. The Supreme Court has held that this right does not apply to civil forfeiture actions. U.S. v. Zucker, 16 S.Ct. 641 (1896).

Second, the hearsay rules were developed to exclude only untrustworthy hearsay. The rules governing the use of hearsay to establish probable cause already insure that hearsay, either alone or with sufficient corroboration, meets constitutional standards of trustworthiness.

Therefore, the spirit of the hearsay rules is not offended by admitting hearsay in a civil forfeiture action.

EXAMPLES

5. You purchase drugs from B and P at a local motel, and immediately place them under arrest and advise them of their Miranda rights. B tells you that he has a car parked outside. He says he loaned the car to P to go from the motel and return with the drugs. You ask him if the car now contains any drugs. He says no. No one saw the car leaving or returning to the motel. P tells you the same story. Will these statements be admissible in a civil forfeiture action to establish probable cause?

   Yes. Your testimony of what B and P have said will be hearsay, because you will repeat it in court to prove they transported drugs in the car for the purpose of sale. Although hearsay is generally excluded from judicial proceedings, it is admissible to establish probable cause in a civil forfeiture action - particularly if it consists of admissions by the owner or person in control of the property. See Ted's Motors v. U.S., cited above.

6. You receive a phone call from a United States Consul in Mexico. He explains that a Mexican official, with whom he has a close working relationship and who has repeatedly proven to be reliable in prior dealings with the Consul, reported seeing an airplane, registration number N9826Z, land on a semideserted road, take on a large number of bulky packages and then take off in the direction of the U.S. border. Armed men, the official said, blockaded the road until the plane could accept its cargo and depart. You check the registration number and determine the plane belongs to Mr. P. In your experience, a plane like P's can hold a cargo of 1400 to 1500 pounds. One of your fellow agents tells you that one of his informants, who has been proven to be repeatedly reliable in the past, has seen P several times within the last month with large quantities of marihuana and money, and that P claimed to the informant that he fetched marihuana once a week from Mexico. You obtain a search warrant for P's ranch and find 1394 pounds of marihuana packaged in red and green butcher paper of the type that is normally found on marihuana coming from Mexico. You also find some Mexican currency. You do not find's P's plane. If you locate P's plane, is it subject to forfeiture?

   Yes. The most devastating evidence that P's plane smuggled marihuana is the hearsay statement of the Mexican official. Because this official has been shown to be previously reliable and because his statement is based upon his personal observations, it can be considered trustworthy hearsay for the purpose of establishing probable cause. See Aguillar v. Texas and Spinelli v. U.S., cited above. The hearsay of the second informant also meets constitutional standards of trustworthiness. Hearsay is admissible to establish probable cause in a civil forfeiture proceeding. This hearsay, together with the discovery of marihuana at P's ranch, clearly shows it is at least "probably true" that P's plane smuggled marihuana from Mexico. Therefore, there is probable cause to forfeit the plane. See U.S. v. One Twin Engine Beech Airplane, cited above.

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NOTES

D. THE EXCLUSIONARY RULE APPLIES TO CIVIL FORFEITURES

Evidence obtained in violation of the Fourth Amendment right against unreasonable searches and seizures, or the Fifth Amendment right against self-incrimination, is not admissible to establish probable cause for forfeiture.

Authorities

S.Ct: U.S. v. $5,372.85 In U.S. Coin & Currency, 91 S.Ct. 1041 (1971); One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 85 S.Ct. 1246 (1965); Boyd v. U.S., 6 S.Ct. 524 (1886).

9 Cir: U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976).

8 Cir: U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (1972).

2 Cir: U.S. v. Physic, 175 F.2d 338 (1949).

DC Cir: see One 1960 Oldsmobile Convertible Coupe v. U.S., 371 F.2d 958 (1966).

ARIZ: Matter of One 1974 Mercedes-Benz, 592 P.2d 383 (App. 1979); Matter of One 1969 Chev. 2-Door, 591 P.2d 1309 (App. 1979).

ARK: Little Rock P.D. v. One 1977 Linc. Cont., 580 S.W.2d 451 (1979).

CAL: People v. Reulman, 396 P.2d 706 (1964).

FLA: In Re 1972 Porsche 2-Dr., 307 So.2d 451 (App. 1975).

ILL: People v. One 1968 Cadillac Auto, 281 N.E.2d 776 (App. 1972).

NEV: One 1970 Chevrolet Motor Vehicle v. County of Nye, 518 P.2d 38 (1974).

NM: In Re One 1967 Peterbilt Tractor, 506 P.2d 1199 (1973).

NY: People v. One 1965 Fiat Convertible, 326 N.Y.S.2d 833 (1971).

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DISCUSSION

The so-called "Exclusionary Rule" prohibits the Government in a criminal proceeding from using evidence obtained in violation of the Fourth Amendment right against unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination. The rule is meant to deter unlawful conduct:

> "...the police must obey the law while enforcing the law;...in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. N. Y., 79 S.Ct. 1202 (1959).

Subject to a few exceptions, the Exclusionary Rule applies to both state and federal criminal proceedings. Weeks v. U.S., 34 S.Ct. 341 (1914); Mapp v. Ohio, 81 S.Ct. 1684 (1961). The rule has a limited application in civil cases. U.S. v. Janis, 96 S.Ct. 3021 (1976).

Although forfeiture actions are generally civil in form, they are "quasi-criminal" in nature. Their purpose is to impose a punishment for the illegal use of property. Therefore, the courts have held that the Exclusionary Rule applies to civil forfeiture actions. Evidence obtained in violation of Fourth and Fifth Amendment rights cannot be relied upon to prove a forfeiture.

A prior determination in a related criminal proceeding as to the admissibility of evidence under the Exclusionary Rule is binding in a civil forfeiture action. It cannot be contested a second time in forfeiture proceedings. Matter of One 1974 Mercedes Benz, 592 P.2d 383 (Ariz. App. 1979).

If no prior determination has been made, an owner can (and should) move to suppress illegally obtained evidence in the forfeiture action. An owner who neglects to contest the admissibility of illegally obtained evidence at the trial court level cannot raise the matter for the first time during an appeal. U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (8 Cir. 1972); One 1970 Chevrolet Motor Vehicle v. County of Nye, 518 P.2d 38 (Nev. 1974).

NOTES

EXAMPLES

7. An anonymous caller tells you that a 1972 black on blue GMC "Blazer-type" vehicle is carrying marihuana from El Centro to Los Angeles, California. You set up a surveillance on the main connecting road and see a vehicle fitting this description. You search it and find a large amount of drugs inside. In criminal proceedings against the driver, the courts rule you lacked probable cause to make the search and they suppress all evidence as to what was found. See U.S. v. Larkin, 510 F.2d 13 (9 Cir. 1974). Is the vehicle subject to civil forfeiture?

   No. The Exclusionary Rule applies to civil forfeitures and the determination in the criminal suppression hearing is binding in a later forfeiture action. Since the information leading up to the search does not amount to probable cause, and the fruits of the search are not admissible, you cannot show probable cause to forfeit the vehicle. See One 1958 Plymouth Sedan v. Comm. of Pennsylvania, 85 S.Ct. 1246 (1965).

NOTES

E. ONCE PROBABLE CAUSE IS SHOWN, OWNERS MUST STEP FORWARD AND DEFEND THE PROPERTY

A showing of probable cause is enough to declare property forfeited, unless owners come forward and prove, by a preponderance of evidence, that:

1. The property was neither used, nor intended to be used, illegally; or

2. The property fits into an express statutory exception, such as a common carrier or stolen conveyance.

In other words, once probable cause is shown, the burden of proof shifts to the party claiming the property.

Authorities

19 U.S.C. 1615; 21 U.S.C. 885; U.C.S.A.506(a)

Refer to cases cited above under "Probable Cause Is Enough to Begin a Forfeiture." Also See:

ARIZ: Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (App. 1978).

DEL: State v. One 1968 Buick Electra, 301 A.2d 297 (Superior Ct. 1973).

IOWA: State v. One (1) Certain 1969 Ford Van, 191 N.W.2d 662 (1971).

LA: In Re One 1971 Dodge Charger Auto, 291 So.2d 872 (App. 1974).

MO: State v. Kemp, 574 S.W.2d 695 (App. 1978).

NJ: State v. One (1) Ford Van, 363 A.2d 928 (App. 1976); State v. One 1977 Dodge Van, 397 A.2d 733 (County Ct. 1979).

NM: State v. Ozarek, 573 P.2d 209 (1978).

NC: State v. Richardson, 208 S.E.2d 274 App. 1974).

DISCUSSION

Federally, the rules governing the burden of proof in a civil forfeiture action are "written in stone." Since 1799, federal statutes have placed the burden on owners to show their property is not forfeitable, once the Government has shown probable cause for the seizure. See Rubin v. U.S., 289 F.2d 195, 200 (5 Cir. 1961). The current federal statute relating to virtually all civil forfeitures is 19 U.S.C. 1615:

> "In all suits or actions brought for forfeiture...where the property is claimed by any person, the burden of proof shall lie upon such claimant... Provided, that probable cause shall be first shown for the institution of such suit or action...."

The forfeiture sections of the Controlled Substances Act (21 U.S.C. 881(d)) and the Contraband Seizure Act (49 U.S.C. 784) incorporate this standard by reference. In addition, several sections of the Controlled Substances Act expressly repeat that the burden of proof is on an owner to defend his property. See Sections 881(a)(4)(B), 881(a)(6) and 885(a)(1).

Faced with a showing of probable cause, federal courts must enter a judgment of forfeiture against the property if the owner fails to appear (F.R.Civ.P., 28 U.S.C., Rule 55, Default Judgment), or fails to offer proof that the property is innocent (F.R.Civ.P., 28 U.S.C., Rule 56, Summary Judgment). See U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (6 Cir. 1978).

Although placing the burden of proof on an owner after a simple showing of probable cause may seem harsh, it is not unconstitutional. U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (9 Cir. 1976).

The burden of proof in state civil forfeiture actions is basically the same, particularly in states which have enacted the Uniform Controlled Substances Act, Sections 505 and 506.

EXAMPLES

8. You arrest Mr. S on charges of distributing heroin. At the time of arrest, he is alone, driving his new $24,000 Porsche. During a lawful search incident to arrest, several tablets of methamphetamine are found on the floor of his car just under his seat. Transportation of illegally acquired drugs for any purpose, in any amount, subjects a conveyance to federal forfeiture. 21 U.S.C. 881(a)(4). You seize the car. S fails to appear in the civil forfeiture proceedings. Is his Porsche forfeitable?

   Yes. Possession of a controlled substance, such as methamphetamine, without a valid prescription is illegal under both state (U.C.S.A. 401c) and federal (21 U.S.C. 844) law. S is the owner and sole occupant of the car, and the pills were within his reach. Legally, S is presumed to be in possession of the pills. See DEA's Drug Agents' Guide to Offenses and Penalties Under the Controlled Substances Act, (1979), for a detailed discussion of "presumptions" in drug cases. In addition, it seems probable that S has no valid prescription for the pills. They were not in a prescription bottle, and their location on the floor under his seat is highly suspicious. It seems "probably true" that S illegally possessed and transported methamphetamine in his Porsche. Once probable cause is shown for forfeiture, an owner must step forward and prove the innocence of the property. If he fails to do so, the property must be declared forfeited.

9. Using the same facts as in the last example, suppose S appears in the forfeiture proceedings and calls three witnesses in defense of his car. His girlfriend G testified that she borrowed S's car the day before his arrest and she dropped her purse on the floor. A bottle of diet pills in her purse accidentally opened and all the pills fell on the floor. She thought she had picked them all up, but she must have missed a few under the seat. Her doctor, a respected physician, testifies that he prescribed methamphetamines for G because she is overweight. G's pharmacist identifies the pills found in S's Porsche as the same brand of methamphetamine he dispensed to G under her doctor's prescription. Everyone's eyes focus on G - she is obviously fat. The court accepts all this testimony as credible. Is the Porsche forfeitable?

NOTES

No. S has come forward with enough credible evidence to prove that the drugs found in his Porsche were lawfully prescribed for his girlfriend, that she dropped them by accident, and that he did not know they were there. It is no longer "probably true" that S illegally possessed and transported illicitly acquired drugs in his car. See In Re One 1971 Dodge Charger Automobile, 291 So.2d 872 (LA.App. 1974).

NOTES

F. NON-DEFENSES

In a civil forfeiture action, the key questions for the court are not the good faith or guilty knowledge of the owner. The questions to be answered focus almost exclusively on the use made of the property, and whether that use requires forfeiture under the statute. Did the car transport drugs? Were the chemicals, glassware and equipment intended for use to make PCP? Was the money exchanged for illicit drugs? With rare exceptions, disproving the illegal use of the property or proving it comes within some statutory exceptions, are the only two defenses to a civil forfeiture.

345-769 O - 81 - 3

NOTES

1. INNOCENCE OF AN OWNER IS NO DEFENSE TO CIVIL FORFEITURE

Owners who are innocent of any criminal involvement and who are totally ignorant of the illegal use made of their property are protected from forfeiture by many state statutes and by several state constitutions. Both conditions must be met to prevent forfeiture; innocence, by itself, is no defense. Federally, neither an owner's innocence, nor his ignorance, is a defense. The United States Constitution permits the forfeiture of illegally used property regardless of the innocence or ignorance of its owner.

Authorities

S.Ct: Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974)(and other Supreme Court cases cited therein).

9 Cir: U.S. v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (1977); U.S. v. One 1967 Ford Mustang, 457 F.2d 931 (1972); U.S. v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (1969); U.S. v. Bride, 308 F.2d 470 (1962); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: U.S. v. One 1976 Lincoln Continental Mark IV, 584 F.2d 266 (1978); U.S. v. One 1973 Buick Riviera, 560 F.2d 897 (1977); U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974); U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (1972).

7 Cir: U.S. v. One 1958 Pontiac Coupe, 298 F.2d 421 (1962).

6 Cir: U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978); U.S. v. One 1961 Cadillac, 337 F.2d 730 (1964).

5 Cir: U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); U.S. v. One 1969 Plymouth Fury, 476 F.2d 960 (1973); U.S. v. One 1970 Buick Riviera, 463 F.2d 1168 (1972); General Finance Corp. of Florida v. U.S., 333 F.2d 681 (1964); U.S. v. One 1957 Oldsmobile, 256 F.2d 931 (1958); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S. v. One 1952 Model Ford Sedan, 213 F.2d 252 (1954); U.S. v. Gramling, 180 F.2d 498 (1950).

NOTES

4 Cir: U.S. v. One 1971 Mercedes Benz, 542 F.2d 912 (1976); The Pilot, 43 F.2d 491 (1930).

3 Cir: The Julia Davis, 72 F.2d 370 (1974).

2 Cir: U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940).

1 Cir: U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

DC Cir: U.S. ex rel Walter E. Heller & Co. v. Mellon, 40 F.2d 808 (1930).

ARIZ: In Re One 1965 Ford Mustang, 463 P.2d 827 (1970); Matter of 1972 Chevrolet Monte Carlo, 573 P.2d 535 (App. 1977); Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (App. 1978).

GA: Garner v. State, 175 S.E.2d 133 (App.1970).

ILL: People v. One 1965 Oldsmobile, 284 N.E.2d 646 (1972); 1957 Chevrolet v. Div. of Narc. Control of Dept. of Public Safety, 189 N.E.2d 347 (1963).

LA: (contra) State v. 1971 Green GMC Van, 354 So.2d 479 (1977).

MD: State v. Greer, 284 A.2d 233 (App. 1971); Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

NJ: Kutner Buick, Inc. v. Strelecki, 267 A.2d 549 (Superior 1970).

ORE: Blackshear v. State, 521 P.2d 1320 (App. 1974).

SD: State v. One 1966 Pontiac Auto., 270 N.W. 2d 362 (1978).

TEX: State v. Cherry, 387 S.W.2d 149 (App. 1965).

DISCUSSION

The word "innocence" has been loosely used to describe five degrees of an owner's "fault" as to the illegal use of his property:

(1) The owner was NOT CONVICTED of any related crime, but was involved in the illegal use.

(2) The owner was NOT INVOLVED in the illegal use, but was aware of it.

(3) The owner was IGNORANT of the illegal use, but was negligent in lending his property.

(4) The owner was NOT NEGLIGENT in lending his property, but could have done more to prevent its illegal use.

(5) The owner HAD DONE EVERYTHING REASONABLY POSSIBLE TO PREVENT THE ILLEGAL USE of his property. (A very high standard of care).

It is important to distinguish between these levels of fault, because the relief available to an owner under the forfeiture laws depends upon it. For convenience, this Guide uses the word "innocence" to refer to level (2): lack of involvement, but with an awareness of the illegal use.

a. Lack of Conviction or Involvement (Innocence) Is Never A Defense.

Virtually every jurisdiction, state and federal, rejects the lack of involvement or lack of conviction of an owner as a defense to civil forfeiture. Because civil forfeitures are independent of criminal proceedings, it makes no difference whether anyone is convicted of a crime related to the seized property.

> "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate....The forfeiture is no part of the punishment for the criminal offense." Various Items of Personal Property v. U.S., 51 S.Ct. 282, 284 (1931).

This has been the rule for more than two-hundred years. Only once has the Supreme Court of the

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United States even hinted that an owner's criminal involvement might be required to civilly forfeit property. In 1971, in U.S. v. U.S. Coin & Currency, 91 S.Ct. 1041, the Court noted:

> "...when the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."

For several years this statement caused some confusion as to whether the High Court intended to change the traditional rule. In 1974, in Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080, 2094, the Court reaffirmed the old rules by emphasizing that the lack of involvement of an owner is still no defense to civil forfeiture:

> "... Coin & Currency did not overrule prior decisions that sustained application to innocents of forfeiture statutes...not limited in application to persons 'significantly involved in a criminal enterprise."

With the exception of the State of Louisiana, no court recognizes an owner's innocence (lack of involvement or conviction) as a defense. State v. One 1971 Green GMC Van, 354 So.2d 479 (LA. 1977).

b. Ignorance, Accompanied by Negligence

Too often, an owner will lend his property under circumstances which should reasonably lead him to suspect it might be used illegally. The borrower might be a known drug violator; he might have a record for trafficking in drugs; or the owner might know of the borrower's involvement with drugs. In such cases, the owner is technically ignorant of any illegal use the borrower makes of his property: the owner does not know, with any probability, that it will be illegally used. But, this ignorance is accompanied by a certain degree of negligence, or fault, on the part of the owner.

No state or federal constitutional provision prohibits the civil forfeiture of property

belonging to an ignorant, but negligent owner. One reason given by courts for forfeiting the property of negligent owners is that it will encourage others to be more careful about lending their property to drug violators:

> "The purpose of the statutes is to curb the narcotic traffic, and the public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced." People v. One 1948 Chevrolet Convertible Coupe, 290 P.2d 538, 541 (CAL. 1955).

The United States Supreme Court recently repeated this reasoning in the Pearson Yacht case:

> "To the extent that such forfeiture provisions are applied to...(owners) ...who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." 94 S.Ct. 2094.

Although there is no constitutional objection to forfeiting the property of negligent owners, most state forfeiture statutes exempt innocent, ignorant, negligent vehicle owners from their coverage. For example, U.C.S.A. 505(a)(4)(ii) provides:

> "no conveyance is subject to forfeiture... by reason of any act or omission established by the owner thereof to have been committed ...without his knowledge or consent;"

Given the widespread use of cars, and the dependence upon them which has developed in our society, these states have determined not to punish a car owner for negligence in lending his property. Statutory exceptions to forfeiture are discussed in detail later in this Guide.

Only a handful of state courts have interpreted their state constitutions as protecting negligent owners. See In Re One 1965 Ford Mustang, 463 P.2d 827 (ARIZ. 1970).

With few exceptions, federal statutes do not exempt the property of negligent owners from forfeiture, even if the owners are innocent and ignorant of the illegal use.

c. The Innocent, Ignorant, Non-Negligent Owner

The traditional view holds that nothing in the federal Constitution, nor in the constitutions of most states, prohibits the forfeiture of property belonging to an innocent, ignorant, non-negligent owner. Governments are free to forfeit everyone's interests in illegally used property, including lessors (landlords and rental companies), secured parties (banks, credit unions and other lienors), and bailors (lenders of property). The Palmyra, 12 Wheat 1, 6 L.Ed. 531 (1827); U.S. v. Brig Malek Adhel, 2 How. 210, 11 L.Ed. 239 (1844); Dobbins Distillery v. U.S., 96 U.S. 395, 24 L.Ed. 637 (1878); Goldsmith-Grant Co. v. U.S., 41 S.Ct. 189 (1921); Van Oster v. Kansas, 47 S.Ct. 133 (1926); and Pearson Yacht, cited above.

The reasoning behind this rule seems to be that some uses of property pose such a serious threat to the community that extremely harsh measures are required as a deterrent.

> "In the eternal struggle that exists between the avarice, enterprise and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measure of policy adopted by the legislature." U.S. v. 1960 Bags of Coffee, 8 Cranch 398, 405, 3 L.Ed. 602 (1814).

Although the vast majority of courts dutifully follow the traditional rule, judges frequently feel the need to question the wisdom of severely punishing non-negligent property owners:

> "The laws relating to forfeitures do cause one who is raised in the traditions of the Anglo-American principles of justice and who is committed to the constitutional principles of due

process and just compensation to search closely for a constitutional violation." U.S. v. One 1961 Cadillac, 207 F.Supp. 693, 698 (EDTENN. 1962).

To relieve non-negligent owners from the full burden of forfeiture, the executive and legislative branches have developed procedures for "pardoning" property. These procedures are discussed in detail in the "Remission" Chapter of this Guide.

d. Judicial Rebellion to Forfeiture

In spite of the ancient rules, and in spite of the executive branch's pardoning power, there have always been judges and juries that refuse to follow the law. Unable to accept the harshness of forfeiting a non-negligent person's property, and unwilling to accept the pardon decisions of the executive branches of government, they have either defied or "bent" the law to prevent forfeiture. For example, juries in the American colonies often rebelled against the King's laws by refusing to declare the property of a non-negligent owner to be forfeitable. Readers interested in the history of American forfeiture law, including a discussion of courts that have defied the doctrine, should refer to Maxeiner, Bane of American Forfeiture Law - Banished At Last?, 62 Cornell Law Review 768 - 802 (1977).

Since 1970, the number of courts willing to ignore the ancient forfeiture laws has significantly increased. In the early seventies, both state and federal courts began to hold that civil forfeiture statutes violate the Just Compensation Clauses of the federal and state constitutions. See McKeehan v. U.S., 438 F.2d 739 (6 Cir. 1971); In Re One 1965 Ford Mustang, 463 P.2d 827 (Ariz. 1970); Suhomlin v. U.S., 345 F.Supp. 650 (DMD. 1972); and U.S. v. One 1971 Ford Truck, 346 F.Supp. 613 (CDCAL 1972). As mentioned earlier, in 1971, the United States Supreme Court gave some encouragement to these courts when it hinted in the Coin & Currency case that the forfeiture statutes were designed to impose a penalty only upon people "significantly involved in a criminal enterprise."

This conflict between traditional forfeiture doctrine and those courts intent on protecting non-negligent owners came to a head in 1974 in the case of Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080. The Pearson Yacht Company was in the business of leasing expensive pleasure yachts in the United States and Puerto Rico. It leased a $19,800 yacht to two Puerto Rican residents. An express prohibition against use of the yacht for unlawful purposes was included in the lease. Puerto Rican authorities later seized the yacht from the lessees because one illegally possessed marihuana cigarette was found on board. Eventually, the yacht was forfeited to the Commonwealth. Pearson Yacht Company sued the Puerto Rican authorities. A Three-Judge United States District Court ruled that the forfeiture was unconstitutional, because the yacht company did not know that its property would be used for an illegal purpose and it was without fault in renting the yacht. The judges disregarded traditional forfeiture law, preferring to follow what they believed was a new trend toward protecting innocent, ignorant, non-negligent owners.

On appeal, the United States Supreme Court reversed the decision and declared the yacht forfeitable. Justices Stewart and Douglas dissented. They believed "that the forfeiture of property belonging to an innocent and non-negligent owner violates...(the Constitution)." But, the majority of Justices stood by the old rules, repeating that civil forfeiture statutes can be applied to innocent, ignorant, non-negligent owners, such as the Pearson Yacht Company. In its opinion, the Court did speculate that forfeiture might be unconstitutional if an owner could prove not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the prescribed use of his property...." (Level 5) But, the Court found that the yacht company did not show it met this very high standard of care.

At first, every lower court accepted the Pearson Yacht decision. For example, the United States Court of Appeals for the Ninth Circuit refused relief to an innocent, ignorant, apparently non-negligent owner in U.S. v.

NOTES

One 1972 Mercedes-Benz 250, 545 F.2d 1233 (1976). But, just one year later, the same court effectively reversed itself in U.S. v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (1977). It "re-read" the Pearson Yacht case to protect non-negligent owners, and it held that owners are entitled to a judicial hearing to prove their lack of negligence. To reach this result, the Ninth Circuit was forced to ignore the facts and the holding of the Pearson Yacht case, which clearly denied relief to a non-negligent lessor. It also had to elevate the speculative language (dicta) in the Pearson Yacht case to a concrete legal doctrine.

Officials responsible for federal forfeitures within the Ninth Circuit (Alaska, Arizona, Calif., Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), should be aware they are governed by special rules not applicable to other jurisdictions. The power of pardon (remission) granted exclusively to the Executive Branch (19 U.S.C. 1618) has been assumed by the federal courts in these states. Moreover, federal judges in these states grant relief to an owner based simply upon the owner's ignorance of the illegal use of his property. They are not requiring an owner to prove he met the highest standard of care in lending his property (Level 5). Nor are they demanding an owner prove his lack of negligence (Level 4). See U.S. v. One 1971 VW Sedan, CDCAL, CV 78-3255-MML, December 6, 1979).

If the Pearson Yacht Company could revive its claim and bring it before federal courts within the Ninth Circuit, it would today be granted the relief that it was denied just a few years ago by the United States Supreme Court. Historically, the judicial rebellion against the forfeiture doctrine is alive and well in the federal courts within the Ninth Circuit.

Although other federal appellate courts have paid lipservice to the speculative language of the Pearson Yacht case, none has embraced it as an established legal doctrine. Several isolated federal trial courts have joined the Ninth Circuit's approach. See U.S. v. One 1976 Lincoln Mark IV, 462 F.Supp. 1383 (WDPA 1979). It remains to be seen how far this will spread before the United States Supreme Court is again asked to speak on the issue.

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EXAMPLES

10. B asks his girlfriend G to lend him $200. B admits he wants the money to buy marihuana. G wants no part of the drugs, but does agree to lend him the money. The same day, B is arrested as he is about to buy some pot. Money intended for exchange for illicit drugs is subject to civil forfeiture in at least nine states (Idaho, Ill., Ky., Md., Mass., Minn., NM, Tenn. & Va.) and under federal law (21 U.S.C. 881a6). Criminal charges against B are dropped for reasons other than lack of evidence. B and G demand the return of their $200. Must you return the money?

No. Innocense of an owner is no defense to civil forfeiture. Neither the lack of conviction of B, nor the lack of involvement of G, is a defense. The money is forfeitable. And, since both were aware of its intended illegal use, the money will not be "pardoned" by an executive official.

11. S, a minor, was arrested for possession of drugs. He took advantage of the youthful-first offender provisions of the Controlled Substances Act(s) and avoided a conviction. F, his father, now tries to pressure S not to use drugs, but F knows that S is still a drug abuser. F lets S use the family car - a Buick - to go on a trip. S is lawfully arrested transporting 234 pounds of marihuana in the car. While the criminal charges against his son are pending, F demands you return his car. Is it forfeitable?

Yes, under federal law. Transportation of illicit drugs, in any amount, for any purpose, subjects a conveyance to federal forfeiture. Neither the federal Constitution, nor federal statutes, protects an innocent, ignorant owner such as F. And, since F was negligent in lending his car to S - he knew S was a drug abuser with a prior arrest - F's Buick cannot qualify for a federal "pardon" (remission). See U.S. v. One 1973 Buick Riviera Auto., 560 F.2d 897 (8 Cir. 1977); U.S. v. One 1976 Linc.

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Cont. Mark IV, 584 F.2d 266 (8 Cir. 1978); and U.S. v. One 1976 Buick Skylark, 453 F.Supp. 639 (DColo. 1978).

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2. DISMISSAL OF CRIMINAL CHARGES IS NO DEFENSE TO CIVIL FORFEITURE

When both a criminal action and a civil forfeiture arise out of the same wrongful conduct, dismissal of the criminal charges - even with prejudice - does not affect the forfeiture.

Authorities

10 Cir: Bramble v. Richardson, 498 F.2d 968 (1974).

5 Cir: U.S. v. One (1) 1969 Buick Riviera, 493 F.2d 553 (1974).

4 Cir: U.S. v. One 1971 Mercedes Benz, 542 F.2d 912 (1976).

1 Cir: U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

SDNY: U.S. v. 20 Strings See Pearls, 34 F.2d 142 (1929).

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3. ACQUITTAL IS NO DEFENSE TO CIVIL FORFEITURE

We have seen that neither the innocence of an owner, nor the dismissal of related criminal charges, has any effect on a civil forfeiture. This is so because a civil forfeiture and a criminal penalty are separate, distinct legal sanctions. Each is independent of the other. It follows that an acquittal of criminal charges does not affect the government's right to pursue a civil forfeiture.

Authorities

S.Ct: One Lot Emerald Cut Stones And One Ring v. U.S., 93 S.Ct. 489 (1972); Helvering v. Mitchell, 58 S.Ct. 630 (1938).

Ct.Cl: Doherty v. U.S., 500 F.2d 540 (1974).

10 Cir: (Contra) Lowther v. U.S., 480 F.2d 1031 (1973)(of highly questionable validity after the 1972 decision in One Lot Emerald Cut Stones, Etc., above).

9 Cir: U.S. v. Kismetoglu, 476 F.2d 269 (1973); U.S. v. Gramer, 191 F.2d 741 (1951).

8 Cir: Glup v. U.S., 523 F.2d 557 (1975).

6 Cir: Epps v. Bureau of Alcohol, Tobacco & Firearms, 375 F.Supp. 345, affirmed 495 F.2d 1373 (1973); McKeehan v. U.S., 438 F.2d 739 (1971); U.S. v. One 1935 Model Pontiac S. Automobile, 105 F.2d 149 (1939).

5 Cir: U.S. v. One (1) 1969 Buick Riviera Auto, 493 F.2d 553 (1974); U.S. v. Burch, 294 F.2d 1 (1961).

4 Cir: U.S. v. One 1953 Oldsmobile 98-4-Door Sedan, 227 F.2d 668 (1955).

3 Cir: U.S. v. One 1964 Ford Thunderbird, 445 F.2d 1064 (1971); U.S. v. One Dodge Sedan, 113 F.2d 552 (1940).

2 Cir: U.S. v. Physic, 175 F.2d 338 (1949).

1 Cir: Murray & Sorenson, Inc. v. U.S., 207 F.2d 119 (1953).

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FLA: Knight v. State, 336 So.2d 385 (App. 1976).

NJ: State v. McCoy, 367 A.2d 1176 (App. 1976).

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DISCUSSION

Anglo-American law has a tradition of providing adverse parties a "day in court" to settle their disputes. It also has a tradition of limiting them to just "one day in court," so to speak. Once an issue between certain parties has been finally decided, those same parties cannot litigate the same issue again. The goal is to prevent needless repetition and harassment. Our legal system has developed at least two principles designed to limit parties to "just one bite at the apple": 1) The doctrine of Collateral Estoppel; and 2) the constitutional doctrine of Double Jeopardy.

If both a criminal proceeding and a civil forfeiture action stem from the same wrongful conduct, is the Government violating these principles by giving itself two separate chances at "punishing" an owner?

a. Collateral Estoppel

According to the United States Supreme Court:

> "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 90 S.Ct. 1189 (1970).

The application of this rule to civil forfeiture actions was first considered by the Supreme Court in 1818 in Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246. After some initial confusion (see Coffey v. U.S., 6 S.Ct. 437, 1886) it has now become well-settled that collateral estoppel is no defense in a civil forfeiture action, although an owner has been acquitted in a related criminal proceeding, or the criminal charges against him have been dismissed. There are three distinct reasons for this view.

First, the issues in a criminal proceeding and in a civil forfeiture action are not identical. Civil forfeiture statutes focus almost exclusively on the use made of property; the criminal state of mind of an owner is irrelevant. Criminal statutes, on the other hand, require the Government to prove prohibited use or conduct combined with an illegal intent. Since the issues in the two proceedings are not the same, the doctrine of collateral estoppel does not apply. An acquittal or dismissal in a criminal case might simply be based upon a lack of criminal intent; it does not necessarily decide the question of the prohibited use of property.

NOTES

Second, the burdens of proof in a criminal proceeding and in a civil forfeiture action are not identical. In a civil forfeiture action, the Government need only prove its case by a preponderance of evidence (the "probably true" test). In a criminal proceeding, the Government must prove its case beyond a reasonable doubt (the "almost certainly true" test). Acquittal or dismissal in a criminal proceeding may simply mean the Government fell short of the higher burden of proof; it does not necessarily decide whether the evidence satisfies the "probably true" or preponderance test. Therefore, the doctrine of collateral estoppel does not apply.

Third, the parties to a criminal proceeding and to a civil forfeiture action are not identical. The defendant in a civil forfeiture action is the property - not the defendant in a related criminal case. Since the parties are not the same, again, the doctrine of collateral estoppel does not apply.

b. Double Jeopardy

The Fifth Amendment to the United States Constitution provides that no citizen of the United States shall "twice be put in jeopardy of life or limb" for the same criminal offense. It is designed to protect a citizen from two criminal prosecutions by the same Government for the same offense.

It does not prohibit one criminal prosecution and one civil penalty for the same offense.

> "(Civil) forfeiture is not barred by the Double Jeopardy Clause of the

345-769 O - 81 - 5

Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." One Lot Emerald Cut Stones v. U.S., 93 S.Ct. at 492 (quoting from Helvering v. Mitchell).

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4. ENTRAPMENT IS NO DEFENSE TO CIVIL FORFEITURE

Entrapment is a factual defense unique to criminal prosecutions. Thus far, no court has applied the defense to a civil forfeiture action.

Authorities (See)

S.Ct: Hampton v. U.S., 96 S.Ct. 1646 (1976); U.S. v. Russell, 93 S.Ct. 1637 (1973).

9 Cir: U.S. v. One 1974 Jeep, 536 F.2d 1285 (1976).

5 Cir: U.S. v. One (1) 1972 Wood, 19 Ft. Custom Boat, 501 F.2d 1327 (1974).

4 Cir: Weathersbee v. U.S., 263 F.2d 324 (1958).

CDCAL: U.S. v. One 1973 Pace Arrow M300 Motor Home, 379 F.Supp. 223 (1974).

NDILL: U.S. v. One 1977 Pontiac Grand Prix, 483 F.Supp. 247 (1962).

DMISS: U.S. v. One 1960 Ford Convertible, 209 F.Supp. 247 (1962).

TEX: McKee v. State, 318 S.W.2d 113 (App. 1958).

WDLA: U.S. v. One Dodge Roadster, 25 F.2d 912 (1927).

NOTES

DISCUSSION

Every crime consists of two kinds of elements: (a) some forbidden act or conduct; and (b) some criminal state of mind. Unless both are present, there is no crime.

Entrapment occurs when an innocent person, who does not have the required criminal state of mind, is pushed by Government agents into doing a forbidden act. The crime is not complete if the defendant was entrapped; he may have done a forbidden act, but he lacked the necessary criminal intent. Since 1932, the Supreme Court of the United States has followed a two-part test for entrapment:

1. WAS THERE INDUCEMENT by the Government agents?

   - if not, then there was no entrapment.

2. If there was Government inducement, WAS THE DEFENDANT PREDISPOSED to commit the offense?

   - if he was predisposed, then there was no entrapment.

   - if he was not predisposed, then he was entrapped.

As this test suggests, entrapment is a criminal defense, concerned exclusively with the defendant's criminal intent. A civil forfeiture action, on the other hand, is a non-criminal proceeding, concerned almost exclusively with the use made of property. Criminal intent of an owner or claimant is virtually irrelevant in a civil forfeiture action.

Therefore, it seems logical to conclude that entrapment is not a defense to civil forfeiture.

EXAMPLE

12. You are called by Customs agents who have discovered 350 grams of cocaine in incoming foreign mail. You arrange for a controlled delivery of the package. You send a pickup notice to P, the addressee. P arrives at post office in his jeep. P takes delivery

NOTES

of the package and starts to drive away. You stop and arrest him. You also seize the package, and his jeep, for forfeiture. P tries to defend against the forfeiture by arguing that you entrapped him into using his vehicle to drive to the post office to pick up the drugs. Will he be successful with this defense?

No. First, the entrapment defense should logically be confined to criminal cases. It has no place in a civil forfeiture proceeding. Second, even if the doctrine applies to civil forfeiture, you did not entrap P. Your notice letter did induce him to come to the post office, but he was already predisposed to come there in a vehicle to pick up the drugs. Therefore, he was not entrapped. See U.S. v. One 1974 Jeep, cited above.

5. ILLEGAL SEIZURE IS NO DEFENSE TO CIVIL FORFEITURE

There is an important difference between illegally obtaining evidence to prove a forfeiture, and illegally obtaining possession of the forfeitable property. Under the Exclusionary Rule, illegally obtained evidence cannot be used to prove property is forfeitable. On the other hand, if enough legally obtained evidence exists to prove property is forfeitable, the fact that the property was illegally seized is no defense. The mere fact of illegal seizure, standing alone, does not immunize property from forfeiture.

Authorities

S.Ct: U.S. v. Jeffers, 72 S.Ct. 93 (1951); Trupiano v. U.S., 68 S.Ct. 1229 (1948); Maul v. U.S., 47 S.Ct. 735 (1927).

9 Cir: U.S. v. One (1) 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (1974); John Bacall Imports, Ltd. v. U.S., 412 F.2d 586 (1969).

6 Cir: Bourke v. U.S., 44 F.2d 371 (1930).

5 Cir: U.S. v. Carey, 272 F.2d 492 (1959); Grogan v. U.S., 261 F.2d 86 (1958).

4 Cir: U.S. v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (1958).

3 Cir: U.S. v. $1,058 In U.S. Currency, 323 F.2d 211 (1963).

2 Cir: U.S. v. Eight Boxes, 105 F.2d 896 (1939); The Underwriter, 13 F.2d 433 (1926).

1 Cir: Berkowitz v. U.S., 340 F.2d 168 (1965); Interbartolo v. U.S., 303 F.2d 34 (1962); U.S. v. One 1975 Pontiac Lemans, 651 F.2d 444 (1980).

DC Cir: Welsh v. U.S., 220 F.2d 200 (1955).

GA: Blackmon v. B.P.O.E., 208 S.E.2d 483 (1974).

ILL: People v. Mota, 327 N.E.2d 419 (App. 1975).

MINN: City of Duluth v. Cerveny, 16 N.W.2d 779 (1944).

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NJ: Farley v. $168,400.97, 259 A.2d 201 (1969). (contains an especially scholarly discussion of law on this issue).

PA: Com. v. Fassnacht, 369 A.2d 800 (1977) (CONTRA).

TENN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

WIS: State v. Voshart, 159 N.W.2d 1 (19).

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DISCUSSION

To understand this principle, it is helpful to distinguish between two activities: (a) Obtaining evidence needed to prove a forfeiture; and (b) obtaining possession of the forfeitable property. It is also helpful to distinguish between two kinds of forfeitable property: (a) Contraband per se; and (b) derivative contraband.

Contraband per se is property the mere possession of which is virtually always unlawful. Examples include: heroin (21 U.S.C. 812, 881f), "moonshine" whiskey (26 U.S.C. 5686, 7302), sawed-off shotguns (26 U.S.C. 5861d), Molotov cocktails (26 U.S.C. 5845), and counterfeit money (18 U.S.C. 492).

Derivative contraband is property which is almost always lawful to possess, but which becomes forfeitable because of its unlawful use, or intended use. Examples include: cars, boats, planes, chemical equipment, and money.

a. Contraband Per Se Is Never Protected

Illegally obtaining evidence regarding contraband per se, or illegally seizing contraband per se, is no defense to the civil forfeiture of such property. Illegally seized heroin, bombs, counterfeit money, and so forth, will be excluded as evidence in a criminal proceeding, but will never be returned to its "owner." And, the Government will never compensate anyone for its seizure and destruction. Contraband per se is always forfeited to the Government. U.S. v. Jeffers, 72 S.Ct. 93 (1951)(illegally imported cocaine).

b. Unlawfully Obtained Evidence of Derivative Contraband

To forfeit derivative contraband, the Government must produce evidence of illegal use, or intended illegal use. This evidence is essential because derivative contraband is "everyday" property.

We have seen that the Exclusionary Rule applies to civil forfeiture. Evidence obtained in

NOTES

violation of Fourth or Fifth Amendment rights cannot be relied upon to prove a civil forfeiture. It follows that if the evidence needed to prove derivative contraband is forfeitable is obtained unlawfully, forfeiture will be denied and the property returned. And, this is true regardless of how possession of the derivative contraband was obtained.

Review Example 7, page 28. In that case, agents illegally searched a vehicle and found drugs. The results of the search were suppressed, and there was not enough independent evidence to prove the illegal use of the car. Therefore, the vehicle escaped forfeiture.

c. Lawfully Obtained Evidence of Derivative Contraband

If the illegal use, or intended illegal use, of derivative contraband can be shown by lawfully obtained evidence, the property is forfeitable, regardless of how possession of the property is acquired. As far back as 1815, the United States Supreme Court held that the power to enforce a civil forfeiture is not lost merely because possession of the property is unlawfully acquired. The Ship Richmond v. U.S., 9 Cranch 102, 3L ed 670.

For an exhaustive list of state and federal cases recognizing this traditional rule, see Annotation, 8 ALR 3d 473 (1966).

There is an analogy between this rule and an unlawful arrest. If the Government has lawfully obtained evidence that X committed a crime, the mere fact the Government unlawfully obtains custody of X is no defense. As long as there is independent proof of the crime, an illegal arrest, seizure, kidnapping, etc., of the defendant is no bar to his conviction. Ker v. Illinois, 7 S.Ct. 225 (1886); Frisbie v. Collins, 72 S.Ct. 509 (1952).

Several courts have erroneously suggested that the Supreme Court's decision in One 1958 Plymouth Sedan v. Pennsylvania, 85 S.Ct. 1246 (1965) has changed this longstanding rule. See Melendez v. Shultz, 356 F.Supp. 1205 (DMASS. 1973). The Plymouth Sedan case merely held that illegally obtained evidence cannot be

relied upon to forfeit derivative contraband. It had nothing to do with cases where the illegal use of derivative contraband can be shown by evidence lawfully obtained independently of an illegal seizure. The case was careful in making this distinction:

> "In both the Boyd...situation and here the essential question is whether evidence...the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture. Boyd holds that it may not."
>
> * * *
>
> "And it is conceded here that the Commonwealth could not establish an illegal use without using the evidence resulting from the search which is challenged as having been in violation of the Constitution." 85 S.Ct. at 1249-1250.

The old rule is still good law: the mere illegal seizure does not immunize property from forfeiture.

Readers interested in a more detailed discussion of this issue should refer to LaFave, Search and Seizure: A Treatise on the Fourth Amendment, Vol. 1, Ch. 1, Sec. 1.5(a)(West 1978).

WARNING: Although an illegal seizure will not, by itself, immunize property from civil forfeiture, it might subject the seizing agents, and the seizing agency, to civil liability for damages. Do not plan to illegally seize forfeitable property.

EXAMPLES

13. You develop probable cause to believe J has cocaine stored in a motel room. The manager of the motel tells you the occupants are away for the day. You go to the room and knock on the door. No one answers. You get a key from the manager and search the room. You find a large quantity of cocaine on a shelf. In criminal proceedings against J, the results of the search are suppressed because your warrantless entry of the room was unlawful. Can J defeat the civil forfeiture of the cocaine?

    No. Cocaine is contraband per se. It is virtually always illegal to possess. Contraband per se is subject to summary forfeiture, regardless of how it was acquired by the Government. The illegal search and seizure is no defense to civil forfeiture (See U.S. v. Jeffers, cited above).

14. You receive an anonymous tip that a Negro male, wearing a fake fur coat and a wide-brimmed hat, is selling phenmetrazine in front of a certain fast food restaurant. You drive to the restaurant and arrest a suspect matching this description. On his person, you find $3,900 in cash, many packages of PCP, and a notebook clearly showing the money is proceeds of PCP sales. Remember, proceeds of drug transactions are forfeitable under federal law (21 U.S.C. 881 a6) and in at least nine states. In criminal proceedings against the defendant, the court rules you lacked probable cause to make the arrest and, therefore, the seizure of evidence incident to arrest was unlawful. See Nance v. U.S., 377 A.2d 384 (DC 1977). Can you subject the seized money to civil forfeiture?

    No. Money is derivative contraband. To forfeit derivative contraband you must have evidence of its illegal use. All the evidence you have has been suppressed. Without other evidence that the money is proceeds, it cannot be civilly forfeited. (See Berkowitz v. U.S., cited above).

15. The owner of a rented farm tells you he has seen his tenants assembling large amounts of glassware, equipment, and chemical products on his property. He has a small piece of paper with the names of chemicals he has seen stored at his farm: piperidine, bromobenzene, magnesium, sodium, bisulfate, cyclohexanone, and hydrochloric acid. A chemist tells you these are all the materials needed to make PCP. The owner gives you a copy of his lease. You recognize one of the tenants as a felon, twice convicted for illegally manufacturing PCP and

methamphetamine. You are convinced the owner is a good citizen with no motive but to help law enforcement. Without obtaining a search warrant, you raid the farm and seize a fully operating PCP lab. If the courts should find that your warrantless search and seizure of the lab site was unlawful, will you still be able to forfeit the laboratory?

Yes. Although the seizure of the lab might have been unlawful, you have enough evidence independent of the seizure to establish probable cause to believe there was a lab at the farm and it was intended for use to make PCP. The lab is forfeitable. The illegal entry and seizure, by itself, is no defense (See Trupiano v. U.S., cited above).

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III. FORFEITABLE PROPERTY

To be forfeitable, property must fall within the provisions of a forfeiture statute. Each provision of each statute forms a kind of "pigeonhole." Unless property "fits" squarely into one of these pigeonholes, it will escape forfeiture.

THERE CAN BE NO FORFEITURE WITHOUT A FORFEITURE STATUTE.

Authorities

S.Ct: U.S. v. Lane Motor Co., 199 F.2d 495 (10 Cir. 1952), affirmed 73 S.Ct. 459 (1953).

3 Cir: U.S. v. Charles D. Kaier Co., 61 F. 2d 160 (1932)

MDLA: U.S. v. Modicut, 483 F. Supp 70 (1979).

NDTEX: King v. U.S., 292 F. Supp. 767 (1968) (Rifle used to assassinate John F. Kennedy)

FLA: Baker v. State, 343 So.2d 622 (App 1977)

NC: State v McKinney, 244 S.E.2d 455 (App 1978).

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A. SCHEDULE I DRUGS ARE ALWAYS FORFEITABLE AS CONTRABAND PER SE

Authorities

21 U.S.C. 881(f) and (g); UCSA 505(f) and (g).

DISCUSSION

Both federal and state law classify all controlled substances into five control groups called "Schedules." Schedule I contains drugs which present the greatest danger to the public. Schedule V contains the least dangerous of controlled drugs. The controls and the penalties for violations vary with the Schedules. Three basic factors are used to determine in which Schedule a drug belongs:

(1) Its potential for abuse,

(2) Its medical use, and

(3) Its likelihood of causing dependence.

Drugs with a high potential for abuse, with no currently accepted medical use, and with a severe likelihood of causing dependence or serious risk of harm (all three conditions must be met) are in Schedule I. This includes natural opiates, opium derivatives and hallucinogens, such as heroin, marihuana, LSD and mescaline. 21 U.S.C. 812; UCSA 201-212.

Because Schedule I drugs are virtually always illegal to possess - except in research - they fall within the definition of "Contraband per se." For this reason, Schedule I drugs are virtually always forfeitable. State and federal law are identical on this issue:

"All controlled substances in Schedule I that are possessed, transferred, sold or offered for sale in violation of the provisions of this title shall be deemed contraband and seized and summarily forfeited..." 21 U.S.C. 881(f); UCSA 505(f).

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Note that Schedule I drugs are "summarily" forfeited; no special forfeiture proceedings or forfeiture paperwork are required. And, as we have already seen, an illegal seizure of contraband per se, including Schedule I drugs, is no defense to forfeiture.

B. NON-SCHEDULE I DRUGS ARE DERIVATIVE CONTRABAND

Authorities

21 U.S.C. 881(a)(1); UCSA 505(a)(1).

DISCUSSION

One characteristic of Schedule I drugs sets them apart from all others: they lack any legitimate medical uses.

Other controlled substances, such as morphine, codeine, amphetamine, methequalone, librium and valium, have currently accepted medical uses. They are produced and prescribed for legitimate purposes. To civilly forfeit non-Schedule I drugs:

YOU MUST PROVE THEY HAVE BEEN ILLEGALLY

MANUFACTURED,

DISTRIBUTED,

DISPENSED, or

ACQUIRED.

Non-Schedule I drugs are, at best, "derivative contraband."

EXAMPLE

16. Acting in an undercover capacity, you buy tablets of Dilaudid from Miss L. Dilaudid is a synthetic opiate prescribed for severe pain, particularly in terminal cancer patients. It is a Schedule II narcotic. After several more purchases, you gain L's confidence and ask about her supplier. She says it's a local pharmacist who has been in business for 39 years. She says she can get as much as she wants. You place an

order with L for 425 more tablets, illegally worth $4,000. L goes to K's pharmacy and returns with the Dilaudid in a large prescription container in a brown paper bag. You seize the Dilaudid and arrest L. Are the seized Dilaudid tablets forfeitable?

Yes. Non-Schedule I drugs, such as Dilaudid, are forfeitable as derivative contraband if you can show probable cause to believe they have been illegally manufactured, distributed, dispensed, or acquired. Here, it is not only probable, it seems almost certainly true that K illegally distributed and L illegally acquired the tablets. Therefore, they are subject to forfeiture. (See U.S. v. Kershman, 555 F.2d 198, 8 Cir. 1977).

NOTE. If the pharmacist is criminally convicted of illegally distributing drugs to Miss L, both state and federal governments have the power to seize his entire stock of controlled substances and to revoke his controlled substances registration. Once his registration is revoked, all his seized drugs are subject to forfeiture. 21 U.S.C. 824; UCSA 304.

NOTES

NOTES

C. EQUIPMENT, PRODUCTS & RAW MATERIALS

All raw materials, products, and equipment of any kind which are used, or intended for use, in illegally manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance are subject to civil forfeiture. 21 U.S.C. 881(a)(2); UCSA 505(a)(2).

Common examples of this type of property include: glassware, chemicals, cutting materials, scales, pumps, strobe lights, and radios.

1. ANYTHING TANGIBLE CAN BE INCLUDED, EXCEPT LAND, BUILDINGS, MONEY AND CONVEYANCES

DISCUSSION

Neither 21 U.S.C. 881(a)(2), nor UCSA 505(a)(2) defines the terms "raw materials, products, and equipment." And, we have not found any reported cases interpreting the meaning of these terms as used in these statutes. Therefore, courts are likely to interpret them according to their ordinary, or dictionary meanings. See 2-A, Southerland, Statutory Construction, Sec. 45.08 (4th ed. 1973).

Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) defines them as:

> (RAW) MATERIALS: "...the basic matter... from which the whole or the greater part of something...is made;...apparatus (as tools or other articles) necessary for doing or making something..."
>
> * * *
>
> PRODUCT: "...something produced by physical labor...; something produced naturally...; a substance produced from one or more other substances as a result of chemical change..."
>
> * * *

345-769 O - 81 - 6

EQUIPMENT: "...the physical resources serving to equip a person or thing...; the implements (as machinery or tools) used in an operation or activity...; all the fixed assets other than land and buildings of a business enterprise...;

* * *

SYN: equipment, apparatus, machinery, paraphernalia, outfit, tackle, gear, material can signify, in common, all the things used in a given work or useful in affecting a given end."

* * * *

On their face, these definitions are broad enough to apply to all tangible things (other than land or buildings) needed for any particular purpose. It seems highly probable that Congress intended this broad interpretation, because it flanked these terms in the statute with the words "All" and "of any kind."

What little legislative history exists on the issue is consistent with this conclusion. Section 881, on which UCSA 505 is patterned, is a combination and extension of prior forfeiture laws. It is modeled after 26 U.S.C. 7301, a provision of the internal revenue laws providing for the forfeiture of: "(a) Taxable articles...; (b) Raw materials - All property found in the possession of any person intending to manufacture the same into...(taxable articles); (c) Equipment - All property whatsoever...intended to be used in the making of... (taxable articles); (d) Packages - All property used as a container for...property described in subsection (a) and (b)...; and (e) Conveyances...."

Much of the substantive language of Section 881 was cannibalized from 26 U.S.C. 4706 (the old Harrison Narcotics Act), 49 U.S.C. 782 (the Contraband Seizure Act) and 21 U.S.C. 334(a)(2) (the Drug Abuse Control Amendments of 1965). The scope of these provisions was considerably expanded. For example, the Contraband Seizure Act provided for the forfeiture of conveyances used to transport contraband, but did not reach conveyances intended for use to transport contraband.

NOTES

NOTES

Section 881 was expanded to cover both use and intended use. See Drug Abuse Control Amendments-1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970)(statement of John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs). And see Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H.R. 17463 Before the Comm. on Ways and Means, House of Representatives, 91st Cong., 2d Sess. (1970)(section-by-section analysis by John E. Ingersoll).

As originally enacted in 1970, Section 881 was not thought to be applicable to drug money. For eight years, no attempts were made to apply 881 (a)(2) to money, and it was not until November 10, 1978, that a new paragraph on money was added to the statute. 21 U.S.C. 881(a)(6). This amendment is evidence that 881(a)(2) was not meant to apply to money. See Pirkey v. State, 327 P.2d 463 (Okla. 1958).

Finally, it seems unlikely that Section 881(a)(2) was meant to apply to conveyances. A separate, comprehensive provision on conveyances is contained in Section 881(a)(4). That section has special protections for owners of stolen conveyances and common carriers. Applying 881(a)(2) to conveyances would avoid these protections. Congress could not have intended such a result. Conveyances can only be forfeited under Section 881(a)(4).

2. ANYTHING USED, OR INTENDED FOR USE, TO ILLEGALLY MANUFACTURE, DELIVER, OR IMPORT DRUGS, IS FORFEITABLE.

The Government need not show actual use; intended use is enough. Whether an object is intended for illegal use is a question of fact, which can be proved by circumstantial evidence. Note that objects intended for use to inject, inhale or ingest illicit drugs are not included; only things used, or intended for use, in manufacturing, delivering or importing drugs are forfeitable.

NOTES

DISCUSSION

a. Actual Use Is Not Required

Certainly if an object is used illegally, the users can be criminally prosecuted and the object civilly forfeited. But actual use is not required. People who control property with the intent to use it illegally are also subject to punishment. No constitutional provision requires the Government to stand back and wait for the illegal use to occur. Many statutes make it a crime to possess property intended for illegal use, and also provide for the civil forfeiture of such property.

For example: (1) 26 U.S.C. 5686 & 7302 make it a crime to "have or possess any property intended for use in violating...(the federal liquor laws)" and they forfeit "any property intended for use to violate...(any part of the Internal Revenue Laws); (2) 18 U.S.C. 492 provides for the forfeiture of "any material or apparatus used or ...intended to be used, in making...counterfeit (money);" (3) 18 U.S.C. 1952 & 1953, make it a crime to send in interstate commerce "any...paraphernalia ...paper, writing, or other device used or to be used, ...in...bookmaking...."; and (4) 26 U.S.C. 5763 provides for the forfeiture of "all property intended for use in...(the illicit production and distribution of tobacco products)."

b. Seizures Incident to Violations

Obviously, it is a question of fact whether property is intended for illegal use. And, unless the person in control of property admits his intent, it must be proved by circumstantial evidence. See One 1941 Ford 1/2 Ton Pickup Truck v. U.S., 140 F.2d 255 (6 Cir. 1944); and G.M.A.C. v. U.S., 32 F.2d 121 (8 Cir. 1929); U.S. v. 18 Barrels of Alcohol, 20 F. 2d 186 (EDPA 1927).

When property is seized close in time and place to the site of illegal activity, it should be easy to prove the intended use of the property. For example, if you raid a house with a PCP lab inside, and a truck loaded with chemicals is backed up to the door of the house, it seems certain the chemicals on the truck are intended for use to illegally manufacture PCP. See U.S. v. One Ford Truck, 46 F.2d 176 (SDTEX. 1931) and Marggraf v. Lewis, 45 F.2d 247 (DMASS. 1930). And, if you find a second truck loaded with glassware and chemicals needed to make PCP abandoned on a road facing in the direction of the PCP lab, a mile away, it seems probable the glassware and chemicals on the truck are also intended for use at the lab. See Yellow Mfg. Acceptance Corp. v. U.S., 84 F.2d 164 (9 Cir. 1936). In both cases, the property is forfeitable.

NOTES

c. Remote Seizures

As the time and distance between the property and the illegal activity increases, it becomes more difficult to prove the property is intended for illegal use; but it is not impossible. Courts are generally willing to find that property is intended for illegal use when:

1) A significant amount of property CAPABLE OF ILLEGAL USE is assembled,

2) by someone having NO APPARENT LEGITIMATE PURPOSE,

3) under SUSPICIOUS CIRCUMSTANCES.

When all three conditions are met, the property can ususally be seized for forfeiture. See U.S. v. Tasto, 586 F.2d 1068 (5 Cir. 1978); U.S. v. Gordon, 580 F.2d 827 (5 Cir. 1978); U.S. v. Johns, 421 F.2d 413 (5 Cir. 1970); U.S. v. Ragland, 306 F.2d 732 (4 Cir. 1962); Chapman v. U.S., 271 F.2d 593 (5 Cir. 1959); U.S. v. Beyan, 265 F.2d 698 (5 Cir. 1959); U.S. v. One 1955 Mercury Sedan, 242 F.2d 429 (4 Cir.1957); and DeHart v. U.S., 237 F.2d 227 (4 Cir. 1956).

CAUTION: A fine line cannot be drawn as to when probable cause exists in these cases. Consult your prosecutor or legal advisor, if possible, before making "remote" seizures for forfeiture.

d. Non-Defendant Suppliers

Merchants and suppliers are not exempt from 21 U.S.C. 881(a)(2) and UCSA 505(a)(2). It is

possible to apply these forfeiture sections to merchants and suppliers catering to customers with illegal intentions. A supplier's property can be seized because it is intended for illegal use if:

1) the supplier instructs buyers on the illegal uses of his merchandise; see Israel v. U.S., 63 F.2d 345 (3 Cir. 1933); Jones v. U.S., 11 F.2d 98 (4 Cir. 1926); or

2) he assembles his merchandise into "kits" for illegal use, or he adapts or designs it for illegal use; see Weinstein v. U.S., 293 F. 388 (1 Cir. 1923); Vinto Products Co. v. Goddard, 43 F.2d 399 (DMINN 1930); or

3) he omits records or reports to conceal the sale; see U.S. v. Piampiano, 271 F.2d 273 (2 Cir. 1959); U.S. v. Loew, 145 F.2d 332 (2 Cir. 1944); Bacon v. U.S., 127 F.2d 985 (10 Cir. 1942); U.S. v. Cusimano, 123 F.2d 611 (7 Cir. 1941); U.S. v. Harrison, 121 F.2d 930 (3 Cir. 1941); or

4) he secretly delivers the merchandise; see U.S. v. Russo, 284 F.2d 539 (2 Cir. 1960); Neely v. U.S., 145 F.2d 828 (5 Cir. 1944); Borgia v. U.S., 78 F.2d 550 (9 Cir. 1935); Vukich v. U.S., 28 F.2d 666 (9 Cir. 1928); and U.S. v. 600 Bags of Turbinado Brand Sugar, 225 F.Supp. 705 (WDLA. 1964).

Any factor which shows the supplier's "guilty knowledge" of the illegal use his buyers will make of his merchandise can be used to establish probable cause. A merchant or supplier need not himself intend to use property illegally. His guilty knowledge is enough to civilly forfeit his merchandise. U.S. v. Ragland, 306 F.2d 732 (4 Cir. 1962); U.S. v. 2265 One-Gallon Paraffined Tin Cans, 260 F.2d 105 (5 Cir. 1958).

For example, if a chemical supplier were to assemble all the ingredients needed to make PCP into a kit complete with instructions, there is little doubt his kits could be seized for forfeiture.

> "Merchants who procure supplies for... (criminals)...knowing of the purpose to which they are to be put, cannot shield themselves from the forfeiture which the law prescribes by providing that they are to be paid." Snead v. U.S., 217 F.2d 912, 914 (4 Cir. 1954), cert. den. 75 S.Ct. 532 (1955).

Readers interested in criminally prosecuting suppliers should read Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Columbia Law Review 228 (1953).

e. Drug "Use" Objects Are Not Forfeitable

Neither Section 881(a)(2), nor 505(a)(2), applies to objects associated with the illegal use of drugs, such as "bongs," syringes, rolling papers, roach clips, etc. These sections are basically confined to property connected with manufacturing, delivering and importing drugs.

DEA's Office of Chief Counsel has drafted a Model Drug Paraphernalia Act which would amend UCSA 505 to provide for the forfeiture of "use" paraphernalia. The Model Act has the approval of the U.S. Department of Justice and is recommended for enactment by the White House. Copies are available to state and local authorities upon request.

EXAMPLE

17. A previously reliable informant tells you that X is organizing a scheme to smuggle marihuana by plane into the United States. The plane is to land at a makeshift airfield in a rural part of your county. You set up a surveillance at the suspected landing area. That night you hear the sounds and see the lights of a truck parking on the field. At dawn, you approach the truck and see X asleep inside. Attached to the rear of the truck is a specially designed aviation fuel trailer with a 500 gallon capacity. You tap the outside of the fuel trailer - it's full. X immediately awakes and gets out of his truck. After checking his ID, you ask for, and receive, a lawful consent to search his truck. Inside you find: several hundred large plastic bags, unused; a strobe light and six spot lights; ten cans of industrial

deodorizer; a portable vacuum cleaner; two ground-to-air VHF radios; a hand operated fuel pump; extra clothes; a sleeping bag; $90,000.00 in cash; a notebook showing the following "expenses," "$5,000 for driver A," "$7,200 for pilot B," "$57,200 for used cargo plane." The notebook shows a beginning balance of $162,500.00. Can you seize all this property for civil forfeiture?

Yes. The fuel trailer, the fuel, and all the equipment are intended for use to import and deliver marihuana. It seems "probably true" that X intends to use these objects to communicate with a smuggler's plane, to help it to land, to unload it, to clean it, to refuel it, to package the bulk marihuana, and so forth. The illegal use need not actually occur. It is enough that X intends to use the property illegally. It is forfeitable under Section 881(a)(2)(federally) and UCSA 505(a)(2)(state law). And, as we shall see later, the truck and the money are also forfeitable under other sections.

NOTES

D. CONTAINERS FOR FORFEITABLE DRUGS, EQUIPMENT & MATERIALS ARE ALSO FORFEITABLE

Anything used, or intended for use, to contain forfeitable drugs, equipment, products and materials is also subject to forfeiture.

Authorities

21 U.S.C. 881(a)(3); UCSA 505(a)(3).

DISCUSSION

These sections are not limited to objects generally considered to be containers, such as bags, jars, cans, and boxes. Instead, they apply to "All property which is used, or intended for use, as a container...."

THE USE, OR INTENDED USE, OF THE OBJECT IS CONTROLLING - NOT ITS CHARACTER.

For example, condoms and balloons are neither designed nor generally considered to be containers, but they are widely used to package small quantities of heroin and cocaine for street delivery. Therefore, they are forfeitable.

Anything used, or intended for use to package illicit drugs is forfeitable, such as capsules, wrappers, envelopes, tin foil, glassine bags and bales.

Anything used, or intended for use, to store or conceal illicit drugs is forfeitable, such as "stash" cans, bags, bottles, vials, attache cases and luggage.

Anything used, or intended for use, to package, store or conceal forfeitable equipment, products and materials is also forfeitable, such as bottles for P2P or piperidine, fifty-five gallon drums, or collapsible bladders used by smugglers to carry extra fuel on long flights.

Almost anything used to hold, wrap, package, store or conceal forfeitable drugs and property can be included; EXCEPT conveyances, land and buildings. For reasons already discussed, it seems certain these sections on containers were not meant to apply to cars, planes, mobile trailers or houses.

NOTES

EXAMPLES

18. A college professor is arrested for possession of cocaine. He admits he smuggled the cocaine back from Columbia, South America, hidden in an expensive, hollowed out sculpture. Is the sculpture subject to civil forfeiture?

    Yes. His admission gives you probable cause to believe the sculpture was used to hold and conceal cocaine. The use of the hollow sculpture to contain illicit drugs makes it forfeitable.

NOTES

E. CONVEYANCES

Federal law provides for the civil forfeiture of:

> "All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of...(forfeitable drugs, products, equipment and raw materials)." 21 U.S.C. 881(a)(4).

State law provides for the civil forfeiture of:

> "All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of...(forfeitable drugs, products, equipment and raw materials)." UCSA 505(a)(4)

The exceptions to these provisions are discussed later in this Guide. You should note that although these sections are similar in many respects, there are significant differences between them. A chart comparing them is on page 129. Preview the chart before you read this material.

1. A CONVEYANCE IS ANY MOBILE THING CAPABLE OF TRANSPORTING OBJECTS OR PEOPLE

DISCUSSION

We have not found any reported cases interpreting the term "conveyances" as used in Sections 881(a)(4) and 505(a)(4). Certainly the statutes make clear it applies to all things recognized as "aircraft, vehicles, or vessels." But, the use of the general term "conveyances" suggests a broader meaning was intended.

a. Mobility Is The Key

Attacking the mobility of drug traffickers was a major purpose behind these provisions. In 1970, when the proposed federal Controlled Substances Act was being considered, the Director of the Bureau of

NOTES

Narcotics and Dangerous Drugs testified before Congress on why Section 881 was needed:

"Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by the drug trafficker in carrying on his trade. The trafficker must merchandise his product, and to do so, he needs mobility. Seizure and forfeiture of the vehicles he uses in carrying on his illicit trade will prevent their use in subsequent offenses and restrict mobility, which in many cases is vital to the illicit trafficker's success."

See Drug Abuse Control Amendments - 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st. Cong., 2d Sess. (1970)(statement of John E. Ingersoll).

The draftsmen of the UCSA echoed this view in their official comment to Section 505:

"Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this Act. The reasoning is to prevent their use in the commission of subsequent offenses...and to deprive the drug trafficker of needed mobility.

With this purpose in mind, the draftsman of Sections 881(a)(4) and 505(a)(4) chose the word "conveyances" rather than limiting the law to just aircraft, vehicles or vessels. A conveyance has traditionally been defined as "...that by which anything is borne along, carried, conveyed or transported; or which serves as a means or way of carriage... " 18 C.J.S., Conveyance (Main text, p.90). Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) defines conveyance as "...a carrier of goods or passengers.... Mobility is at the heart of all definitions of "conveyances." A conveyance is simply any mobile thing capable of transporting objects or people. The draftsmens' use of the additional words "All" and "including" supports this broad interpretation, since they indicate that objects which are not easily catagorized as aircraft, vehicles, or vessels, can still be covered by the term "conveyances."

Thus, bicycles, hot air balloons, sleds, rafts, rowboats, ice-yachts, hang-gliders and even sedan-chairs can be considered conveyances.

b House Trailers

Are house trailers conveyances? There are only two reported cases to discuss the status of house trailers as conveyances.

1) TRUE MOBILE HOMES ARE CONVEYANCES

House trailers which have been used, or are readily capable of use, as mobile homes, have been found to be "vehicles" subject to forfeiture under the Contraband Seizure Act (49 U.S.C. 781). Biasotti v. Clarke, 51 F. Supp. 608 (RI.1943). Therefore, they are conveyances under Sections 881(a)(4) and 505(a)(4).

2) IMMOBILIZED HOUSE TRAILERS ARE NOT

House trailers which are installed at fixed locations, which are on permanent or semi-permanent foundations, and which are not readily mobile, have been held not to be conveyances subject to forfeiture under the Internal Revenue Laws. U.S. v. One 1953 Model Glider Trailer, 120 F.Supp. 504 (EDNC. 1954). It seems fair to say that trailers in this category have lost their character as conveyances and have become buildings.

c. APPURTENANCES ARE FORFEITABLE

Appurtenances are basically the parts of a conveyance. They are objects which: (1) have a purpose related to the conveyance, (2) are usually, but not always, attached to it, and (3) are generally considered as permanent parts. For example, a vehicle's appurtenances include the spare tire, jack, tools, hubcaps, mirrors, seat covers, radio, and floor mats.

Lawyers define an "appurtenance" as "That which belongs to something else; an adjunct;

an appendage; something annexed to another thing more worthy as principal, and which passes as incident to it...." Black's Law Dictionary (4th ed. rev. 1968).

Because the term "conveyance" automatically includes all appurtenances, they are also forfeitable. No special reference to appurtenances is required in a forfeiture statute. The Frolic, 148 F.921(DRI.1906). Courts routinely forfeit appurtenances incident to the forfeiture of conveyances. See U.S. v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (9 Cir. 1976); U.S. v. One 1974 Jeep, 536 F.2d 1285 (9 Cir. 1976); U.S. v. One(1) 1972 Wood, 19 Ft. Custom Boat, 501 F.2d 1327 (5 Cir. 1974); U.S. v. One 1976 Buick Skylark, 453 F.Supp. 639 (D.COLO.1978); U.S. v. Vessel FL 4127 SE, 311 F.Supp. 1353 (SD.FLA. 1970); and U.S. v. One 1964 MG, 408 F. Supp. 1025 (WD.WASH.1976).

WARNING: Personal property, which does not qualify as an appurtenance, is not forfeitable simply because it is found in a forfeitable conveyance. It must be an appurtenance to be forfeitable under Sections 881(a)(4) and 505 (a)(4).

EXAMPLES

19. B agrees to sell you cocaine. He insists the exchange take place at the intersection of two rural roads. It is winter and the ground is covered with snow. You and your partner drive to the intersection. Within minutes B approaches cross-country on a snowmobile. He delivers the cocaine, takes the money and drives off into the woods. Eventually you arrest B and seize the snowmobile for forfeiture. B's lawyer shows you a section of the state vehicle code which says snowmobiles are not considered "vehicles" and need not be registered, inspected, etc. B's lawyer insists the snowmobile is not forfeitable. Is he correct?

No. Both state and federal law subject to forfeiture conveyances that have transported illicit drugs for sale. A conveyance is any mobile thing capable of transporting objects or people; it is not limited to just aircraft, vehicles or vessels. The snowmobile qualifies

NOTES

as a conveyance within the meaning of the forfeiture statutes (21 U.S.C. 881(a)(4); UCSA 505(a)(4). The fact that it is not a "vehicle" within the meaning of the motor vehicle code is irrelevant. It is forfeitable.

20. You seize a schooner used to transport heroin from Hawaii to San Francisco. Aboard the vessel at the time of seizure is an expensive new navigation device that has been leased to the owner of the vessel. The leasing company tells you the lease is for three years with an option to buy at any time. Is the navigation device forfeitable?

Yes. It has a purpose related to the schooner. It is attached to the schooner, even though it can be removed. And it is generally considered to be a permanent or at least long-term, part of the vessel. Therefore, it is an appurtenance. No special reference to appurtenances is required in a forfeiture statute. They are forfeitable as parts of the conveyance. See The Frolic, cited above, and U.S. v. One Chevrolet Stylemaster Sedan, 91 F.Supp. 272 (DC COLO.1950); and In Re SS Tropic Breeze, 456 F.2d 137 (1 Cir 1972).

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2. TRANSPORTATION OF DRUGS FOR ANY PURPOSE, IN ANY AMOUNT, SUBJECTS A CONVEYANCE TO FEDERAL FORFEITURE

The transportation need not be related to drug trafficking. And, the amount of drugs transported is irrelevant. As harsh as it may seem, the transportation of any measurable quantity of illicit drugs subjects a conveyance to federal forfeiture.

Authorities

21 U.S.C. 881; 49 U.S.C. 781-782.

S.Ct: See Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080, 2097 (1974) (one marihuana cigarette).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976) (small amount of hashish).

8 Cir: Ted's Motors v. U.S., 217 F.2d 777 (1954)(five marihuana cigarettes).

6 Cir: U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978)(Four marihuana cigarette butts).

5 Cir: U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977)(two grams of cocaine); Associates Investments Co. v. U.S., 220 F.2d 885 (1955)(two marihuana cigarette butts).

2 Cir: Lee v. Thornton, 538 F.2d 27 (1976)(one gram marihuana seeds).

1 Cir: U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977)(small amount of marihuana for personal use).

DCNY: U.S. v. One 1973 Jaguar Coupe, 431 F. Supp. 128 (1977)(small tin foil packet of cocaine); U.S. v. One 1975 Mercury Monarch, 423 F.Supp. 1026 (1976)(mere trace of drugs).

EDPA: U.S. v. One 1971 Porsche Coupe, 364 F. Supp. 745 (1973)(small amount of heroin for use of addicted veteran); U.S. v. One 1955 Ford Convertible, 137 F.Supp. 830 (1956)(1.7 grams of heroin).

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EDWIS: U.S. v. One 1963 Cadillac Hardtop, 231 F.Supp. 27 (1964)(small tin foil packet of marihuana).

345-769 0 - 81 - 7

CONTINUED

1 OF 5

DISCUSSION

The language of 21 U.S.C. 881(a)(4) is clear: it applies to any transportation of illicit drugs. The statute does not say "transport for the purpose of sale." It does not say "transport more than an ounce." It simply says "transport." On its face, Section 881(a)(4) applies to any transportation of illicit drugs for any purpose in any amount.

In spite of this far-reaching language, claimants frequently challenge forfeitures involving only small amounts of drugs. Their argument is straight-forward: (1) Congress passed the federal forfeiture statutes to strike at commercial trafficking in drugs; (2) transportation of very small amounts of drugs, particularly for personal use, is not significantly connected to commercial trafficking; (3) therefore, there should be no forfeiture in such cases.

There are serious problems with this argument. First, federal courts should not attempt to "read the mind" of Congress when the language of a statute is clear and unambiguous. Ex parte Collett, 69 S.Ct. 944 (1949).

Second, Congress can, and usually does, have more than one purpose in mind in passing any law. It is true that a major purpose behind Section 881 and the Controlled Substances Act of 1970 was to strike at commercial drug trafficking. But this was neither the only, nor the ultimate objective. The ultimate goal of all drug laws is to prevent drug abuse - meaning the non-medical use of drugs. To accomplish this goal, Congress controlled secondary activities, or conduct, which make abuse possible: possession of drugs, transportation of drugs, delivery of drugs, manufacturing of drugs, prescribing of drugs, and so forth. Nothing in the history of the law indicates Congress was exclusively interested in punishing commercial traffickers.

Third, Section 881(a)(4) was modeled after federal forfeiture laws which have never been restricted to commercial trafficking. For example, the Contraband Seizure Act, 49 U.S.C. 781, 782 provides for the forfeiture of conveyances in which illicit drugs are transported regardless of

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NOTES

the amount of drugs or whether they are for personal use. Ted's Motors v. U.S.; and Associates Investments Co. v. U.S., cited above.

For these reasons, federal courts have refused to restrict the broad wording of Section 881(a)(4) to commercial trafficking in large quantities of drugs. The transportation of any measurable quantity of illicit drugs subjects a conveyance to federal forfeiture.

a. COMPARE: UNDER STATE LAW TRANSPORTATION MUST BE FOR THE PURPOSE OF SALE

State law requires that a conveyance be involved in drug trafficking to be forfeitable. Forfeiture is improper under state law in simple possession cases.

Authorities

UCSA 505(a)(4)

ALA: Reeder v. State, 314 So.2d 853 (1975)

FLA: Griffis v. State, 356 So.2d 297 (1978).

MASS: Com. v. One 1969 Mercedes-Benz Auto, 378 N.E.2d 65 (App. 1978).

SD: State v. One 1972 Pontiac Grand Prix, 242 N.W.2d 660 (1976).

TEX: Amrani-Khaldi v. State, 575 S.W.2d 667 (App. 1978).

UTAH: State v. One Porsche 2-Door, 526 P.2d 917 (1974).

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DISCUSSION

UCSA 505(a)(4) requires that drugs be transported for the purpose of sale (or receipt) before a conveyance can be forfeited. This same section also contains a separate exemption for the simple possession of drugs in a conveyance. 505(a)(4)(iii). The intent could not be any clearer: a conveyance must be involved in commercial trafficking to be forfeitable.

Even in states which have rejected 505(a)(4) in favor of the broader federal language of Section 881(a)(4), courts have done some "judicial juggling" to require evidence of commercial trafficking. See the Florida, South Dakota and Utah cases cited above.

Forfeiture of a $20,000 yacht or a $3,000 car merely because a marihuana cigarette is found inside is a very harsh penalty. If the executive branches of state governments do not develop policies pardoning conveyances in simple possession cases, the temptation for state judges to "re-write" broadly worded forfeiture statutes is great. To combat this temptation, legal scholars are encouraging law enforcement agencies to adopt regulations limiting the seizure of conveyances to commercial trafficking situations. The Model Rules For Law Enforcement caution:

> "Statutes authorizing forfeiture of vehicles in narcotics offenses are typically very broad. The Model Rule proposes, as an alternative position, that police should seize vehicles only where a substantial amount of narcotics or drugs is involved, or where the owner of the vehicle is a significant drug violator. This approach would exclude ...a mere user of narcotics. But dealers and pushers would be subject to seizure for forfeiture proceedings. The effect of the Rule should be to lighten the administrative burden on the police while effecting the statutory purpose of impeding the traffic in drugs." Project on Law Enforcement Policy and Rulemaking, Searches, Seizures, and Inventories of Motor Vehicles 59 (Commentary on Rule 601A, 1974).

NOTES

Only a handful of states follow the federal rule of forfeiting conveyances in simple possession cases:

ARIZ: Matter of 1972 Chevrolet Monte Carlo, 573 P.2d 535 (App. 1977).

IOWA: State v. One Certain Conveyance, 211 N.W.2d 297 (1973).

NEB: State v. One 1970 2-Door Sedan Rambler (Gremlin), 215 N.W.2d 849 (1974).

The vast majority prohibit the forfeiture of conveyances not involved in trafficking.

EXAMPLES

21. D is arrested on a vehicular charge while driving a new pickup truck. A search incident to arrest reveals a baggie containing 1.45 grams of marihuana in his coat pocket. Is the truck forfeitable?

    No, in the majority of states; the transportation of drugs must be for the purpose of sale. The quantity of drugs involved here indicates it was possessed for personal use. And, there is no independent evidence the drugs were being transported to, or from, an illicit sale. Without evidence of trafficking, conveyances are not forfeitable in most states.

    Yes, under federal law and in a handful of states. Transportation of drugs for any purpose, in any amount, subjects a conveyance to federal forfeiture. Federal law makes no exception for simple possession cases. See Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (App. 1978).

b. TO "TRANSPORT" INCLUDES PROVIDING THE MOVING POWER

Engines, tractors, tow trucks, and other conveyances, that push, pull, or in any way provide the power to move illicit drugs are guilty of "transporting." Drugs need not be present in conveyances which supply motive power; they are equally forfeitable for transporting.

Authorities

9 Cir: Yellow Mfg. Acceptance Corp. v. U.S., 84 F.2d 164 (1936).

5 Cir: Utley Wholesale Co. v. U.S., 308 F.2d 157 (1962); U.S. v. Bryan, 265 F.2d 698 (1959); and see U.S. v. One (1) 1972 Wood, 19 Ft. Custom Boat, 501 F.2d 1327 (1974)(boat trailer forfeited with boat).

4 Cir: See Weathersbee v. U.S., 263 F.2d 324 (1958).

NOTES

EXAMPLE

22. X buys a sophisticated barge. It has a pneumatic system that allows it to be raised or lowered in the water. The hold of the barge is watertight. Using this system, the fully loaded barge can be towed slightly below the water line so as to be virtually invisible to surrounding vessels. It can even be lowered to the bottom, cut loose, and at a later time reconnected and raised. X loads the barge in Mexico with a ton of marihuana. He uses his pleasure yacht to tow the barge up the West Coast toward California. Anytime he nears land or other vessels, he lowers the barge deep into the water to avoid detection. Are the barge and the yacht forfeitable?

Yes. Both the barge and the yacht are conveyances: They are mobile and capable of transporting persons or objects. The barge is clearly transporting marihauana. The yacht is supplying the power to move the barge. Therefore, the yacht is also "transporting" marihuana. A conveyance which does not contain contraband, but which provides the moving power, regardless of how the contraband is contained, is being used to transport the contraband. See U.S. v. Bryan, cited above.

NOTES

NOTES

c. TRANSPORTING DRUG-CARRYING PASSENGERS SUBJECTS A CONVEYANCE TO FORFEITURE

A conveyance used to transport drug-carrying passengers is forfeitable under both state and federal law if: (1) the owner knows a passenger is in possession of illicit drugs; and (2) the drugs are being transported by the passenger in connection with an illicit sale. Federal law goes so far as to subject a conveyance to forfeiture even though: (1) the owner and operator are unaware a passenger has illicit drugs; and (2) the drugs are simply possessed for personal use.

Authorities

49 U.S.C. 781(a)(2), 782; 21 U.S.C. 881(a)(4)

9 Cir; U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971); Thill v. U.S., 66 F.2d 432 (1933).

5.Cir: U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); U.S. v. Addison, 260 F.2d 908 (1958).

4 Cir: U.S. v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912 (1976).

DCLA: U.S. v. One (1) Oldsmobile Sedan, 75 F. Supp. 83 (1948).

DCMO: U.S. v. One 1969 Cadillac DeVille Convertible, 330 F. Supp 1338 (1971).

EDNY: U.S. v. One One 1946 Plymouth Sedan,, 73 F. Supp. 88 (1946).

WDTEX: U.S. v. One 1973 Pontiac Grand AM, 413 F.Supp. 163 (1976).

EDWIS: U.S. v. One 1963 Cadillac Hardtop, 231 F.Supp. 27 (1964).

ARIZ: See Matter of One 1965 Ford Econoline Van, 591 P.2d 569 (App. 1979).

NJ: State v. One (1) Ford Van, 381 A.2d 387 (App. 1977).

ORE: Blackshear v. State, 521 P.2d 1320 (App. 1974).

NOTES

DISCUSSION

Owners and operators have a duty to prevent the transportation of contraband in their conveyances. It is a federal offense "to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft...." 49 U.S.C. 781(a)(2). Most states have similar laws which make an owner or operator criminally liable if he voluntarily transports a passenger known by him to be in possession of illicit drugs. This duty was recently explained by the California Supreme Court in People v. Rogers, 486 P.2d 129 (1971):

> "Regardless of his purpose or intent, the driver or owner of an automobile has the responsibility to prevent the conveyance of contraband by himself or his passengers, at least while that vehicle is under his dominion or control. Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt without further proof of an actual purpose to transport the drug for sale or distribution."

Commenting on the situation in which drugs are exclusively in the possession of a passenger, the high court also noted:

> "Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may 'transport' marihuana or other drugs even though they are in the exclusive possession of another."

Although an owner's or operator's guilty knowledge is required for a criminal conviction, it is not required for a civil forfeiture, at least under federal law. Federal statutes subject conveyances to forfeiture anytime they transport drug-carrying passengers. 49 U.S.C. 782; 21 U.S.C. 881(a)(4).

"(Federal)...Courts are closed to innocent vehicle owners, who must suffer the consequences even of the surreptitious transmission of contraband by passengers, unless the ...(Executive Branch)...chooses to be lenient." U.S. v. One 1946 Plymouth Sedan, 73 F.Supp. 88, 89 (EDNY.1946).

State forfeiture laws are more restrictive. An owner must know a passenger is in possession of illicit drugs. UCSA 505(a)(4)(ii). And, the passenger must be transporting the drugs in connection with an illicit sale. The ignorant owner who gives a ride to a drug-carrying passenger is protected under state law. Even before UCSA 505 was drafted in 1970, state supreme courts were rejecting the federal rule by requiring that an owner know a passenger was in possession of contraband before there could be a forfeiture:

"I forfeit title to my automobile if I overtake, on the road, a man with a bottle of whiskey in his pocket, invite him to ride and he accepts the invitation. He is using my automobile to transport whiskey unlawfully. I have not consented to it and do not know it - but...that will not avail me ...Is this result absurd? It surely is; but it is a conclusion inevitable from the argument that is put before us in this case." Hoover v. People, 187 P.531, 533 (Colo.1920).

As a practical matter, the federal rule is not as harsh as it appears. Owners caught in such a situation are virtually certain of receiving a "pardon" of their property from the Executive Branch, provided they were not negligent in accepting the passenger. 19 U.S.C. 1618.

EXAMPLES

23. Mr. S owns a commercial building. He also owns a new Mercedes-Benz coupe. One night S gives a ride to a worker in his building.

The worker is carrying an attache' case containing contraband drugs. Both are arrested by drug agents. S swears he was unaware of what his passenger had in the case. The passenger corroborates S's statement and does not implicate S in the crime. Criminal charges against S are dismissed. Is the Mercedes subject to civil forfeiture for transporting contraband?

No, under state law. S was ignorant that his passenger was transporting drugs in the car, therefore the car is not subject to state forfeiture. See People v. One 1948 Chevrolet Convertible Coupe, 290 P.2d 538 (1955).

Yes, under federal law. Ignorance of an owner or driver is no defense to federal forfeiture. They have a duty to prevent the transportation of contraband in conveyances under their control. S is limited to petitioning the Attorney General for a pardon (remission) of the forfeiture. See U.S. v. One 1971 Mercedes-Benz 2-Door Coupe; U.S. v. One 1975 Ford Pickup Truck; and U.S. v. One 1946 Plymouth Sedan, cited above.

NOTES

3. TRANSPORTATION OF FORFEITABLE EQUIPMENT, PRODUCTS & MATERIALS, SUBJECTS A CONVEYANCE TO FORFEITURE

Conveyances transporting forfeitable equipment, products and raw materials are forfeitable under both state and federal law. See Example 17. State law requires the transportation be connected to commercial trafficking.

Authorites

21 U.S.C. 881(a)(4); UCSA 505(a)(4)

5 Cir: U.S. v. One 1978 Chevrolet Impala, 614 F.2d 983 (1980).

NOTES

4. FACILITATION

Conveyances used, or intended for use, to "facilitate" the transportation of illicit drugs are forfeitable under state and federal law, to the same extent as those used to transport the contraband. A conveyance need not actually transport illicit drugs to be forfeitable. Federal law also provides for the forfeiture of conveyances that "facilitate" the sale, receipt, possession or concealment of contraband drugs.

a. TO "FACILITATE" MEANS TO HAVE A SIGNIFICANT CONNECTION TO...

DISCUSSION

Because legislators have used the word "facilitate" in so many statutes without bothering to define it, courts have traditionally interpreted the word according to its ordinary or dictionary meaning. Platt v. U.S., 163 F.2d 165(10 Cir. 1947); Howard v. U.S., 423 F.2d 1102(9 Cir. 1970); U.S. v. (One)(1) 1971 Chevrolet Auto, 496 F.2d 210(5 Cir. 1974); U.S. v. One 1950 Buick Sedan, 231 F.2d 219(3 Cir. 1956).

Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) defines "facilitate" as:

> "TO MAKE EASIER OR LESS DIFFICULT: free from difficulty or impediment ...to lessen the labor of: ASSIST, AID."

From a logical viewpoint, every conveyance used by a law violator assists his illegal activities, if only in a very small or remote way. If the dictionary meaning of facilitation is stretched to logical extremes, then every conveyance belonging to a drug violator is guilty of "facilitating" or assisting him in his crimes. It seems unlikely that legislators intended this result. Therefore, the courts have never interpreted the word in such an extreme fashion.

> "(T)he mere fact that a car is used by a law violator does not establish

the requirement for 'facilitation.'" U.S. v. One 1952 Ford Victoria, 114 F.Supp. 458, 460 (NDCAL.1953).

Instead, courts have placed some practical limitations on the meaning of the word. They require a significant connection between a conveyance and a crime before the conveyance can be found guilty of "facilitation."

> "It can readily be seen that whether any particular connection of a vehicle with contraband, where the contraband is not in the vehicle or in the possession of the occupant of the vehicle, constitutes facilitation is a question of degree, which is in turn a question of fact not readily susceptible to generalization." U.S. v. One Dodge Coupe, 43 F.Supp. 60, 61 (SDNY,1942).

For years courts have struggled to verbalize the degree of involvement needed to justify forfeiture. Several "tests" have been devised to date. For example, there is the "ACTIVE AID TEST" of facilitation:

> The test of whether a conveyance is being used to facilitate a crime is whether or not its use is an active aid in carrying out essential elements of the offense.

This test was developed by the United States Court of Appeals for the Fifth Circuit in: U.S. v. One 1968 Ford LTD, 425 F.2d 1084 (1970); U.S. v. One 1959 Pontiac Tudor Sedan, 301 F.2d 411 (1962); and U.S. v. G.M.A.C., 239 F.2d 102 (1956).

More recently, there is the "SUBSTANTIAL OR INSTRUMENTAL CONNECTION TEST" of facilitation:

> "...to be forfeited, a vehicle must have some substantial connection to, or be instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent." U.S. v. One 1972 Datsun, 378 F.Supp. 1200, 1204 (DCNH. 1974).

Courts using this test include: U.S. v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65 (9 Cir. 1976); U.S. v. One 1973 Volvo, 377 F.Supp. 810 (WDTEX. 1974); U.S. v. One 1970 Buick Riviera, 374 F.Supp. 277 (DCMINN. 1973); and see U.S. v. One(1) Liberian Refrigerator Vessel, 447 F.Supp. 1053 (MDFLA. 1977).

None of these tests is very helpful, but at least they point out that there must be a SIGNIFICANT CONNECTION between property and prohibited conduct before the property can be forfeited for facilitation.

b. COMMON PATTERNS OF FACILITATION

Fortunately, it is possible to describe examples, or common patterns, of facilitation, despite the difficulty in defining the word. Conveyances which fall within these established factual patterns are clearly subject to forfeiture.

1) ESCORT CONVEYANCES ARE FORFEITABLE

If a conveyance is forfeitable for transporting illicit drugs, other conveyances that escort it for some special purpose are also forfeitable. Pilot, lookout, guard, escape, decoy, and counter-surveillance conveyances are guilty of "facilitating" the transportation of drugs in the "load" conveyance. They need not contain drugs to be forfeitable.

Authorities

6 Cir: U.S. v. Lawson, 266 F.2d 607 (1959).

5 Cir: U.S. v. One 1968 Ford LTD 4-Door, Etc., 425 F.2d 1084 (1970); U.S. v. One 1952 Lincoln Sedan, 213 F.2d 786 (1954).

4 Cir: Weathersbee v. U.S., 263 F.2d 324 (1958); U.S. v. One 1956 Ford Tutor Sedan, 253 F.2d 725 (1958); and see U.S. v. One 1957 Ford 2-Door Sedan, 262 F.2d 651 (1958).

3 Cir: U.S. v. One Dodge Sedan, 113 F.2d 552 (1940).

DCCA: U.S. v. One Dodge Sedan, 28 F.2d 44 (1928).

DCMASS: U.S. v. One 1938 Buick Sedan, 29 F. Supp. 752 (1939).

NDMISS: U.S. v. One 1962 Mercury Sedan, 218 F.Supp. 140 (1963).

WDSC: U.S. v. One 1950 Model Willys Jeep, 91 F.Supp. 822 (1950).

DISCUSSION

The mere fact that two conveyances travel in tandem over a common route does not prove they are a convoy; one is not necessarily escorting the other. U.S. v. One 1957 Model Pontiac, 156 F.Supp. 837 (EDNC. 1957). An escort conveyance must have some special purpose for accompanying another conveyance. It might serve as a pilot or guide. It might serve as a scout or lookout. It might serve as an armed guard. It might provide a potential means of escape. It might serve as a decoy to confuse pursuers. It might run interference with pursuers. Or, it might carry tools, parts or supplies needed if there is a mechanical breakdown.

The exact nature of the service provided by the escort makes no difference. What is important is that it is present for some special purpose related to the illegal transportation of contraband.

> "Forfeiture does not turn upon differences in the risk sought to be avoided; whatever the risk which seems to require attendance of a convoying vehicle, the relation of the convoy to the shipment, for purposes of forfeiture, would seem to be the same." U.S. v. One 1956 Ford Tutor Sedan, 253 F.2d 725, 727 (4 Cir. 1958).

Whatever function the escort serves, it clearly has a significant connection to the transportation of illicit drugs. If the "load" conveyance is forfeitable, then escorts are also forfeitable for "facilitation."

EXAMPLES

24. You observe X loading his Chevy van with large plastic bags known by you to contain marihuana. When the van is fully loaded, X drives away followed by his brother Y, who is driving a new Ford LTD. You follow the two vehicles. Suddenly, the headlights of Y's Ford blink twice to X's van in front of it. X's van accelerates to a high speed while Y's Ford slows

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down. Apparently, Y has realized he is being followed. You try to pass the Ford to catch up to the Chevy, but the Ford purposely swerves back and forth across the road blocking your way. You radio other members of your surveillance team who apprehend X in the Chevy van. A lawful search of the van produces 600 pounds of marihuana. Is the Ford forfeitable?

Yes. The Chevy van transported drugs for the purpose of sale. That makes it forfeitable under both state and federal law. The Ford escorted the Chevy to act as a lookout and to run interference so the Chevy could escape. Therefore, the Ford is forfeitable under state and federal law for facilitating the illegal transportation of drugs in the Chevy. See U.S. v. One 1968 Ford LTD 4-Door, cited above.

NOTES

2) TRANSFERRING DRUG MONEY IN A CONVEYANCE SUBJECTS IT TO FEDERAL FORFEITURE

A conveyance that has never contained illicit drugs, but is used as a place to hand over drug purchase money, is subject to forfeiture under federal law for "facilitating" the illegal sale.

Authorities

9 Cir: U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976).

3 Cir: U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).

DCCONN: U.S. v. One 1951 Oldsmobile Sedan Model 98, 126 F.Supp. 515 (1954).

SDALA: U.S. v. One 1960 Ford Galaxie Sedan, 203 F.Supp. 387 (1961).

NOTES

DISCUSSION

NOTES

A conveyance offers a reasonable amount of privacy from public observation, from public eavesdropping and from public interference. A conveyance also offers the advantages of mobility. For these reasons, many professionals and businessmen use conveyances as mobile offices. The drug trafficker is no exception; privacy and mobility help him avoid apprehension, and promote the efficiency of his illegal operation.

"That an automobile is a form of property which is a facility for the illicit traffic in narcotics is evident from the facts in this case. The automobile enables the dope seller to make himself more elusive in traveling to places where he meets his customers or his confederates. It is more difficult to trail the law violator if he uses an automobile. He can travel greater distances, follow less frequented streets or roads, move about at will and alone, and be completely independent of public means of conveyance. The automobile helps him escape observation, detection and capture. It is an operating tool of the dope peddler's trade." U.S. v. One 1941 Pontiac Sedan, 83 F.Supp. 999, 1002(SDNY.1948).

A conveyance used as a place to hand over drug purchase money is significantly connected to the illegal transaction. It is "facilitating" the "sale, receipt, possession or concealment" of illicit drugs. Therefore, it is forfeitable under federal law. 21 U.S.C. 881(a)(4).

"Negotiations for an illegal sale of narcotics do not take place openly and publicly. It is always convenient that some degree of privacy attend all phases of the sale. The automobile certainly provided a convenient place for conversation and payment. Of course, the parties might have talked on the sidewalk. By the same token, they could have transacted their business in a million other places. But that does not mean that the automible did not facilitate the sale." U.S. v. One 1950 Buick Sedan, 231 F.2d 219, 222 (3 Cir. 1956).

NOTES

Contrast State Law: UCSA 505(a)(4) does not provide for the forfeiture of conveyances that facilitate illegal sales. Section 505(a)(4) is limited to conveyances that transport, or facilitate the transportation of illicit drugs. In most states, transferring drug money in a conveyance does not, by itself, subject it to forfeiture.

There are, nevertheless, a few states which have the broader language of the federal statute, and which follow the federal rule. For example, see:

FLA: Mosley v. State, 363 So.2d 172 (App. 1978).

NOTES

3) NEGOTIATING DETAILS OF A DRUG DELIVERY IN A CONVEYANCE SUBJECTS IT TO FEDERAL FORFEITURE

A conveyance that has never contained illicit drugs, but is used as a place to negotiate or arrange the details of a future drug delivery, is subject to forfeiture under federal law for "facilitating" the illegal sale or receipt of drugs.

Authorities

10 Cir: U.S. v. One 1950 Chevrolet 4-Door Sedan, 215 F.2d 482 (1954).

9 Cir: See U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976).

3 Cir: U.S. v. One 1950 Buick Sedan, 231 F. 2d 219 (1956).

SDCA: U.S. v. Ford Coupe Automobile, 83 F. Supp. 866 (1949).

NOTES

DISCUSSION

Drug traffickers do not conduct the details of their trade over the telephone. The possibility the government is tapping their phones may be slight, but the potential consequences of a tap are very serious. Similarly, drug traffickers do not conduct their business by mail. Offers to sell heroin, price quotations, availability of supply, counteroffers, conditions of delivery, acceptances and final contracts are never put in writing. Unlike legitimate businessmen, traffickers are totally dependent upon face-to-face negotiations to carry on their illicit trade.

The advantages to the trafficker of using a conveyance as a place to hand over drug money, apply as well to the use of a conveyance as a place to negotiate the details of a drug delivery. In both instances, the conveyance is significantly connected to the illicit sale or receipt of drugs. Therefore, it is forfeitable under federal law. 21 U.S.C. 881(a)(4).

Contrast State Law: As already noted, UCSA 505(a)(4) does not forfeit conveyances that facilitate illicit sales. Conducting drug negotiations in a conveyance does not subject it to forfeiture in most states.

NOTES

4) TRANSPORTING DRUG MONEY IN A CONVEYANCE TO A SALE SUBJECTS IT TO FEDERAL FORFEITURE

A conveyance used to secure or transport forfeitable drug money prior to or during a drug sale is subject to forfeiture under federal law. Although it may never have contained drugs, it has "facilitated" their illegal sale or receipt.

Authorities

WDTEX: U.S. v. One 1973 Volvo, 377 F.Supp. 810 (1974).

DCONN: U.S. v. One 1951 Oldsmobile, 126 F.Supp. 515 (1959).

SDNY: U.S. v. One 1941 Pontiac Sedan, 83 F. Supp. 999 (1948).

SDCA: See U.S. v. One 1962 Ford Galaxie Sedan, 236 F.Supp. 529 (1964).

DCMINN: U.S. v. One 1970 Buick Riviera, 374 F. Supp. 277 (1973)(Contra).

DMASS: U.S. v. One 1972 Chevrolet Corvette, F.Supp. (26 Cr.L. 2439, 1/18/80); rev'd F.2d (1 Cir 1980).

5 Cir: See Wingo v. U.S., 266 F.2d 421 (1959).

9 Cir: See Nocita v. U.S., 258 F.2d 199 (1958).

NOTES

DISCUSSION

Transportation of money is an essential part of drug trafficking. Checks, money orders and other monetary instruments leave a "paper trail" for law enforcement to follow. Moreover, under the Bank Secrecy Act of 1970, commercial banking transactions involving $10,000 or more must be reported to the Department of Treasury. To avoid the risks associated with a paper trail, most drug traffickers conduct their business on a cash-and-carry basis.

By current estimates, the annual gross income of drug traffickers in the United States approaches 60 billion dollars. Given the cash-and-carry nature of the business, traffickers face serious problems with storing, concealing, safeguarding and moving large amounts of bulky cash. Conveyances play a big part in solving these problems.

During illicit sales, conveyances are used to safeguard and transport drug purchase money. A car, particularly a car trunk, provides a relatively secure place to store large amounts of cash during a drug exchange. It is also a fairly secure way to move cash to and from the site of exchange. In a very real sense, a car can act as a kind of mobile "safe." This facilitates the sale and receipt of drugs within the meaning of 21 U.S.C. 881(a)(4).

The problems of safeguarding and moving money do not end with the individual exhange. Although the market for illicit drugs is within the United States, the sources of supply are thousands of miles away from this Country. Operating on a cash-and-carry basis, the drug trafficker must secretly move drugs from foreign sources to points of sale within the U.S. market and he must secretly move bulky cash from the market back to foreign suppliers. In reality, the flow of drugs into this Country is "mirrored" by a flow of money in the opposite direction.

Again, conveyances play a key role in moving the illgotten cash out of the United States.

This activity is important to the successful accomplishment of the illegal scheme. Both the flow of drugs and the flow of money are vital to the sale of illegal drugs within this Country.

For a more detailed discussion of how traffickers move money, see Kobakoff, Narcotics Moneyflow, Drug Enforcement (Magazine), Vol. 5 No. 1, July 1978.

Contrast State Law: Conveyances that facilitate sales by transporting drug money are not forfeitable under UCSA 505(a)(4).

NOTES

5) MERE PRESENCE OF DRUGS IN A CONVEYANCE SUBJECTS IT TO FEDERAL FORFEITURE

The mere possession or concealment of illicit drugs in a conveyance, in any amount, for any purpose, subjects it to forfeiture under federal law. Simple physical presence of drugs on one occasion is enough; nothing more need be shown.

Authorities

21 U.S.C. 881(a)(4); 49 U.S.C. 781(a)(3), 782.

9 Cir: U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971).

6 Cir: U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978).

5 Cir: Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S. v. One 1952 Model Ford Sedan Auto, 213 F.2d 252 (1954).

1 Cir: See U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

DCMICH: U.S. v. One 1973 Dodge Van, 416 F.Supp. 43 (1976).

DCPA: See U.S. v. One 1971 Chevrolet Corvette Auto, 393 F.Supp. 344 (1975).

EDPA: See U.S. v. One 1971 Porsche Coupe, Auto, 364 F.Supp. 745 (1973).

SDTEX: See U.S. v. One Buick Automobile, 39 F.2d 107 (1930).

NOTES

DISCUSSION

The argument is sometimes made that actual transportation of drugs must be shown to justify the forfeiture of a conveyance. More than fifty years ago, the United State Supreme Court held that mere concealment or possession of contraband on one occasion is enough to declare a forfeiture; actual transportation is not required. U.S. v. One Ford Coupe' Automobile, 47 S.Ct. 154 (1926).

Today, at least two federal statutes require forfeiture where any contraband has been physically present in a conveyance. Section 881(a)(4) of the Controlled Substances Act (21 U.S.C.) provides for the forfeiture of "All conveyances...used, or intended for use ...in any manner to facilitate the...possession, or concealment of...(illicit drugs, products and equipment)." Section 781(a)(3) of the Contraband Seizure Act (49 U.S.C.) makes it unlawful "to use any vessel, vehicle, or aircraft to facilitate the...concealment... (or)...possession...of any contraband article." And Section 782 forfeits conveyances used illegally.

Under these statutes, the mere presence of any amount of illicit drugs in a conveyance subjects it to federal forfeiture.

Contrast State Law: UCSA 505(a)(4) does not forfeit conveyances in which drugs are simply possessed or concealed.

Several states follow the federal rule. See:

ARIZ: Matter of One 1965 Ford Econoline Van, 591 P.2d 569 (App. 1979).

EXAMPLE

25. You are searching S's garage for cocaine under the authority of a valid warrant. During the search, you see several marihuana butts in plain view on the dashboard of S's new Mercedes 280S. Is the car forfeitable?

NOTES

NOTES

Yes, under federal law. The mere possession or concealment of illicit drugs in a conveyance, in any amount, for any purpose, subjects it to federal forfeiture. See U.S. v. One 1975 Mercedes 280S, cited above.

No, in most states.

c) MERE COMMUTING SHOULD BE CONSIDERED FACILITATION

In the past, a conveyance used solely for the personal convenience of the driver to commute to a site of illegal activity has not been considered forfeitable under state or federal law. The Controlled Substances Act has, apparently, changed this old rule.

Authorities

21 U.S.C. 881(a)(4)

S.Ct: U.S. v. Lane Motor Co., 73 S.Ct. 459 (1953).

10 Cir: Platt v. U.S., 163 F.2d 165 (1947).

9 Cir: Howard v. U.S., 423 F.2d 1102 (1970); Simpson v. U.S., 272 F.2d 229 (1959).

8 Cir: See One 1961 Linc. Cont. Sedan v. U.S., 360 F.2d 467 (1966).

5 Cir: U.S. v. (One)(1) 1971 Chevrolet Corvette Auto, 496 F.2d 210 (1974); Burt v. U.S., 283 F.2d 473 (1960).

4 Cir: U.S. v. One Ford Coach, 1949 Model, 184 F.2d 749 (1950).

3 Cir: U.S. v. One 1948 Plymouth Sedan, 198 F. 2d 399 (1952).

2 Cir: U.S. v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (1977)(Contra).

DCNH: U.S. v. One 1972 Datsun, 378 F.Supp. 1200 (1974).

NJ: Ben Ali v. Towe, 103 A.2d 158 (Super 19).

NOTES

DISCUSSION

Different courts, in different times, under different statutes, have consistently held that the mere use of a conveyance to commute to a site of illegal activity does not subject it to civil forfeiture.

One court has reached an opposite conclusion. The United States Court of Appeals for the Second Circuit held in One 1974 Cadillac Eldorado Sedan that a conveyance is forfeitable under 21 U.S.C. 881(a)(4) if it is used to transport drug traffickers to the site of an illegal sale or to a meeting where negotiations for a sale take place:

> "As a matter of common sense we cannot accept the concept that while the transportation of any quantity of drugs however minute is admittedly sufficient to merit the forfeiture of the vehicle, nonetheless the transportation of the trafficker to the site of the drug sale or to a prearranged meeting with a prospective customer where the sale is proposed should save the vehicle from forfeiture...It is well understood that extremely small amounts of narcotics are worth considerable sums...The vehicle is employed not as a moving van to cart bulky contraband, but realistically to facilitate the transportation of the person who deals in it. The nabobs of the drug business normally eschew physical custody of dope, relegating to their minions possession of the brown paper bag.... If the purpose of the statute is, as Congress indicated, to reduce the profits of those who practice this nefarious profession, we are loathe to make the forfeiture depend upon the accident of whether dope is physically present in the vehicle. Its use to transport the peddler or his confederates to the scene of the sale or to a meeting where the sale is proposed is sufficient." 548 F.2d at 425-426.

The logic of this decision seems compelling:

NOTES

(1) Prior commuting cases merely interpreted prior statutes; they did not state a constitutional rule on commuting.

(2) Congress intended 21 U.S.C. 881(a)(4) to have a much wider scope than earlier laws. To reflect this, it placed the words "in any manner" before the term "to facilitate" in the statute.

(3) Therefore, earlier decisions on commuting are irrelevant to 21 U.S.C. 881(a)(4).

(4) Congress passed 21 U.S.C. 881(a)(4) to deprive traffickers of their mobility. This is clear from the legislative history quoted on pages 75-76 of this Guide.

(5) The mobility of the buyer and seller is as important as the mobility of drugs and drug money. See page 100 of this guide.

(6) Therefore, transportation of a buyer or seller to negotiations or sales should also result in forfeiture for "facilitation."

Because of this decision, federal agents in New York, Connecticut and Vermont can seize conveyances used merely to commute to sites of illegal drug sales and drug meetings. As yet, no other courts have considered this newly announced rule.

Federal agents outside the Second Circuit, and state officers working under UCSA 505(a)(4), should consult their legal advisors concerning the potential application of this rule in their jurisdictions.

EXAMPLE

26. You meet with R at a restaurant to negotiate the purchase of LSD. He agrees to sell you 950 dosage units and asks you to follow him to where they are stashed. You follow R as he drives his Datsun to a home where he sells you the LSD. Is the car forfeitable?

    Yes, in federal courts in New York, Connecticut and Vermont. Arguably yes in all other federal courts, although the question must still be litigated. cf U.S. v. One 1972 Datsun, cited above.

345-769 O - 81 - 9

NOTES

d) BEYOND THE COMMON PATTERNS

Statutes are often written in general terms that are broad enough to cover many factual situations which were not foreseen at the time the laws were passed. New factual patterns are covered by generally worded laws, provided they come within both the wording and the spirit of the statutes.

> "Old crimes...may be committed under new conditions. Old laws apply to changed situations...While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." Browder v. U.S., 61 S.Ct. 599, 602 (1941).

The word "facilitate" is a general term; it is not frozen, or restricted, to the common patterns we have discussed. To emphasize this, the draftsmen of 21 U.S.C. 881(a)(4) and UCSA 505(a)(4) placed the phrase "in any manner" before the term "to facilitate." See U.S. v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2 Cir. 1977).

THE FACILITATION SECTIONS OF STATE AND FEDERAL FORFEITURE STATUTES CAN APPLY TO FACTUAL PATTERNS AS YET UNKNOWN.

For miscellaneous facilitation cases, not falling within the common patterns, see: U.S. v. Arias, 453 F.2d 641 (9 Cir. 1972); U.S. v. Bride, 308 F.2d 470 (9 Cir. 1962); D'Agostino v. U.S., 261 F.2d 154 (9 Cir. 1958); U.S. v. LaVecchia, 513 F.2d 1210 (2 Cir. 1975); U.S. v. One 1966 Ford LTD 4-Door Sedan, 273 F.Supp. 1007, aff'd sub nom Bullock v. U.S., 384 F.2d 747 (5 Cir. 1967); and U.S. v. One 1962 Ford 2-Door Sedan, 234 F.Supp. 798 (WDVA. 1964).

EXAMPLE

27. Acting in an undercover capacity, you meet with L at a restaurant to buy $25,000 worth of heroin. L arrives there in his car. You show him the money which you have stored in the trunk of your car. Then you ask L to see the drugs. He says he doesn't have them; his source has the heroin and is waiting for L to call. L quickly goes to a phone. When he returns he asks you to follow him across town to a bar. He drives there in his car. At the parking lot of the bar a stranger enters L's car and talks to L for no more than a minute. The stranger then gets out and disappears back into the bar. L comes over and asks you to follow him to a train station. He drives there in his car. At the station, L shows you a key which the suspect gave him at the bar. He asks you to accompany him to the public lockers in the train station. He asks you to bring your money. Enroute, he explains that the heroin is in a certain locker which he will open with the key. You are to take out the drugs and put your money in. L will keep the key and return it to his source. After inspecting the drugs in the locker, you arrest L. Is his car forfeitable?

Yes, under federal law. The delivery plan devised by L and his source required L to travel quickly about the city. L's car was used for more than just commuting; it was a necessary part of a complex plan to deliver drugs. And, constructive possession of the heroin was transferred in L's car when his source handed him the locker key. The use of this vehicle does not fit the common patterns we have seen, but it has facilitated the sale of heroin in a significant way. Therefore, it is forfeitable under federal law. See U.S. v. LaVecchia, cited above.

NOTES

5. COMMON CARRIERS ARE EXEMPT FROM CIVIL FORFEITURE

A common carrier, such as a commercial airplane, bus, train or taxi, is exempt from both state and federal forfeiture, unless:

1. It is not being operated as a common carrier at the time of illegal use; or

2. An owner or person in control (captain, driver, conductor, pilot, etc.) knows of and acquiesces in the illegal use.

Although common carriers are exempt, the exemption is not absolute.

Authorities

21 U.S.C. 881; 49 U.S.C. 782; 19 U.S.C. 1594; U.C.S.A. 505(a)(4)(i); 21 U.S.C. 885; 19 U.S.C. 1615.

MDFLA: U.S. v. One (1) Liberian Refrigerator Vessel, 447 F.Supp. 1053 (1977).

MD: Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

DISCUSSION

Both state and federal law exempt common carriers from civil forfeiture. Section 881(a)(4)(A) of the federal Controlled Substances Act (21 U.S.C.) provides:

> "no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation...."

Similar provisions appear in Section 782 of the federal Contraband Seizure Act (49 U.S.C.), and in Section 1594 of the federal Tariff Act of 1930 (19 U.S.C.). The state Uniform Controlled Substances Act contains a virtually identical provision in Section 505(a)(4)(i).

Basically, a "common carrier" is a person or company employed to transport goods or passengers, such as a commercial airline, bus line, train, taxi, parcel or freight service.

> "The salient characteristic of a common carrier is that 'He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally...(and) holds himself out as ready to engage in the transportation of goods for hire as a public employment ...and...undertakes for all persons indifferently." U.S. v. One (1) Liberian Refrigeration Vessel, cited above (quoting from U.S. v. Stephen Bros. Lines, 384 F. 2d 118, 5 Cir. 1967).

The rationale given for exempting common carriers is that, unlike owners of private conveyances, they are generally required by law to accept all persons and all parcels for carriage.

> "There can, we think, be no clearer case of reasonableness in classification for purposes of enforcing the narcotics statutes than the one made here. The

opportunity of the owner of a common carrier to detect or prevent carriage by one of its passengers (who must be carried without discrimination) of a small quantity of narcotics is obviously slight as compared with the opportunity of the owner of an automobile who reserves the full right of inviting to ride whom he wishes." U.S. v. One 1957 Oldsmobile Auto., 256 F.2d 931 (5 Cir. 1958).

Because of this distinction, owners of property not exempted from forfeiture cannot complain they have been denied due process or equal protection of the laws. U.S. v. One 1971 Mercedes Benz, 542 F.2d 912 (4 Cir. 1976); U.S. v. One 1957 Oldsmobile Auto, 256 F.2d 931 (5 Cir. 1958); U.S. v. One 1962 Ford Thunderbird, 232 F.Supp. 1019 (NDILL. 1964); State v. Richards, 301 S.W.2d 597 (Tex. 1957); and see Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (Mass. 1978).

The common carrier exemption is not absolute, and the burden of proving the exemption rests partly with the carrier. First, the government has the burden to show probable cause for the seizure. Second, the burden shifts to the claimant to prove that the conveyance was being operated as a common carrier at the time of illegal use. 21 U.S.C. 885, 19 U.S.C. 1615. Third, the burden shifts back to the government to prove that either the owner or person in control of the common carrier acquiesced in the illegal use. U.S. v. One (1) Liberian Refrigeration Vessel, cited above.

EXAMPLES

28. You develop probable cause to believe that G, a local taxi driver, is selling heroin to students. You observe G drive his cab to a local high school and park. Students begin to enter and leave his cab. You arrest G seated in his taxi. He has many small bags of heroin and a large quantity of small bills in his possession. Is the taxi forfeitable?

    Yes. As a general rule, common carriers are exempt from civil forfeiture, but the

exemption is not absolute. If a conveyance is not being operated as a common carrier at the time of illegal use, then it is not exempt. Also, if the person in control acquiesces in the illegal use, then it is not exempt. Here, both of these exceptions apply: the taxi was not being used for public transportation at the time it was parked outside the school, and the driver knew of the illegal use of the cab. Therefore, the taxi is not exempt as a common carrier. Since heroin was present in the cab, it is subject to federal forfeiture. And, since G transported heroin in the cab for the purpose of sale, it is subject to state forfeiture. See Prince Georges County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

29. You are surveilling a docked ship believed to be involved in smuggling. At 2:30 a.m., several crewmembers unload dark colored trash bags through a porthole on to the dock. You approach the dock and the crewmembers immediately scatter in the direction of a nearby field. You do not catch any of the men, but you find a dark colored trash bag floating in the water between the ship and the dock, and you find seven more dark colored trash bags abandoned in the nearby field. The bags contain a total of 173 pounds of pure cocaine. In the morning, you interview the ship's officers and crew. The "boatswain," who is the liaison between the ship's officers and crew, and who is responsible for the crew's work assignments, denies any involvement in smuggling. He does admit, however, that he, the Captain, and another officer had seen the cocaine on board in one of the crew's cabin at the beginning of the voyage. Is the ship forfeitable?

    Yes. Although no drugs were found on board, the circumstantial evidence makes it virtually certain that a very large quantity of cocaine was transported in the ship for sale in the United States. Therefore, it is forfeitable under both state and federal law. And, the common carrier exception to forfeiture does not apply. The Captain, plus one of the ship's officers, plus the boatswain

knew at the beginning of the voyage that cocaine was on board, yet they took no action to remove it or to call the authorities. Since the people in control of the ship knew of, and acquiesced in, the transportation of cocaine, it is not exempt from forfeiture. See U.S. v. One (1) Liberian Refrigerator Vessel, 447 F.Supp. 1053 (MDFLA. 1977).

6. STOLEN CONVEYANCES ARE EXEMPT FROM CIVIL FORFEITURE

A conveyance is exempt from federal forfeiture if the owner can prove:

1. It was possessed unlawfully at the time of illegal use; and

2. Possession was illegally acquired in violation of the criminal laws of the United States or of any state.

In other words, the exemption depends upon the owner's ability to prove the conveyance was stolen. Because most states exempt all innocent owners from civil forfeiture, stolen conveyances are also exempt under state law.

Authorities

21 U.S.C. 881; 49 U.S.C. 782; UCSA 505(a)(4)(ii); 21 U.S.C. 885; 19 U.S.C. 1615.

S.Ct: Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808)

9 Cir: U.S. v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (1969); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: See U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974).

6 Cir: See One 1941 Ford 1 Ton Pickup A. Truck v. U.S., 140 F.2d 255 (1944).

5 Cir: General Finance Corp. v. U.S., 333 F.2d 681 (1964); Westfall Oldsmobile v. U.S., 243 F.2d 409 (1957); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S. v. One Chevrolet Truck, 1934 Model, 79 F.2d 651 (1935); Beaudry v. U.S., 79 F.2d 650 (1935).

MD: Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

DISCUSSION

As early as 1808, the Supreme Court of the United States suggested that it might be unconstitutional to forfeit stolen property:

> "The court is...of opinion, that the removal for which the act punishes the owner with a forfeiture of the goods, must be made with his consent or connivance, or with that of some person employed or trusted by him."

> "If, by private theft, or open robbery, without any fault on his part, his property should be invaded...the law cannot be understood to punish him with the forfeiture of that property." Peisch v. Ware, 8 U.S. (Cranch) 347, 365, 2 L.Ed.643.

Later Supreme Court decisions have referred to this statement, but have not directly decided whether stolen property is constitutionally exempt from forfeiture. It seems unlikely that any decisions will be made on this issue, because the vast majority of forfeiture statutes contain exemptions for stolen property, particularly stolen conveyances. To illustrate, Section 782 of the Contraband Seizure Act (49 U.S.C.) provides:

> "That no..., vehicle,...shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such..., vehicle,...was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State."

Similarly, Section 881(a)(4)(B) of the federal Controlled Substances Act provides:

> "(N)o conveyances shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State."

a. Possession Must Be Criminal

A conveyance must be "stolen" before an owner can rely upon this exception.

The National Motor Vehicle Theft Act, also known as the Dyer Act, 18 U.S.C. 2312, 2313, controls whether a conveyance is stolen within the meaning of federal law. Readers interested in an extended discussion of the federal meaning of "stolen" should refer to 45 ALR Fed. 370. State statutes and common law decisions control whether a conveyance is stolen under state law. Readers interested in this topic should refer to the annotations in 70 ALR 3d. 1202, 38 ALR 3d.949, and 9 ALR 3d.633. Because of the many differences in state laws, any detailed discussion of this subject is far beyond the scope of this Guide. But, several generalization are possible.

1) Default on Payments

If a buyer, or renter, of a conveyance is behind on his payments to a seller, lessor, or secured party, the conveyance is not stolen within the meaning of state or federal law. Continued possession of a conveyance after defaulting on payments is not a crime. And, the conveyance was legally acquired. Therefore, the stolen conveyance exception does not apply. U.S. v. 1967 Cadillac Fleetwood El Dorado Auto, 296 F.Supp. 891 (SDTEX.1969); U.S. v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (DNJ. 1953); Prince George's County v. Blue Bird Cab Co., 284 A.2d 203 (MD.App. 1971).

2) Exceeding Permission

If the owner, lessee, or possessor of a conveyance has agreed not to use it for unlawful purposes, and he breaks the agreement, the conveyance is not considered

"stolen." In addition, possession of the conveyance was lawfully acquired. Therefore, the stolen conveyance exception does not apply. U.S. v. 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (9 Cir. 1969); U.S. v. One Chevrolet Truck, 1934 Model, 79 F.2d 651 (5 Cir. 1935); U.S. v. One 1941 Chrysler Brougham Sedan, 74 F. Supp. 970 (EDMICH. 1947); and see U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (8 Cir. 1974).

If a conveyance is loaned to someone for a particular purpose, and he goes on a "frolic" of his own using the conveyance for some other purpose, the conveyance is generally not considered "stolen." And, it was not criminally acquired. Therefore, the stolen conveyance exception does not apply. U.S. v. One 1976 Buick Skylark, 453 F.Supp. 639 (D.Colo. 1978); U.S. v. One 1951 Oldsmobile Sedan, 135 F.Supp. 873 (EDPA. 1955).

If a conveyance is loaned to someone and, without permission, he allows a third party to drive it, it is not "stolen." And, it was not criminally acquired. Therefore, the exception does not apply. U.S. v. One 1963 Cadillac Hardtop, 231 F. Supp. 27 (EDWIS. 1964); U.S. v. One Lincoln Touring Car, 11 F.2d 551 (NDNY. 1925).

3) Illegal Taking (Theft)

If a conveyance is illegally acquired by fraud, such as by forging papers, it will be considered "stolen" in most states. Compare U.S. v. 1957 Oldsmobile 4-Door Sedan, 173 F.Supp. 956 (SDTEX. 1959) with Gen. Finance Corp. v. U.S., 333 F.2d 681 (5 Cir. 1964); Westfall Oldsmobile v. U.S., 243 F.2d 409 (5 Cir. 1957); and Beaudry v. U.S., 79 F.2d 650 (5 Cir. 1935).

If a conveyance is taken, even by a relative, without the express or implied permission of the owner, it is considered "stolen" and will be exempt from forfeiture. U.S. v. One Ford Mustang 1971 Mach I, 354 F.Supp. 81 (CDCAL. 1973); U.S. v. One 1971 Ford Truck, 346 F.Supp. 613 (CD CAL. 1972); U.S. v. One 1962 Ford Galaxie Sedan, 236 F.Supp. 529 (SDCAL. 1964); U.S. v. One 1954 "98" Oldsmobile Convertible, 152 F.Supp. 616 (MDPA. 1957); U.S. v. One 1954 Cadillac 2-Door Sedan, 135 F.Supp. 1 (WDMO. 1955); U.S. v. One 1938 Chevrolet Coach Auto., 78 F.Supp. 676 (WDSC. 1948) (owner too drunk to give "legal" permission.)

b. Owners Must Prove Theft

The Evidence Section of this Guide explains that once probable cause is shown for forfeiture, the claimant has the burden of disproving the illegal use of the property, or of proving it fits within a statutory exception. 19 U.S.C. 1615, 21 U.S.C. 885. In addition, the plain wording of 49 U.S.C. 782 and 21 U.S.C. 881(a)(4)(B) requires the claimant to establish his property was stolen.

A mere "hue and cry" that property was stolen will not satisfy this requirement. Merely pleading, or claiming, that a conveyance was stolen is not enough. The claimant must establish his property was stolen by a preponderance of evidence. See the cases cited earlier in this Guide on burden of proof. In particular, see U.S. v. Andrade, 181 F.2d 42 (9 Cir. 1950); One 1941 Ford ½ Ton Pickup v. U.S., 140 F.2d 255 (6 Cir. 1944); U.S. v. One (1) 1950 Burger Yacht, 395 F.Supp. 802 (SDFLA. 1975); and U.S. v. One Oldsmobile Sedan, 30 F. Supp. 254 (D.MASS. 1939).

c. State Law Compared

An owner need not prove his conveyance was stolen to escape forfeiture under state law. Certainly, if it was stolen, it will be exempt from state forfeiture. But state law, as discussed below, excepts property from forfeiture anytime the illegal use was without the knowledge of the owner. UCSA 505(a)(4)(ii).

NOTES

7. ADDITIONAL STATE EXCEPTIONS

States which have adopted UCSA 505(a)(4) have several exceptions to the civil forfeiture of conveyances, which federal law does not recognize.

a. Simple Possession Cases

UCSA 505(a)(4)(iii) provides that "a conveyance is not subject to forfeiture for a violation of Section 401(c)...." This refers to the simple possession of drugs' offense in the Uniform Act.

It is unclear why this provision was included in the Uniform Act, since the main part of Section 505(a)(4) already prohibits forfeiture in non-trafficking cases. Whatever the reason, state governments have the initial burden of establishing the probability of trafficking. This "exception" need not be proved by a claimant. Griffis v. State, 356 So.2d 297 (FLA. 1978); Reeder v. State, 314 So.2d 853 (ALA. 1975).

Contrast Federal Law: Remember, federal law contains no statutory exception for conveyances involved in simple possession cases. Instead, owners must seek a pardon (remission or mitigation) from the Attorney General.

b. Innocent Owner

UCSA 505(a)(4)(ii) provides that:

> "no conveyance is subject to forfeiture under this Section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent."

If a conveyance has more than one owner, the guilty knowledge of one is imputed, or chargeable, to all the others. As long as any one of the owners had knowledge of the illegal use, the "Innocent Owner" Exception does not apply; the conveyance remains forfeitable. State v. One 1968 Buick Electra, 301 A.2d 297 (Del. 1973); Amrani-Khaldi v. State, 575 S.W.2d 667 (TEX. App. 1978).

A non-registered party, who is a "true owner" is an owner under this section. Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (ARIZ. App. 1978).

The exception makes clear that the owner has the burden of proving his ignorance of the illegal conduct that gave rise to the seizure. State ex rel Reid v. Kemp, 574 S.W.2d 695 (MO. App. 1978); State v. Richardson, 208 S.E.2d 274 (NC. App. 1974).

Of course, if the owner testifies that he was ignorant of the illegal activity, and if he is judged to be credible, and if the State has no evidence he had guilty knowledge, this should be enough to avoid forfeiture under the exception. State v. Ozarek, 573 P.2d 209 (NM. 1978); State v. One (1) Certain 1969 Ford Van, 191 N.W.2d 662 (IOWA. 1971); Garner v. State, 175 S.E. 2d 133 (GA. App. 1970).

If a conveyance is seized twice from the same drug violator, and if after the first seizure an owner invokes the Innocent Owner Exception as a defense, that owner's guilty knowledge will virtually be presumed in the second forfeiture proceeding. State v. Richardson, 208 S.E.2d 274 (NC. App. 1974).

Contrast Federal Law: Federal law has no statutory exception for innocent owners of conveyances. They must petition for a pardon of the property (remission or mitigation) from the Attorney General.

c. Innocent Secured Parties

UCSA 505(a)(4)(ii) provides that:

> "a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission."

NOTES

"Is subject to" means subordinate, inferior or secondary to. It means the State's right to forfeit a conveyance may not interfere with, or jeopardize, the interests of a bona fide secured party. If necessary, a state court can order return of a conveyance to a secured party to protect his interest pending the completion of forfeiture proceedings. State v. One 1977 Dodge Van, 397 A.2d 733 (NJ. Super. 1979).

A "secured party" is a creditor who has special rights in specific property of the debtor. The bank that lends money to buy a new car is a secured party; it has special rights (a security interest) in the car (the collateral). Not every creditor is a secured party. Who qualifies depends upon the commercial law of the State. See Article 9 of the Uniform Commercial Code.

Owners are not considered secured parties. Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (ARIZ. App. 1978).

Contrast Federal Law: Again, federal law contains no statutory exception for innocent secured parties of conveyances. They must petition the Attorney General for a pardon of their interests in the seized property (remission or mitigation).

Forfeitable Conveyances

The Following Are Subject To Forfeiture... All Conveyances... Used, or Intended for Use To:

(State) U.C.S.A. 505	vs. (Federal) 21 U.S.C. 881
Transport Drugs for the Purpose of Sale	**Transport Drugs** for any Purpose, in anyAmount.
Facilitate Transportation of Drugs for the Purpose of Sale. —Escort Conveyances	**Facilitate Transportation of Drugs** for any Purpose, in any Amount. —Escort Conveyances
	Facilitate the Sale of Drugs —Negotiate Sale in Conveyance —Transport Drug Money —Payoff in Conveyance
	Facilitate Receipt of Drugs
	Facilitate Possession or Concealment —Mere Presence of Drugs in Conveyance

Exceptions

Stolen Conveyances	**Stolen Conveyances**
Common Carriers	**Common Carriers**
Simple Possession Cases	
Innocent Owner's Interests	
Creditor's Interests	

345-769 O - 81 - 10

NOTES

F. RECORDS KEPT BY DRUG VIOLATORS ARE FORFEITABLE

All records of drug violations, including research, formulas, microfilm, tapes and data, which are made and kept by drug violators are forfeitable under both state and federal law. Books of general distribution and drug related literature, on the other hand, are constitutionally exempt from civil forfeiture.

Authorities

U.S.C.A., Constitution, Amendment 1.
21 U.S.C. 881(a)(5); UCSA 505(a)(5).

WDKY: Kane v. McDaniel, 407 F.Supp. 1239 (1975).

NDGA: High Ol'Times v. Busbee, 456 F.Supp. 1035 (1978).

G. CURRENCY & PROCEEDS

NOTES

Prior to November 10, 1978, the civil forfeiture provisions of federal law did not reach so-called "drug money" or drug profits. On that date Section 881 of the Controlled Substances Act was extended to include:

> "All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of... (the Controlled Substances Act or the Controlled Substances Import and Export Act)...,"
>
> "all proceeds traceable to such an exchange, and"
>
> "all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of ...(the Controlled Substances Act or the Controlled Substances Import and Export Act)..."
>
> "except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the owner, to have been committed or omitted without the knowledge or consent of that owner."

Although these provisions are written as one paragraph in the statute (21 U.S.C. 881(a)(6)), they are actually four distinct sections:

(1) The EXCHANGE Section,

(2) The PROCEEDS Section,

(3) The FACILITATION MONEY Section, and

(4) The INNOCENT OWNER Section.

You may find the following chart helpful in distinguishing between these sections as you read through this Guide.

Drug Currency and Proceeds

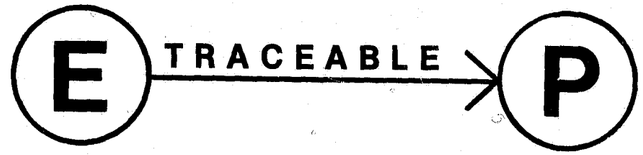
21 U.S.C. 881 (a) (6)

Exchange Section

"All...things of value furnished or intended to be furnished... in exchange for'...(drugs)."

Proceeds Section

"All proceeds traceable to such an exchange..."



Facilitation Money Section

"All money...used or intended to be used to facilitate any... (drug law)...violation..."

Innocent Owner Section

"Except... property... established by the owner to have been...(illegally used)... without his knowledge..."

NOTES

1. ANYTHING EXCHANGED, OR INTENDED FOR EXCHANGE, FOR ILLICIT DRUGS IS SUBJECT TO FEDERAL FORFEITURE

Federal law provides for the civil forfeiture of anything of value furnished, or intended to be furnished, illegally in exchange for controlled substances. At least nine states have similar, although not identical, civil forfeiture provisions.

Authorities

21 U.S.C. 881(a)(6)

IDAHO: Code Sec. 37-2711.(6).

ILL: Ann.Stat.ch. 56-½ Sec. 1505(a)(4).

KY: Code of Sec. 218A-270(1)(f).

MD: Crimes & Punishments Code Ann. Sec. 297(a)(6)(1957).

MASS: Gen. Laws Ann. ch. 94C Sec. 47(a)(5) (West).

MINN: Stat.Ann. Sec. 152.19 Subdv. 1(2)(West)

NM: Stat.Ann. Sec. 54-11-33F (1953).

TENN: Code Ann. Sec. 52-1443(a)(6).

TEX: Art. 4476-15, Vernon's (iv. Stat. Sec. 5.03(a)(6).

VA: Code of 18.2-249 (1950).

NOTES

DISCUSSION

Although the Exchange Section of 21 U.S.C. 881 (a)(6) specifically refers to moneys, negotiable instruments and securities, it is not limited to them. It applies to "(any) other things of value "exchanged, or intended for exchange, for illicit drugs.

a. Direct Evidence of Exchanges

Your observations, the observations of an informant, or the admissions of a defendant or owner, will frequently provide you with direct evidence of an exchange or intended exchange.

To illustrate, suppose you observe A giving B $2,000 in exchange for an ounce of cocaine; the money is forfeitable under the Exchange Section of 21 U.S.C. 881(a)(6).

Suppose you masquerade as a major supplier of Thai heroin and B negotiates with you to buy a large shipment of the drug. You give B a very small sample to test and he shows you a bankbook with a $200,000 balance and a check made out to you in the same amount. The check, the passbook and the money in B's account are forfeitable under the Exchange Section of 21 U.S.C. 881(a)(6). They are intended for exchange for drugs; an actual exchange need not take place.

Suppose Z is stopped at the border as he is returning from Mexico and a Customs search of his suitcase reveals one pound of marihuana, 800 quaalude tablets, a vial of hashish oil and $4,000 in cash. Z admits he went to Mexico with $6,000 in cash to buy all the drugs he could find. He complains he could only find $2,000 worth of drugs, so he gave up looking and came home. The $4,000 is forfeitable under the Exchange Section of 21 U.S.C. 881(a)(6). It was intended for exchange for illicit drugs. Remember, an actual exchange need not take place.

b. Circumstantial Evidence of Exchanges

Too often you will not have direct evidence of an exchange; fortunately, this will not

NOTES

necessarily preclude forfeiture. Circumstantial evidence is admissible to prove an exchange occurred or that one was intended. See State v. Petty, 241 S.E.2d 561(SC. 1978) and Lettner v. Plummer, 559 S.W.2d 785 (TENN 1977). In addition, the circumstantial evidence need not prove an exchange to a certainty - mere "probability" of an exchange is enough to begin a civil forfeiture. For these reasons, it is important to consider the kinds of circumstantial evidence you are likely to encounter.

1) Simple Possession of Money & Drugs

If small sums of money are found with small amounts of drugs, a reasonable suspicion exists that they are connected in some way. Two states (Idaho and Maryland) have elevated this suspicion to a statutory presumption. For example, Maryland's law forfeits:

> "All money or currency which shall be found in close proximity,to contraband controlled dangerous substances...."

The Exchange Section of 21 U.S.C. 881(a)(6) does not contain such a presumption. It requires the federal government to establish the probability that money was exchanged, or was intended for exchange, for drugs. Without more evidence, small sums of money found with small amounts of drugs are not subject to federal forfeiture.

To illustrate, suppose B is arrested at an airport for smoking marihuana. During his arrest, one marihuana cigarette, seven grams of marihuana in a small bag, and $55 in cash are found in one of his pockets. The money is forfeitable in the states of Idaho and Maryland simply for being found in close proximity to drugs. It is not forfeitable under federal law; simple possession of drugs and money does not create a probability the money is connected to an illicit exchange.

Suppose in this last example, an additional $3,900 in cash is found rolled in

two bundles hidden in the arrestee's socks. Does the larger sum of money create a probability it is connected to a drug exchange? No. A large sum of money is certainly suspicious, but without some evidence of drug trafficking there is no probability it is linked to an illegal exchange.

2) Small Sums Possessed by Traffickers

Suppose you obtain an arrest warrant for an attorney indicted of drug trafficking. And suppose during his arrest you find $100 in cash in his wallet. Is the cash forfeitable? No. Small sums of money are common. You cannot say with any probability that the money is related to a drug exchange. It seems just as likely the cash is spending money acquired in a legitimate way. Without more evidence, small sums possessed by traffickers are not forfeitable under state or federal law.

3) Large Sums Possessed by Traffickers

The drug trafficking business has many peculiar characteristics. We have already noted that it is a cash-and-carry trade, it relies upon face-to-face transactions, it avoids leaving a paper trail, and it is very dependent upon mobility.

In addition, it cannot depend upon a steady source of supply; seizures and arrests continually interrupt the supply line. Both the availability and purity of drugs can vary dramatically with time. And, it cannot depend upon a steady stream of reliable buyers; the peddler cannot advertise; and new buyers must be scrutinized to avoid infiltration by government agents.

The result is a somewhat chaotic market in which drugs suddenly become available, or unavailable, purity fluctuates, and prices change up to the moment of sale. To function effectively in this market, the successful trafficker needs a cash reserve on hand to buy drugs as they become available and to pay last minute price increases. Given the high value of illicit drugs (an ounce of pure cocaine has a retail street value of over $17,000 and an ounce of pure heroin brings over $60,000), the cash reserve usually involves a large sum of money.

Large sums of cash possessed by drug traffickers probably were received in exchange for drugs, or are intended for exchange for a particular shipment of drugs, or are a cash reserve intended for exchange for drugs that might become available. Judges understand this: they believe that possession of large sums of unexplained cash is highly relevant evidence of drug trafficking. U.S. v. Barnes, 604 F.2d 121 (2 Cir. 1979); U.S. Magnano, 543 F.2d 431 (2 Cir. 1976); and U.S. v. Tramunti, 513 F.2d 1087 (2 Cir. 1975)

In Barnes the court states:

> "Evidence of the possession and receipt of huge amounts of money is highly relevant in an operation in which the costs of the commodity and the profits therefrom are astronomical." 604 F.2d at 146.

In Tramunti the court held:

> "The possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." 513 F.2d at 1105.

Jurors are even more convinced that large sums of unexplained cash are evidence of wrongdoing. The likelihood of seeing or possessing $15,000 or $100,000 or $1,000,000 in cash is extremely remote. Most jurors are awed at the sight of piles of money and quickly conclude it was illegally obtained. For this reason, prosecutors are eager to display large sums of cash as evidence in drug cases.

If large sums of cash are legally considered highly relevant evidence of trafficking (exchanges), and if they are logically considered to be very unusual in the community,

it seems highly probable that they were intended for exchange, or were exchanged for drugs. Therefore, they should be forfeitable without any direct evidence of exchanges.

4) Large Sums Found With Drugs Intended For Distribution

The quantity, the purity, and the packaging of illicit drugs can create a presumption they are intended for illegal exchange (distribution). The logic behind this presumption is so strong that an individual can be convicted of intending to distribute drugs without any direct evidence of an intended exchange. U.S. v. Davis, 562 F.2d 681 (DC Cir. 1977); U.S. v. Heiden, 508 F.2d 898 (9 Cir. 1974); U.S. v. Nocar, 497 F.2d 719 (7 Cir. 1974); U.S. v. Polite, 489 F.2d 679 (5 Cir. 1974); U.S. v. King, 485 F.2d 353 (10 Cir. 1973); U.S. v. Echols, 477 F.2d 37 (8 Cir. 1973); and U.S. v. Bishop, 469 F.2d 1337 (1 Cir. 1972).

If large sums of cash are found with drugs intended for distribution, it seems highly probable the money was exchanged or is intended for exchange for drugs.

To illustrate, suppose you arrest A for drug trafficking. In his possession you find seven (7) pounds of 98% pure cocaine and $109,800 in cash. The conclusion seems inescapable that A got the cash in exchange for some of the cocaine, or that he intended to buy more cocaine with the money. What possible legitimate explanation exists for the possession of such a large sum of cash with such a large quantity of drugs?

5) Large Sums Found With Non-Drug Evidence Of Trafficking

Occasionally, traffickers will be found in possession of marked funds used by government agents on prior occasions to buy illicit drugs. Or, they will be found in possession of records of illicit drug transactions showing customers, costs, receipts and so forth. Evidence of trafficking can take many forms.

Remembering that drug trafficking is a cash-and-carry trade and that large sums of cash

are highly unusual in the community, finding a large sum of cash with other evidence of trafficking makes it probable the money was exchanged or intended for exchange for drugs. Therefore, it should be forfeitable. See U.S. v. One Machine For Corking Bottles (And $), 267 F.501 (WDWASH. 1920)

CAUTION: This analysis combines common sense with an understanding of the habits of traffickers. As yet, there is no case law reaching these conclusions on circumstantial evidence. You should discuss the above-described factual patterns with your prosecutor or legal advisor before making seizures based upon circumstantial evidence.

NOTES

2. ALL PROCEEDS TRACEABLE TO ILLICIT DRUG EXCHANGES ARE SUBJECT TO FEDERAL FORFEITURE

If something exchanged for illicit drugs is later sold, exchanged, or otherwise disposed of, everything received in its place is considered "proceeds" of the original drug exchange. If these proceeds are subsequently disposed of, everything received in their place is considered proceeds of the original drug exchange. As long as these changes can be traced and the final proceeds can be identified with reasonable accuracy, they are subject to civil forfeiture under federal law. Apparently, only one state has a similar provision.

Authorities

21 U.S.C. 881(a)(6)

MASS: Gen. Laws Ann. ch. 94C Sec. 47(a)(5) (West).

NOTES

DISCUSSION

Profits from the cash-and-carry drug trade are eventually hidden by changing their form. They are converted into homes, yachts, planes, cars, precious metal accounts, stocks, bonds, businesses, bank accounts and other property. The power to seize and forfeit cash exchanged for drugs strikes at the operational funds of the illicit business. The power to seize and forfeit drug "proceeds" poses a much greater threat to the accumulated profits of traffickers.

a. Proceeds Defined

The word "proceeds" is a flexible term that appears in many areas of the law. It can be found in leases, land sale contracts, wills, insurance policies, divorce decrees, deeds, trusts, commercial contracts and in a wide variety of other legal documents. See 34 Words & Phrases, Proceeds (West). At last count, the word appears 1,864 times in the United States Code.

1) The Ultimate Product of Exchange

In virtually every context:

PROCEEDS MEANS WHATEVER IS RECEIVED WHEN AN OBJECT IS SOLD, EXCHANGED, OR OTHERWISE DISPOSED OF.

It does not necessarily mean money. More importantly, everytime proceeds are disposed of in exchange for other property, the newly acquired property becomes proceeds. In a sense, proceeds is a status, or character, that attaches to any property substituted for what was originally exchanged. See 68 Am.Jur.2d, Secured Transactions Sec. 186 et seq; Uniform Commercial Code Sec. 9-306; 76 Am.Jr.2d, Trusts Sec. 251 et seq; 4A Collier on Bankruptcy Sec. 70.25; and Restatement, Restitution Sec. 202, Comment(i)(1937).

The best way to clarify this is with an example: Suppose A uses $10,000 in cash to buy five ounces of cocaine from

B, and B opens a new bank account with the $10,000; the account is proceeds of the drug exchange. Suppose B withdraws $9,000 from this account and buys a new car; the car is considered proceeds of the drug exchange. Both the car and the $1,000 remaining in the account are forfeitable under federal law.

Because the word "proceeds" is used in so many different contexts, the exact scope of its meaning depends upon the purpose or goal of the draftsmen using the term. Phelps v. Harris, 101 U.S. 370, 25 L.Ed. 855 (1879).

The term "proceeds" in 21 U.S.C. 881(a)(6) is intended to apply to the PROFITS of drug trafficking. Senator John Culver (D-Iowa), who sponsored the statute with Senators Lloyd Bentsen (D-Tex), William Hathaway (D-Me), and Sam Nunn (D-Ga), made this clear when he introduced the law into the United States Senate:

"Mr. CULVER....

* * *

"Mr. President, the third title of the amendment which I am offering would authorize U.S. officers to seize any moneys or other property that was furnished or intended to be furnished in exchange for illegal drugs."

* * *

"(It) would authorize Federal officers to seize such moneys much as they now seize illicit drugs and vehicles that are used to transport or conceal these substances. In certain cases, they would also be able to seize property that is traceable to such illegal transactions. Finally, the provision would allow authorities to seize certain moneys, negotiable instruments and securities if they are used or intended to be used to facilitate such an illegal exchange.

* * *

"In summary,...the amendment that I am offering today would provide the United States with strong new weapons to...strike at the profits of illegal drug trafficking."

* * * *

(124 Congressional Record S17644, October 7, 1978).

The Senate unanimously passed this provision on October 7, 1978.

Congressmen Paul Rogers (D-Fla), Harley O. Staggers (D-W.Va.), Tim Lee Carter (R-Ky), Benjamin Gilman (R-NY) and Lester L. Wolff (DL-NY) echoed the same purpose when they introduced the statute into the United States House of Representatives:

"Mr. ROGERS. Mr. Speaker, I am pleased to present to the House for consideration the Senate amendment to the... Psychotropic Substances Act of 1978 ...."

* * *

"The purpose of Title III of the Senate amendment is to provide Federal drug law enforcement officials with the ability to strike at the profits of illicit trafficking in abusable controlled substances."

* * * *

(124 Congressional Record H12790, October 13, 1978).

"Mr. STAGGERS...."

* * *

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"Mr. Speaker, I believe the Senate amendment will help curb the illegal manufacture and abuse of dangerous drugs and urge Members to support it."

"In addition, the Senate amendment will enable the Drug Enforcement Administration to strike at the profits of illicit drug traffickers."

* * *

"Currently, the DEA cannot seize moneys used in illegal drug transactions or seize the proceeds of those transactions."

(124 Congressional Record H12793-H12794, October 13, 1978).

"Mr. CARTER. Mr. Speaker...."

* * *

"(T)he Senate amendment expands section 511 of the Controlled Substances Act to require the forfeiture of all moneys or other things of value which are substantially connected to a criminal violation of our drug control laws. In other words, Mr. Speaker, the Senate amendment simply requires the drug pusher to give up his ill-gotten gains."

* * * *

(124 Congressional Record H12793, October 13, 1978).

"Mr. GILMAN. Mr. Speaker...."

* * *

"This measure strikes at the coffers of the traffickers...by requiring the forfeiture of the proceeds from illicit drug transactions."

* * * *

(124 Congressional Record H12793, October 13, 1978).

. . . . . .

"Mr. WOLFF. Mr. Speaker...,"

* * *

"(T)itle III subjects to forfeiture the traceable proceeds of illegal drug transactions. This provision...is an extremely important weapon against the financial backers of illegal drug trafficking since it reaches them where it hurts the most. No longer will the big-money men of illegal drugs be able to hide their ill-gotten profits with impunity."

"This legislation is critical if we are to continue to fight the war against drugs."

* * * *

(124 Congressional Record H12793, October 13, 1978).

The statute passed the House of Representatives by a two-thirds vote on October 13, 1978.

As the statements of its sponsors make clear, it is intended to force traffickers to give up their operating funds and their ill-gotten gains. Any refinements on the definition of "proceeds" must be consistent with this goal.

Like Section 881(a)(6), the Law of Restitution aims at forcing the wrongdoer to give up everything he has gained from his wrongdoing. The concept of identifying the "proceeds" of wrongdoing is central to both areas of the law. For these reasons,

the Law of Restitution stands out as a potential source of guidance on the meaning of "proceeds" under 21 U.S.C. 881(a)(6). See Restatement of Restitution (American Law Institute, 1937); and Wade, The Literature of the Law of Restitution, 19 Hastings Law Journal 1087 (1968)(the most comprehensive bibliography on the subject).

2) Gain Is Included

ANYTHING RECEIVED AS A RESULT OF HOLDING PROCEEDS IS ALSO FORFEITABLE.

If drug proceeds increase in value, or if they are invested and generate interest, dividends, rent, or other income, the "gain" should be considered forfeitable. It is a direct product of the proceeds, therefore, it is logical to treat it as proceeds. The Law of Restitution takes this approach:

"Sec. 205 ACCOUNTABILITY FOR DIRECT PRODUCT
Where a person received property for which he is accountable to another, he is accountable for any direct product which he receives from the property." Restatement, Restitution Sec. 205 (1937).

This interpretation forces the wrongdoer to forfeit all of the profits directly attributable to his illegal conduct. It eliminates all the incentive to wrongdoing. See Restatement, Restitution Sec. 202, Comments (c) & (j); and 76 Am.Jur.2d Trusts Sec. 254. This is consistent with the goal of 21 U.S.C. 881(a)(6).

3) Proceeds Means Gross, Not Net

PROCEEDS MEANS GROSS PROCEEDS.

Assume A buys drugs for $8,000 and immediately resells them for $10,000. His "gross proceeds" are $10,000. His "net proceeds" are $2,000. The Exchange Section of 21 U.S.C. 881(a)(6) subjects the entire $10,000 to forfeiture; it makes no allowances for illegal costs or expenses

surrounding the exchange. Everything received from the illegal exchange is forfeitable. The Proceeds Section of 21 U.S.C. 881(a)(6) permits the government to follow the "gross proceeds" of the exchange as they change form.

b. The Need to Trace

PROCEEDS MUST BE TRACED TO SPECIFIC ASSETS.

Each time proceeds change hands, or change form, a "link" is added to the "chain" that connects them to an illicit drug exchange. To forfeit a specific asset under the Proceeds Section of 21 U.S.C. 881(a)(6), this chain must be identified with reasonable accuracy. The process of identifying, pursuing, or following the chain is called "tracing."

In every area of the law, tracing is essential to establishing a property right in proceeds. Section 215 of the Restatement of Restitution (1937) provides a good example:

"Sec. 215 NECESSITY OF TRACING PROPERTY
...(W)here a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a...lien upon any part of the wrongdoer's property."

Congress incorporated this requirement in 21 U.S.C. 881(a)(6) by inserting the term "traceable" after the term "proceeds." It also commented on "tracing" in the Joint House-Senate Explanation of the new law:

"(The Statute)...provides for forfeiture of property which is the proceeds of an illegal drug transaction only if there is a traceable connection between such property and the illegal exchange of controlled substances. Thus if such proceeds were, for example, co-mingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form: they would still be subject to forfeiture, but only to the extent that it could be shown that a traceable connection to an illegal

transaction in controlled substances existed." (1978 U.S. Code Cong. & Ad. News at 9522).

If the proceeds of an illegal drug exchange cannot be traced, in whole or in part, to a specific, identifiable asset, there is nothing to seize and forfeit.

COMMENT: Remember that virtually any fact can be established by circumstantial evidence - direct evidence is not required. You should be able to prove the existence of some of the "links" in the "chain" by circumstantial evidence. See Church of Jesus Christ v. Jolley, 467 P.2d 984 (Utah 1970) and Costell v. First National Bank of Mobile, 150 So.2d 683 (ALA. 1963). Also remember, you need not prove each link of the chain beyond a reasonable doubt. In a civil forfeiture action you need only prove the probable existence of any link. Absolute certainty is not required.

c. Mingling

MINGLING MEANS MIXING.

Wrongdoers frequently mix proceeds with non-proceeds, particularly in bank accounts. They usually make additions to and withdrawals from the mingled funds. Sometimes they co-mingle the funds with the money of an innocent third party, such as a wife or child. They might use part of the mingled, or co-mingled, funds to buy stocks, houses or other property. The funds might earn interest or the property might increase or decrease in value. Tracing "mingled" proceeds can present complex accounting problems.

1) Tracing Satisfied

MINGLED FUNDS ARE SEIZABLE.

The need to trace proceeds is satisfied when a specific asset can be identified into which the proceeds have been mingled. The Joint House-Senate Explanation of 21 U.S.C. 881(a)(6), quoted above, makes this clear. Every other area of the law follows the same rule on tracing. Again, the Restatement of Restitution (1937) provides a good example:

"Sec. 209 MINGLING WITH FUNDS OF WRONGDOER.
Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund."

Mingling does not destroy the government's right to seize the mingled fund or mingled property, and to civilly forfeit that part which is proceeds. See National Bank v. Insurance Co., 104 U.S. 54, 26 L.Ed. 693 (1881).

To illustrate, suppose A received $500 from B in exchange for marihuana. And suppose A deposits the money in his savings account, which already contains $1,000. The account can be "seized" and $500 of the account can be civilly forfeited as proceeds of the drug exchange.

2) A Part of the Whole

ONLY THAT PART CONSISTING OF TRACEABLE PROCEEDS IS FORFEITABLE.

Under traditional tracing rules, a party has a property right in mingled funds equal to the amount of his money traceable to them. He gets a part of, but not all of, the funds. See Restatement, Restitution § 209, Comment (a); and Sec. 211, Comment(d)(1937).

Congress adopted this rule when it passed 21 U.S.C. 881(a)(6). The Joint House-Senate Explanation, quoted above, emphasizes that mingled proceeds are forfeitable.

"...but only to the extent that it could be shown that a traceable connection to an illegal transaction in controlled substances existed."

3) Purchases With Mingled Funds

ASSETS BOUGHT WITH MINGLED FUNDS ARE SEIZABLE.

If mingled funds are used to buy other assets, the government has the right to seize those assets, and to civilly forfeit

that fraction of the property which represents the government's share of the mingled funds. See Restatement, Restitution Sec. 210 (1937).

The Joint House-Senate Explanation of 21 U.S.C. 881(a)(6) states that "intervening legitimate transactions" with proceeds (mingled or non-mingled) does not destroy the right to follow them into the newly acquired property. But again, only that part or fraction attributable to traceable proceeds is forfeitable.

To illustrate, suppose A mingles $10,000 from a cocaine exchange with $20,000 of non-forfeitable money, and he uses the $30,000 to buy stocks. The government can seize and forfeit one-third of the stocks under 21 U.S.C. 881(a)(6). And, since proceeds includes any "gain," if the stocks double in value to $60,000, the government is entitled to $20,000 of the stocks - one-third of the investment plus one-third of the gain.

4) Withdrawals

If a part of mingled funds is withdrawn and can be traced to the purchase of another asset, the government can seize and civilly forfeit an appropriate fraction of that asset.

If the withdrawn funds cannot be traced to some new asset, the government can continue to look to the remaining part of the mingled funds to recover its share of traceable proceeds.

If non-traceable withdrawals reduce the funds to an amount less than the proceeds originally traceable to it, the right to forfeit is limited to the lowest balance reached by the funds.

If at any time the funds are totally depleted by non-traceable withdrawals, the right to civilly forfeit the fund is lost. See Restatement, Restitution Secs. 210-212 (1937).

5) The Swollen Estate Problem

Suppose you prove that a trafficker received substantial amounts of cash from illegal drug exchanges. And, suppose you prove that his estate, or "worth," increased significantly in value during the same period. And, suppose you are unable to trace the proceeds of an exchange to any specific asset in his estate. You have a "swollen estate" problem.

Simply proving that money obtained from trafficking "swelled" the trafficker's estate does not satisfy the tracing requirement of 21 U.S.C. 881(a)(6). See Schuyler v. Littlefield, 34 S.Ct. 466, 58 L.Ed. 806 (1914); 76 Am. Jr.2d Trusts Sec. 262; A. Scott, Trusts Sec. 521 (2ed. 1956); 4A Collier on Bankruptcy § 70.25(2)(1978); and Restatement, Restitution Sec. 215 (1937).

The Proceeds Section of 21 U.S.C. 881(a)(6) requires tracing to specific, identifiable assets. To illustrate, suppose you have direct evidence that X received a total of $200,000 over a six month period in exchange for heroin. But, you cannot trace the money after it was received by X. You feel sure that X has hidden it in some way; you can show he made several random bank deposits and bought several assets during this period. But, you are unable to identify with any probability a specific account or asset into which the money has been mingled. There is nothing to seize and forfeit under the Proceeds Section of 21 U.S.C. 881(a)(6).

This "Strict Tracing" requirement has been severely criticized by several legal scholars. See Taft, A Defense of a Limited Use of the Swollen Assets Theory Where Money has Wrongfully been Mingled with Other Money, 39 Columbia Law Review 172 (1939). Nevertheless, it continues to be a recognized rule of tracing followed in virtually every area of the law of "proceeds." It seems almost certain the courts will follow this rule in applying the Proceeds Section of 21 U.S.C. 881(a)(6).

Because the swollen estate is strong circumstantial evidence of illegally accumulated profits, it is not without its uses. The Internal Revenue Service relies upon the swollen estate to establish that traffickers have received income which they did not

declare as taxable. Following the "Net Worth and Expenditures Method" of circumstantial proof, IRS measures the growth, or swell, in an estate for the taxable period, it adds on estimated living expenses, and declares the balance to be income. It then takes action against the trafficker to collect the taxes due.

Similarly, the swollen estate is excellent evidence that a trafficker received "substantial income and resources" from his activities. This is an indispensable element of proof in convicting a trafficker of engaging in a continuing criminal enterprise (21 U.S.C. 848). See U.S. v. Jeffers, 532 F.2d 1101 (7 Cir. 1976). Once convicted, the swell in his estate which represents his profits is subject to seizure as a form of criminal fine or criminal penalty (a criminal forfeiture).

It is helpful to understand that tax cases and criminal forfeitures are fundamentally different than civil forfeitures. Tax assessment is a personal claim against the taxpayer. It demands he account for the money he owes the government. Only if he refuses to pay, will the government satisfy the tax debt from his assets. Similarly, criminal forfeiture begins as a personal charge against the trafficker. It accuses him of engaging in racketeering or a continuing criminal drug enterprise. Only after he is convicted of the charge can the government seize and forfeit his profits from the crime. In legal jargon, the tax case and the criminal forfeiture are "in personam" actions (against a person).

Civil forfeiture, on the other hand, is an "in rem" action (against an object or property). It depends upon a showing that a specific asset is directly connected to illegal activity. It is a property action totally independent of any personal claims or charges against an owner. Evidence of a swollen estate is very useful in in personam cases; but it is not very helpful in in rem proceedings.

d. Paying Debts

1) Unsecured Debts

If a trafficker owes a lawful debt, and if the debt is not secured by any collateral, and if the creditor is unaware he is dealing with a trafficker, and if the trafficker pays the debt with forfeitable proceeds, then the right to forfeit the proceeds is lost. See Restatement, Restitution Sec. 207, Comment (d)(1937).

To illustrate, suppose A receives $10,000 in exchange for several ounces of heroin and he delivers it to his bank to pay off a personal, unsecured loan. There is nothing to seize and forfeit.

2) Secured Debt

If a trafficker owes a lawful debt, and if the debt is secured by some asset (collateral), and if the trafficker pays the debt with forfeitable proceeds, then the asset-collateral is "proceeds." See Restatement, Restitution Sec. 207, Comment (b)(1937).

To illustrate, suppose X uses forfeitable proceeds to pay off a $50,000 mortgage on his $100,000 home. The home is seizable and one-half the home is forfeitable as proceeds.

3) Illegal Debt

If a trafficker uses forfeitable proceeds to pay an illegal debt (to a loan shark, bookie, drug supplier, and so forth), the proceeds continue to be seizable if they can be identified in the possession of the illegal creditor. See the following discussion on Bona Fide Purchasers.

e. Bona Fide Purchasers Are Exempt

A Bona Fide Purchaser (BFP) is an innocent party who:

(1) gives something of legal value in exchange for proceeds,

AND

(2) has no knowledge that what he is acquiring is connected to drug trafficking.

Both conditions must be met to qualify as a BFP.

To illustrate, suppose B uses $10,000 of forfeitable proceeds to buy a new car from Dealer X. The Dealer has given something of legal value in exchange for the money and, in a commercial, "arm's length" transaction, he does not know the money is drug-related. Therefore, Dealer X is a BFP of the money.

PROCEEDS TRANSFERRED TO A BFP ARE NEITHER SEIZABLE, NOR FORFEITABLE.

Traditionally, money or property loses its status as proceeds when it is transferred to a BFP. See Uniform Commercial Code Secs. 8-301, 302; 76 Am. Jur.2d, Trusts Sec. 269; 4A Collier on Bankruptcy Sec. 70.25; and Restatement, Restitution Secs. 172-176 (1937). The Law of Restitution states:

> "Sec. 172 BONA FIDE PURCHASER
> ...Where a person acquires title to property under such circumstances that otherwise he would hold it... subject to...(a)...lien, he does not so hold it if he gives value for the property without notice of such circumstances."

In most cases, everyone benefits from this rule. BFP's are protected because they take property free from any unknown claims. Parties pursuing proceeds are protected because they have the right to claim the property given to the wrongdoer by the BFP as proceeds. Dealer X, for example, is protected from any claims to the $10,000 he received for his car. The government is protected because it can seize the car sold to B as proceeds.

Occasionally, the BFP rule works to the disadvantage of the party pursuing proceeds. For example, suppose a female drug violator uses $50.00 in forfeitable proceeds to get her hair styled. The commercial beauty shop is a BFP of the money. It has provided a valuable service in exchange for the $50.00, and it does not know the money is drug-related. Therefore, the government cannot seize the money from the beauty shop, and is left with nothing to forfeit.

Remember, proceeds transferred to a non-BFP are seizable, while proceeds transferred to a BFP are not seizable.

3. ALL FACILITATION MONEYS SIGNIFICANTLY CONNECTED TO ANY DRUG OFFENSE ARE SUBJECT TO FEDERAL FORFEITURE

All moneys, negotiable instruments, and securities used, or intended for use, to facilitate any drug law violation are subject to federal forfeiture. Only moneys, negotiable instruments and securities are forfeitable under this section. Seven states have similar provisions.

Authorities

21 U.S.C. 881(a)(6)

IDAHO: Code Sec. 37-2711.(6)

ILL: Ann.Stat. Ch. 56-1/2 Sec. 1505(a)(4).

MD: Crimes & Punishments Code Ann. Sec. 297 (a)(6)(1957).

MASS: Gen. Laws Ann. Ch. 94C Sec. 47(a)(5) (West).

MINN: Stat.Ann. Sec. 152.19 Subdv. 1(2)(West).

NM: Stat.Ann. Sec. 54-11-33F(1953).

VA: Code Sec. 18.2-249(1950).

NOTES

NOTES

DISCUSSION

ONLY MONEYS, NEGOTIABLE INSTRUMENTS & SECURITIES ARE FORFEITABLE

Other things of value are not forfeitable under the Facilitation Moneys Section of 21 U.S.C. 881(a)(6). Refer back to the chart on page 133 of this Guide. Note that the Facilitation circle at the bottom of the chart contains a dollar sign ($) as a reminder that it applies only to money and things like money.

MONEYS means officially issued coin and currency of the United States or any foreign country.

NEGOTIABLE INSTRUMENTS means documents, containing an unconditional promise to pay a sum of money, which can be legally transferred to another party by endorsement (signature) and delivery (e.g., a bank check).

SECURITIES means any evidence of debt or ownership of property, especially a bond or stock certificate.

As originally drafted, the Facilitation Money Section was limited to moneys which facilitate drug exchanges. See the speech of Senator Culver quoted on page 144 of this Guide. But the section was expanded to include the facilitation of any violation of the drug laws. Import-export violations, manufacturing violations, conspiracy violations, attempt violations, continuing criminal enterprise violations, possession violations and distribution violations are all included within this section. Congressman Paul Rogers emphasized this in his October 13, 1970 speech in Congress:

"Mr. ROGERS. Mr. Speaker...."

* * *

"Title III of the Senate amendment which is now before the House... differs from the original Senate-passed version...."

"(I)t provides for the seizure and forfeiture of moneys, negotiable instruments and securities if they

NOTES

are used or intended to be used to facilitate any violation of controlled substances laws, not just those violations involving an illegal exchange of controlled substances."

(124 Congressional Record H12790)

The Exchange and Proceeds Sections of 21 U.S.C. 881(a)(6) are dependent upon drug exchanges. The Faciliation Money Section applies to any drug violation.

Remember the definition of facilitation? "To faciliate means to have a significant connection to...." Congress was aware of this definition when it drafted and passed this section. The Joint House-Senate Explanation states:

"...any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent."

(1978 U.S. Code Cong. & AD. News at 9522).

The mere fact that moneys, negotiable instruments or securities are possessed by a drug violator does not subject them to forfeiture under this section.

Examples of money forfeitable under this section include:

- Money used to pay the operating expenses of a PCP lab;
- Money used to rent airplanes, pay pilots, buy fuel and bribe officials as part of a smuggling venture;
- Money used to pay drug couriers, or "mules," and
- Money used by a drug courier to pay expenses.

The possibilities are almost limitless.

4. INNOCENT OWNERS OF CURRENCY & PROCEEDS ARE EXEMPT FROM FEDERAL CIVIL FORFEITURE

Owners of seizable currency and proceeds are statutorily exempt from federal civil forfeiture if they can prove their ignorance of the illegal conduct that gave rise to the seizure.

Authorities

21 U.S.C. 881(a)(6)

NOTES

345-769 0 - 81 - 12

DISCUSSION

Property owned by an innocent third party (other than a BFP) is subject to seizure if it falls within the categories of property forfeitable under 21 U.S.C. 881(a)(6). The seizure, however, does not necessarily mean the property will be forfeited.

Congress put the "Innocent Owner" Section in 21 U.S.C. 881(a)(6) to insure that:

> "...no property would be forfeited...to the extent of the interest of any innocent owner of such property. The term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that:
>
> 1. the property was furnished or intended to be furnished in exchange for a controlled substance in violation of law,
>
> 2. the property was proceeds traceable to such an illegal exchange, or
>
> 3. the property was used or intended to be used to facilitate any violation of Federal illicit drug laws."
>
> * * * *

(Joint House-Senate Explanation, 1978 U.S. Code Cong. & AD. News 9522, 9523).

The broad meaning given to the term "owner" protects the property interests of all innocent parties, including: donees, mortgagees, spouses with community property interests, creditors with security interests, and BFP's.

At the same time, a party cannot protect what he does not own. Therefore, innocent owners are protected only to the extent of their interests. If they own less than the entire seized property, they cannot prevent the forfeiture of what remains.

NOTES

NOTES

Traditionally, the word "owner" means something more than merely having a right to possession of property. To illustrate, if you lend your car to a friend for a day, he has a possessory interest in your car; he can prevent anyone (except you) from taking the car from him. This is called a "bailment." But, he is not considered an owner of your car. The Joint House-Senate Explanation of "owner," quoted above, refers to recognizable legal or equitable interests in property - not possessory interests. Therefore, despite the broad interpretation Congress intended for the term "owner," it should not be applied to minor possessory interests in property, such as a bailment.

Finally, although innocent owners of currency and proceeds are protected from forfeiture, the burden is on them to prove their innocence. The plain wording of the Innocent Owner Section makes this clear:

> "except that no property shall be forfeited ...by reason of any act or omission established by the owner, to have been committed or omitted without the knowledge or consent of that owner." (underlines added).

To illustrate all these points, suppose H and W are married and live in a community property state. H is a major drug violator. H uses forfeitable proceeds to buy a house in his own name. The house is seizable (attachable) as proceeds under 21 U.S.C. 881(a)(6). Although W is not a BFP (she gave nothing of value for the house), she is an owner under Section 881 (a)(6). The community property laws give her a vested one-half interest in all property acquired by her spouse during their marriage. As a result, if W can offer enough evidence to prove she was unaware of H's drug activities, her half of the house will escape forfeiture. If she cannot offer such evidence, the entire house will be forfeited.

NOTES

5. THE EX POST FACTO CLAUSE APPLIES TO THE FORFEITURE OF CURRENCY & PROCEEDS

Proceeds of illicit drug exchanges occurring before November 10, 1978 are not subject to federal civil forfeiture.

Authorities

U.S. Const., Article I, Sec. 9, cl 3.

NOTES

DISCUSSION

Section 881(a)(6), providing for the forfeiture of currency and proceeds, is an amendment to the original Controlled Substances Act (21 U.S.C.). It did not become effective until November 10, 1978, when it was signed by President Carter. It seems virtually certain it cannot be applied to the proceeds of illicit drug exchanges occurring prior to its effective date.

a. The Ex Post Facto Problem

The United States Constitution prohibits both the federal government and the States from passing "ex post facto" laws. U.S. Const., Art I, Sec. 9, cl 3 and Sec. 10, cl 1.

Basically, an ex post facto law is one which makes an act punishable in a manner in which it was not punishable when committed. The most quoted definition of an ex post facto law appears in Calder v. Bull, 3 U.S. (3 Dall) 386, a United States Supreme Court case decided in 1798:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

Many Supreme Court decisions have stated that the ex post facto clause applies only to criminal statutes. But, there are also Supreme Court cases that have applied the clause to civil statutes which were really "punishments" in disguise. See U.S. v. Lovett, 328 U.S. 303 (1946); Ex Parte

Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 (4 Wall.) 277 (1867).

This has caused some confusion, and a lot of debate, over when a law should be considered "punishment," even though it appears civil in form. Note, Ex Post Facto Limitations on Legislative Power, 73 Mich. L. Rev. 1491 (1975); Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216 (1960); and Crosskey, The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws, 14 U. Chi. L. Rev. 539 (1947).

The Supreme Court has already decided that the civil forfeiture of contraband per se is not punishment; it is truly civil in nature and does not violate the ex post facto clause. Removing moonshine, heroin, sawed-off shotguns, Molotov Cocktails, and so forth, from the community benefits society, independently of any punishment imposed upon the possessor of such contraband. Samuels v. McCurdy, 45 S.Ct. 264 (1925). Therefore, statutes providing for the civil forfeiture of contraband per se can be applied to objects legitimately possessed prior to their passage.

On the other hand, the Court has decided that the civil forfeiture of derivative contraband, such as a car, is "quasi-criminal" or penal in nature. Therefore, the Fourth Amendment right against unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination apply to forfeitures of cars, money, land, and all other property not inherently dangerous to the community. One 1958 Plymouth Sedan v. Com. of Pennsylvania, 85 S.Ct. 1246 (1965); Boyd v. U.S., 6 S.Ct. 524 (1886).

If the courts follow this distinction, it seems probable they will apply the ex post facto prohibition to the civil forfeiture of currency and proceeds. Forfeiting the proceeds of drug exchanges occurring prior to November 10, 1978, subjects drug violators to an additional "punishment" which was not applicable to them when the illicit exchanges took place. The courts are likely to find that this violates the ex post facto clause, as explained by Chief Justice Marshall in Fletcher v. Peck:

> An ex post facto law is one
> " ...which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment." 10 U.S. (6 Cranch) 87, 138-139 (1810).

As an aside, it is interesting to note that no federal forfeiture statute applied to the rifle used to assassinate President John F. Kennedy. Oswald's wife immediately sold her rights in the weapon to a buyer who wanted to display it at carnivals and side-shows. The buyer demanded the return of the weapon after the proceedings of the Warren Commission ended. The courts found this situation to be incredible:

> "Under the peculiar facts of this case, one would suppose that under some principle of common law or at least natural law or natural justice, weapons used in the commission of a crime of this magnitude would be subject to forfeiture by the proper authorities and, certainly, that property of this character would not be subject to commercial traffic. It is, therefore, somewhat astonishing to discover that there is not any such principle and that forfeiture is a matter of statutory regulation." King v. U.S., 292 F.Supp. 767, 771 (N.D. Tex. 1968).

Congress was intent on keeping the weapon, but could it pass a new forfeiture law that could work "backwards," or must it take the weapon by eminent domain and compensate the

new owner? This question was never directly decided in the courts, because Congress passed a statute condemning the rifle and authorizing the courts to determine what "just compenation" must be paid to the owner. (PL 89 - 318, November 2, 1965).

b. Statutory Construction

Regardless of the constitutional arguments, the courts are virtually certain to apply the currency and proceeds sections of 21 U.S.C. 881(a)(6) to drug violations occurring only on, or after, November 10, 1978.

There is a fundamental rule of statutory construction that applies to all laws, both civil and criminal: laws are presumed to operate on conduct, events, or circumstances which occur after their enactment. Courts will never interpret a law as acting "backwards" unless the law clearly, expressly, states that it is intended to affect earlier rights or conduct. See Southerland, Statutes and Statutory Construction, Vol. 2, Sec. 41.04.

The United States Supreme Court clearly stated the principle in Union Pacific Railroad Co. v. Laramie Stock Yards Co.:

"...the first rule of construction is that legislation must be considered as addressed to the future, not to the past."

* * *

"...a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the lesislature." 34 S.Ct. 101, 102 (1913).

Nothing in the language of 21 U.S.C. 881(a)(6), nor in its legislative history, indicates it was intended to apply retrospectively.

It is also a rule of statutory construction that the amendment of a statute to provide for the forfeiture of otherwise lawful property used in violating the statute indicates a legislative conclusion that the forfeiture of such property was not previously included within the terms of the statute, and therefore such property was not subject to forfeiture for its use in the commission of an offense prior to the amendment. Pirkey v. State, 327 P.2d 463 (OKLA. 1958); 36 Am. Jur. 2d, Forf. & Pen. Sec. 25.

H. THE FOREIGN REACH OF FEDERAL FORFEITURE LAW

The lawmaking power of the United States is not confined to conduct literally occurring within this country. Congress has the power to punish acts done outside the country, which are intended to produce and which do produce harmful effects within the country. For example, a person outside our borders who fires a rifle at a target within the United States can be subject to punishment under our laws, if he can be brought before a United States Court.

> "Acts dones outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." Strassheim v. Daily, 31 S.Ct. 558 (1911)(Justice Oliver Wendel Holmes).

Several provisions of the Controlled Substances Import and Export Act (21 U.S.C. 951-966) apply to foreign, as well as domestic conduct. The prohibition against illegally importing, or conspiring to import, drugs has "extraterritorial" reach to persons acting entirely outside the United States. U.S. v. Winter, 509 F.2d 975 (5 Cir. 1975); U.S. v. Lawson, 507 F.2d 433 (7 Cir. 1975); Ewing v. U.S., 386 F.2d 10 (9 Cir. 1967); Rivard v. U.S., 375 F.2d 882 (5 Cir. 1967); and U.S. v. Pizzarusso, 388 F.2d 8 (2 Cir 1968).

In addition, manufacturing or distributing drugs outside the United States, knowing they are intended for illegal importation into the United States, is a special offense. U.S. v. Daniszewski, 380 F.Supp. 113 (EDNY 1974). Section 959 of the Import and Export Act provides:

> "959. Manufacture or distribution for purposes of unlawful importation.
>
> It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II -
>
> (1) intending that such substance will be unlawfully imported into the United States; or
>
> (2) knowing that such substance will be unlawfully imported into the United States.
>
> This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia."

Assets outside the United States which are involved in these Import-Export violations and which fit within the provisions of the civil forfeiture sections of 21 U.S.C. 881, are subject to civil forfeiture to the United States Government. Section 965 of the Import-Export Act incorporates all the civil forfeiture provisions of 21 U.S.C. 881. See Section 301(b) of the Psychotropic Substances Act (PL 95-633); 1978 U.S. Code Cong. & Adm. News at 9523.

To illustrate, moneys exchanged for drugs in Turkey, Thailand or Iran are subject to civil forfeiture if the drugs are intended for illegal importation into the United States. Proceeds from these exchanges traced to Swiss bank accounts are forfeitable. Moneys used to manufacture heroin in Italy, intended for importation into the United States are forfeitable. And so forth.

The next chapter of this Guide explains that custody of forfeitable property is absolutely essential to the jurisdiction of a court to declare a forfeiture. Therefore, in spite of this "right" to forfeit foreign assets, a forfeiture proceedings against the assets depends upon the ability to bring them back to the United States.

The proper method to obtain custody of foreign assets is through cooperation with the executive branches of foreign governments, or through requests for international judicial assistance. Recently, in Fonseca v. Blumenthal, F.Supp. (78 Civ. 1907, EDNY May 21, 1979), a federal judge returned $250,000, in cash, seized from several Columbian drug violators in New York, to the Columbian courts in response to Letter's Rogatory.

If proper procedures are not successful, the United States has the option to take custody of the property by illegal means. Remember, the illegal seizure of property is no defense to civil forfeiture. See the cases cited on page 54 of this Guide; in particular, see The Ship Richmond, 9 Cranch 102, 3 L.Ed. 670 (1815) in which the United States Supreme Court upheld the civil forfeiture of a ship illegally seized from the territory of a foreign power.

The illegal seizure of foreign assets will be a defense to their forfeiture only if the United States has entered into a treaty renouncing its right to the property. Cook v. U.S., 53 S.Ct. 305 (1933); and see U.S. v. F/V Taiyo Maru, 395 F.Supp. 413 (SDME. 1975).

WARNING: Do not seize foreign assets by illegal means. Forfeiture law aside, you could subject yourself to foreign prosecution and the United States to liability.

Finally, United States forfeiture laws apply to all U.S. Flag Vessels wherever they are located. They are subject to civil forfeiture under 21 U.S.C. 881 regardless of where the offense takes place. The Underwriter, 13 F.2d 433 (2 Cir. 1926); U.S. v. One (1) 43 Foot Sailing Vessel Winds Will, 405 F.Supp. 879 (SDFLA. 1975).

NOTES

NOTES

IV. SEIZURES

This chapter discusses the necessity of seizing forfeitable property, who can seize it, how to seize it, the effect of delaying the seizure, pre-seizure notice, and the application of the Fourth Amendments Warrant Requirement to forfeitures.

A. PROPERTY MUST BE SEIZED BEFORE PROCEEDINGS CAN BEGIN

In a civil forfeiture action the property is the defendant (in rem). Therefore, the property must be seized and brought within the territorial jurisdiction of a judge or other authority before forfeiture proceedings can begin.

DISCUSSION

The power of a court to subject a particular thing to civil forfeiture depends upon its ability to get control over the object. Civil forfeiture is an in rem proceeding; the defendant is the object. A court's jurisdiction always depends upon having control over the defendant. The Brig Ann, 9 Cranch (U.S.) 289, 291 (1815); Pennington v. Fourth National Bank, 37 S.Ct. 282 (1917); Yokohama Specie Bank v. Wang, 113 F.2d 329 (9 Cir. 1940); Strong v. U.S., 46 F.2d 257 (1 Cir. 1931).

1. MOVABLE PROPERTY MUST BE SEIZED

The term "movable property" refers to things that can be easily moved, such as money, furniture, equipment, conveyances, documents, animals, and so forth. Movable property must actually be seized to be brought under the control of a court. The United States Supreme Court discussed this seizure requirement in Pelham v. Rose, 9 Wall 103, 106, 19 L.Ed. 602 (1870):

> "the seizure of the property... is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or

constructive, depending upon the nature of the thing seized. As applied to subjects (objects) capable of manual delivery, the term means caption; the physical taking into custody."

Seizure prevents the object from being moved outside the territorial jurisdiction of the court while the proceedings are pending. Seizure also provides greater assurance that owners of the object will be informed of the forfeiture proceedings against their property. Pennoyer v. Neff, 95 U.S. 714, 727, 24 L.Ed. 565 (1878).

Federal court jurisdiction over the forfeiture of movable property depends upon where the property is first seized.

a. On Land

If the seizure of forfeitable property takes place on land within the United States, the federal district court within whose territory the seizure takes place has exclusive jurisdiction over the forfeiture. 28 U.S.C. 1355, 1395(b); U.S. v. Larkin, 28 S.Ct. 417 (1908); U.S. v. One 1974 Cessna, 432 F.Supp. 364 (DSC. 1977); CF Westfall Oldsmobile v. U.S., 243 F.2d 409 (5 Cir. 1957).

The place of seizure, not the place where the property was illegally used, determines which federal court has the power to hear the case. The Merino, 9 Wheat. 391, 6 L.Ed 118 (1824); The Slavers, 2 Wall. 383, 403, 17 L.Ed 911 (1864).

After seizure the government can, for convenience, store property outside the federal district where it was seized. 21 U.S.C. 881(c)(2). But this does not change the jurisdiction over the forfeiture 19 U.S.C. 1605.

b. On U.S. Waters

If the seizure of forfeitable property takes place on navigable waters within the United States territory, any federal district court into whose territory the property is brought has jurisdiction over the forfeiture. 28 U.S.C. 1355, 1395(d).

c. Foreign Seizures

If the seizure of forfeitable property takes place on the high seas or any place outside United States territory, again, any federal district court into whose territory the property is brought has jurisdiction over the forfeiture. 28 U.S.C. 1355, 1395(c); The Merino, 9 Wheat 391, 6 L.Ed 118 (1824).

2. IMMOVABLES MUST BE "SERVED"

The power to forfeit land, buildings and other immovable property belongs to the court having jurisdiction over the territory where the property is located. Because immovable property is impracticable to seize, it is usually brought under the control of the court by affixing certain legal documents to the property in a conspicuous place and by leaving copies with the person in control. Heidritter v. Elizabeth Oil-Cloth Co., 5 S.Ct. 135 (1884); Tyler v. Judges of the Court of Registration, 55 N.E. 812 (Mass. 1908)(Justice Holmes); and see Treasure Salvors v. Unidentified Wrecked, Etc., 569 F.2d 330 (5 Cir. 1978).

> "While the general rule in regard to jurisdiction in rem requires an actual seizure and possession of the res (object) by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court." Cooper v. Reynolds, 10 Wall. 308-318.

3. INTANGIBLE INTERESTS

Stock certificates, bonds, negotiable instruments and bank certificates of

deposit are merely so much paper; their value lies in the intangible property interests which they symbolize. This creates special problems in forfeiture cases. For example, if a stock certificate is seized in Florida, but the company that issued the stock is incorporated in Delaware, yet all the tangible assets of the company are located in New Jersey, where is the "stock" located? Which court has jurisdiction over the forfeiture of the stock?

a. Stocks & Bonds

Forty-nine states have adopted either the uniform Stock Transfer Act or the Uniform Commercial Code. As a result, the property interest represented by a stock certificate or bond follows the document. In other words, by statute the court in whose territorial jurisdiction a stock or bond is found has jurisdiction over the forfeiture of the "shares" represented by the document. See Guaranty Trust Co. v. Fentress, 61 F.2d 329 (7 Cir. 1932); Norrie v. Lohman, 16 F.2d 355 (2 Cir. 1926); and Direction Der Disconto-Gesellschaft v. U.S., 45 S.Ct. 207 (1925).

b. Negotiable Instruments

Remember the definition of "negotiable instrument?" It means a document containing an unconditional promise to pay a sum of money, which can be legally transferred to another by endorsement (signature) and delivery. The court in whose territorial jurisdiction a negotiable instrument is found has jurisdiction over the forfeiture of the obligation represented by the document. See Pelham v. Rose, 9 Wall. 103, 19 L.Ed 602 (1870); First Trust Co. of St. Paul v. Matheson, 246 N.W. 1 (Minn. 1932); and see Shaffer v. Heitner, 97 S.Ct. 2569 (1977).

c. Accounts

If no document embodies the obligation, the court in whose territorial jurisdiction the "obligor" is found has jurisdiction over the forfeiture. Harris v. Balk, 25 S.Ct. 625 (1905).

For example, a bank account merely involves an obligation by a bank to pay a depositor a certain sum of money, plus interest, on demand. The bank book issued to a depositor is simply a record of the account; the bank book does not embody the account. The account cannot be transferred by merely delivering the bank book to another person. If the book for a forfeitable bank account is seized in Florida, but the bank is located in New York, the federal district court having territorial jurisdiction over the New York bank (the obligor) has jurisdiction over the forfeiture of the account.

345-769 O - 81 - 13

CONTINUED

2 OF 5

NOTES

B. SEIZURE WARRANTS

Searches for, and seizures of, forfeitable property must satisfy Fourth Amendment requirements. The Fourth Amendment applies to all government "searches and seizures."

It applies to health and safety searches. Marshal v. Barlow's, Inc., 97 S.Ct. 776 (1977). It applies to searches for, and seizures of people, whether felons, witnesses or hostages. Payton v. N.Y., 100 S.Ct. 1371 (1980); Rule 41, F.R.Cr.P. It applies to searches and seizures to enforce the tax laws. G.M. Leasing Corp. v. U.S., 97 S.Ct. 619 (1977). No search or seizure, regardless of its purpose, is immune from the Amendment.

Because the Fourth Amendment applies to forfeitures, there must be probable cause to believe property is forfeitable before it can be seized. The existence of some form of probable cause is essential to all Fourth Amendment seizures. U.S. v. Premises Known As 608 Taylor Ave., 584 F.2d 1297 (3 Cir. 1978); McClendon v. Rosetti, 460 F.2d 111 (2 Cir. 1972); and Fell v. Armour, 355 F.Supp. 1319 (MDTENN. 1972).

In addition, if forfeitable property is located in a home, in an office, in a garage, in a safety deposit box, in luggage, or in some other "private" area protected against government entry, then a criminal search warrant must be obtained to enter the area to search for and seize the forfeitable property. No one disputes these basic rules.

There is, however, a minor controversy over whether a warrant is required to seize forfeitable property found in a "public" place. The vast majority of courts hold that a warrant is not required. A small minority, on the other hand, has recently indicted that a seizure warrant is generally required. U.S. v. Pappas, 613 F.2d 324 (1 Cir. 1980); U.S. v. McCormick, 502 F.2d 281 (9 Cir. 1974); Melendez v. Shultz, 356 F.Supp. 1205 (DMASS. 1973). As explained below, the majority is correct: no warrant is required to make a probable cause seizure of property found in a public place.

NOTES

1. A FORFEITABLE CONVEYANCE CAN BE SEIZED IN PUBLIC WITHOUT A WARRANT

If probable cause exists to believe a conveyance is forfeitable, and if it is located in a public area - an area not protected by the Fourth Amendment - it can be seized without a warrant. If, on the other hand, it is located in a private area, a search warrant is generally required to enter the area and seize the property. In either case, once a forfeitable conveyance is lawfully seized, it can be searched without obtaining a search warrant.

Authorites

S.Ct: See G.M. Leasing Corp. v. U.S., 97 S.Ct. 619 (1977); and Cooper v. California, 87 S.Ct. 788 (1967).

10 Cir: U.S. v. Stout, 434 F.2d 1264 (1970); Sirimarco v. U.S., 315 F.2d 699 (1963).

9 Cir: Compare U.S. v. McCormick, 502 F.2d 281 (1974)(warrant is required unless 4th Amendment exception exists) with Lockett v. U.S., 390 F.2d 168 (1968) (no warrant required); U.S. v. Johnson, 572 F.2d 227 (1978).

8 Cir: U.S. v. Milham, 590 F.2d 717 (1979); O'Reilly v. U.S., 486 F.2d 208 (1973); U.S. v. Young, 456 F.2d 872 (1972); Drummond v. U.S., 350 F.2d 983 (1965).

7 Cir: U.S. v. Edge, 444 F.2d 1372 (1971); U.S. v. Mills, 440 F.2d 647 (1971).

6 Cir: U.S. v. White, 488 F.2d 563 (1973).

5 Cir: U.S. v. Sink, 586 F.2d 1041 (1978); U.S. v. Pruett, 551 F.2d 1365 (1977); U.S. v. McKinnon, 426 F.2d 845 (1970); Grogan v. U.S., 261 F.2d 86 (1958); Sanders v. U.S., 201 F.2d 158 (1953).

4 Cir: U.S. v. Trotta, 401 F.2d 514 (1968); U.S. v. Haith, 297 F.2d 65 (1961); U.S. v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (1958).

3 Cir: U.S. v. Troiano, 365 F.2d 416 (1966).

2 Cir: U.S. v. Panebianco, 543 F.2d 447 (1976) U.S. v. Zaicek, 519 F.2d 412 (1975); U.S. v. Capra, 501 F.2d 267 (1974); U.S. v. Francolino, 367 F.2d 1013 (1966); U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940).

1 Cir: Compare U.S. v. Pappas, 613 F.2d 324 (1980) and U.S. v. One 1972 Chevrolet Nova, 560 F.2d 464 (1977) with Interbartolo v. U.S., 303 F.2d 34 (1962) and U.S. v. One 1975 Pontiac Lemans, 621 F.2d 444 (1980).

SDMAINE: U.S. v. Balsamo, 468 F.Supp. 1363 (1979).

DMASS: U.S. v. One 1975 Pontiac Lemans, 470 F.Supp. 1243 (1979); Melendez v. Shultz, 356 F.Supp. 1205 (1973).

EDPA: U.S. v. Thrower, 442 F.Supp. 272 (1977)

MDTENN: Fell v. Armour, 355 F.Supp. 1319 (1972)

WDTEX: U.S. v. One 1973 Pontiac Grand Am, 413 F.Supp. 163 (1976).

IND: Brune v. State, 342 N.E.2d 637 (App. 1976).

MD: Crowley v. State, 334 A.2d 557 (App. 1975).

TENN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

WASH: State v. One 1972 Mercury Capri, 537 P.2d 763 (1975)(contra).

DISCUSSION

a. Public Seizures

The United States Supreme Court has traditionally permitted the warrantless seizure of both persons and property found in a public place, provided the seizure is based upon probable cause.

For example, in Hester v. U.S., 44 S.Ct. 445 (1924), the Court upheld the warrantless seizure of liquor found in an open field. In Carroll v. U.S., 45 S.Ct. 280 (1925), the Court upheld the warrantless seizure (and search) of a vehicle found on a public highway. In Cooper v. California, 87 S.Ct. 788 (1967), the Court assumed the legality of a warrantless seizure of a forfeitable vehicle found in a public place, and went on to uphold a subsequent warrantless search of the seized car. In U.S. v. Watson, 96 S.Ct. 820 (1976), the Court upheld the warrantless seizure (arrest) of a felon found in a public place. In Arkansas v. Sanders, 99 S.Ct. 2586 (1979) and in U.S. v. Chadwick, 97 S.Ct. 2476 (1977), the Court approved of warrantless seizures of luggage found in public and believed to contain contraband, but disapproved of the later warrantless searches of the luggage. In G.M. Leasing Corp. v. U.S., 97 S.Ct. 619 (1977), the Court upheld the warrantless seizure for tax purposes of conveyances found in public, but disapproved of the warrantless seizure for tax purposes of property located in a private office. The Court was careful to distinguish between the "public"and "private" seizures:

> "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property... situated on private premises to which access is not otherwise available for the seizing officer." 97 S.Ct. 629-630.

In Payton v. U.S., 100 S.Ct. 1371 (1980), the Court repeated this distinction in disapproving of a warrantless entry into a home to seize (arrest) a suspected felon. The Court said:

> "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well-settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area, and such a seizure on private premises, was plainly stated in G.M. Leasing Corp. v. United States,...."

The reasoning of these Supreme Court cases supports the holding of the majority of other courts: the Fourth Amendment does not require a warrant to seize a forfeitable conveyance found in a public place. See Authorities, cited above.

b. Is There A Statutory Warrant Requirement?

Several courts have held that the forfeiture section of the Federal Controlled Substances Act contains a warrant requirement, even if a warrant is not always constitutionally required. See U.S. v. Pappas, 613 F.2d 324 (1 Cir. 1980); U.S. v. One 1972 Chevrolet Nova, 560 F.2d 464 (1 Cir. 1977); and see O'Reilly v. U.S., 486 F.2d 208 (8 Cir. 1973) (Judge Lay, "dissenting"). They point to 21 U.S.C. 881(b), which provides:

> Any property subject to forfeiture to the United States under this title MAY be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims..., except that seizure without such process MAY be made when -
>
> (1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; (or)
>
> * * *
>
> (4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this title.
>
> In the event of seizure pursuant to paragraph...(4) of this subsection, proceedings... SHALL be instituted promptly. (Emphasis is not in the original).

The plain wording says that process may be obtained; it does not say shall or must be obtained. Courts believing this section requires a warrant have ignored this distinction; they treat the use of the word "may" as imposing a mandatory requirement, rather than as an option available to the government. If Congress had used only the word "may" throughout this section, there might be some logic to what these few courts are saying. After all, Congress could have confused the word "may" with the word "shall." But, Congress used the term "shall" at the end of 881(b) to require prompt proceedings under the statute. By using both terms in the same section, Congress indicated it understood the difference and intended the words to be interpreted differently. Minor v. Mechanic's Bank, 1 Pet (26 U.S.) 46, 7 L. Ed. 47 (1828); U.S. ex rel Siegel v. Thoman, 15 S.Ct. 378 (1895). Therefore, section 881(b), on its face, must be interpreted as giving the government the option to obtain seizure "warrants" under the Admiralty Rules; but 881(b) does not require warrants.

Those courts interpreting 881(b) to require a warrant have also been forced to "re-write"

subsection 881(b)(4). As written by Congress, that subsection exempts all seizures for forfeiture from any "requirement" for Admiralty Process arguably imposed by the section. See Pappas and O'Reilly cited above.

What justification do these few courts have for ignoring the plain wording of 881(b)? Could Congress have actually intended 881(b) to impose a mandatory warrant requirement, despite the wording of the section? It seems very unlikely.

First, Congress has written other forfeiture statutes which are still in effect and which do not require seizure warrants. See 19 U.S.C. 1595, The Tariff Act of 1930, and 49 U.S.C. 781, 782, The Contraband Seizure Act. A car transporting imported marihuana is subject to forfeiture under both these laws, and under 881(a)(4) of the Controlled Substances Act (21 U.S.C.). It is absurd to think that Congress has permitted the government to seize such a car under the first two statutes without obtaining a warrant, but that it has required a seizure warrant under the third statute.

Second, at the time Congress was considering the passage of Section 881, the federal courts were unanimous that warrants were not required to seize forfeitable property found in public places. Congress must have known of these court decisions.

Third, in passing Section 881 as part of the Controlled Substances Act of 1970, Congress thought it was strengthening existing law enforcement authority, rather than placing new restrictions on it. See House Report No. 91-1444, 3 U.S. Code Cong. & Admin. News, p. 4566 (1970).

Fourth, the authors of this Guide have read the entire legislative history of the 1970 Controlled Substances Act, including unpublished materials in the files of the library of the Drug Enforcement Administration. There is absolutely no evidence in the history of the statute that indicates

Congress intended to require warrants under 21 U.S.C. 881(b). And see Pappas, cited above (Judge Campbell, dissenting).

Finally, if Congress had intended to subject all seizures for forfeiture to judicial supervision, it would not have referred to "Admiralty Process" in Section 881(b). Instead, it would have referred to Rule 41 of the Federal Rules of Criminal Procedure (traditional warrants). Admiralty "warrants" do not meet Fourth Amendment requirements. They are issued by court clerks, not by judges, magistrates or other judicial officers. They do not require any showing of probable cause. They do not require sworn statements of the facts and circumstances supporting the seizure. They need not specify with particularity the location of the property to be seized. In short, they provide none of the protections normally associated with "true" warrants. U.S. v. 935 Cases More Or Less, 136 F.2d 523 (6 Cir. 1943). Again, see Pappas cited above (Judge Campbell, dissenting).

The conclusions to be drawn from all this are that:

1. A traditional search warrant is required to search for, and to seize, forfeitable property only when it is located in an area subject to Fourth Amendment protection;

2. No warrant of any kind is needed to make a probable cause seizure of forfeitable property, particularly a conveyance, found in a public place; and

3. The government has the option under 21 U.S.C. 881(b) to obtain admiralty "warrants" to facilitate the seizure of land, buildings, large vessels, cargo, accounts, etc., provided the seizure does not invade privacy interests protected by the Fourth Amendment.

c. Searches of Forfeitable Conveyances

Despite the controversy over whether a warrant is needed to seize a forfeitable conveyance in public, all courts agree that once a forfeitable conveyance has been lawfully seized, it is subject to a thorough

search without a warrant. In fact, once a conveyance has been lawfully seized for forfeiture, it can be searched at any time even though there may no longer be any reason to believe it contains seizable property. Moreover, the search can be very intensive, including the dismantling of parts such as the seats, gas tank and "rocker panels." It is not limited to an inventory. See all the cases cited under "Authorities." In particular, see U.S. v. Johnson, 572 F.2d 227 (9 Cir. 1978); and U.S. v. Balsamo, 468 F.Supp. 1363 (DMAINE 1979).

d. Exclusion of Evidence

If there is enough lawfully obtained evidence to prove a conveyance is forfeitable, but a court rules the conveyance should have been seized with a warrant, the court is limited to excluding any evidence found in the conveyance as a result of the warrantless seizure. The court cannot prevent the forfeiture of the conveyance. Remember, the mere fact of illegal seizure, standing alone, does not immunize property from forfeiture. See page 54 of this guide for a discussion of this issue.

2. Tangible Personal Property

Unlike a car, most tangible personal property is not likely to be left in a public area. Therefore, seizures of cash, diamonds, deeds, and other forfeitable personal property must be made with a traditional search warrant (Rule 41, F.R.Cr.P.), or must come within one of the recognized exceptions to the Fourth Amendment's warrant requirement. Typically, forfeitable personal property can be seized from a violator without a warrant as part of a search incident to his arrest. U.S. v. 71.41 Ounces Gold Filled Scrap, 94 F.2d 17(2 Cir. 1938). Or, it can be seized without a warrant if it is discovered in plain view during an otherwise lawful search. Or, it can be seized without a warrant by obtaining a voluntary consent for the seizure. Or, it can be seized without a warrant if it is suddenly threatened with immediate removal or destruction. See DEA's Drug Agents' Guide to Search & Seizure (1978) for a detailed discussion of these exceptions.

Remember, all searches and seizures are subject to the restrictions of the Fourth Amendment. Although an illegal warrantless seizure will not jeopardize the forfeiture, it will subject you to potential civil liability for a Fourth Amendment violation.

3. Accounts and Intangible Property

Traditional search warrants are neither necessary, nor suitable for seizing intangible property, such as a bank account. Attaching or levying accounts involves no invasion of privacy. See U.S. v. Miller, 96 S.Ct. 1619 (1976). Seizures by levy, or attachment, need not be made with a traditional warrant. Murray's Lessee v. Hoboken Land & Improv. Co., 18 How. (59 U.S.) 272, 15 L.Ed. 372 (1856).

Seizures of accounts and other intangible property should be accomplished under the Supplemental Rules for Certain Admiralty and Maritime Claims (28 U.S.C. Appx.). Rule C(3) provides:

> "(3) Process. Upon the filing of the complaint, the clerk shall forthwith issue a warrant for the arrest of the ...property...and deliver it to the marshal for service. If the property ...consists of...the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment."

And see Rule C(5).

If the third party in control of the account (e.g., a bank) does not immediately turn over the funds, he effectively becomes a party-defendant to the forfeiture proceedings. See Rules E(4)(c), B(3)(a) and C(6).

4. Real Property

Again, traditional warrants (Rule 41, F.R.Cr.P.) are not suitable for "seizing" real property, such as land and buildings. U.S. v. 63,250 Gallons Of Beer, 13 F.2d 242 (DMASS. 1926). As with intangible property, seizures

of land and buildings should be made under the Supplemental Rules for Certain Admiralty and Maritime Claims (28 U.S.C. Appx.). Rule E(4)(b) provides:

> "(b) Tangible Property. If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent."

Note that this procedure makes no mention of entering premises to conduct a search, nor does it mention ejecting occupants lawfully on the property. The owners or occupants do not automatically lose their privacy rights in the premises pending the outcome of the forfeiture. Nor do they lose their privacy rights as to their personal property stored on the premises. See U.S. v. Sanford, 493 F. Supp. 78 (DDC. 1980); Boone v. Maryland, 393 A.2d 1361 (MD. 1978); People v. Stadtmore, 382 N.Y.S. 2d 807 (App. 1976); Chuze v. Florida, 330 So.2d 166 (FLA. App. 1976). If probable cause exists to search the premises, obtain a separate search warrant. Do not rely upon Admiralty process to search premises incident to their "seizure."

Finally, it might be necessary to file a special notice, called a lis pendens in state property records concerning the seizure and pending forfeiture of real property. See 28 U.S.C. 1964 and Winkler v. Andrus, 614 F.2d 707 (10 Cir. 1980). At this time, it is not clear whether this requirement applies in federal forfeiture proceedings. Until the question is decided, it is probably safer to file such a notice.

C. FEDERAL AGENTS CAN ADOPT SEIZURES MADE BY ANYONE

If property that is forfeitable under federal law is seized by someone who lacks the authority to make the seizure, a federal agent can take custody of the property and, in effect, "adopt" the seizure just as though it had originally been seized by him.

Authorities

28 U.S.C. 2464; 19 U.S.C. 1619

S.Ct: Gelston v. Hoyt, 3 Wheat. 246, 4 L.Ed. 381(1818); The Caledonian, 4 Wheat. 100, 4 L.Ed. 523(1819; Taylor v. U.S., 3 How. 197, 11 L.Ed. 559(1845); U.S. v. One Ford Coupe Auto., 47 S.Ct. 154(1926).

9 Cir: U.S. v. One Studebaker Seven-Passenger Sedan, 4 F.2d 534(1925).

8 Cir: See Ted's Motors v. U.S., 217 F.2d 777 (1954).

5 Cir: Two Certain Ford Coupe Autos v. U.S., 53 F.2d 187 (1931)

4 Cir: Harman v. U.S., 199 F.2d 34(1952); U.S. v. Tito Campanella Societa DiNav, 217 F.2d 751(1954); U.S. v. One Studebaker, 4 F.2d 534 ( ).

2 Cir: U.S. v. Eight Boxes, 105 F.2d 896(1939); U.S. v. Various Items of Personal Property, 40 F.2d 422 (1930).

1 Cir: The Ray of Block Island, 11 F.2d 522, aff'd sub nom Dodge v. U.S., 47 S.Ct. 191(1926); The Conejo, 16 F.2d 264 (1926).

DCCir: Hammel v. Little, 87 F.2d 907(1936).

OKLA: Neal v. First National Bank, 158 P.2d 336(1945).

NOTES

DISCUSSION

Four topics related to "adoption" are discussed in this section: (1) Who can seize for federal forfeiture; (2) the potential civil liability of the seizers; (3) the current federal policy on adoption; and (4) the rewards available to seizers and tipsters.

1. The Right to Adopt

Under old English Common Law anyone had the right to seize outlaws and "outlawed" property and to turn them over to the King. United States Supreme Court decisions since the birth of the Country have accepted this rule as federal law.

> "It is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law or by the law of prize, for the purpose of enforcing the forfeiture; and it depends upon the government itself whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command." The Caledonian, 4 Wheat. 100, 103, 4 L.Ed. 523, 525(1819).

Justice Oliver Wendel Holmes explained some of the reasoning for this rule in Dodge v. U.S., 47 S.Ct. 191(1926).

> "The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. However effected it brings the object within the power of the Court, which is an end that the law seeks to attain, and justice to the owner is as safe in the one case as in the other."

NOTES

Congress has never passed legislation expressly authorizing adopted seizures. But it has enacted statutes that provide rewards for seizing forfeitable property (19 U.S.C. 1619) and that grant immunity from civil lawsuits to the seizers(28 U.S.C. 2464). The United States Supreme Court has treated these statutes as implied statutory authorization of adopted seizures:

> "And if the party be entitled to any part of the forfeiture(as the informer under the statute of 1794, ch. 50, is by the express provision of the law), there can be no doubt that he is entitled in that character to seize it." Gelston v. Hoyt, 3 Wheat. 246, 4 L.Ed 381 at 397(1818).

2. The Captor's Liability

Persons seizing property for forfeiture have historically been referred to as "captors." Old English Common Law granted captors complete immunity from civil suit provided the Crown successfully adopted their seizures.

> "At common law, any person may, at his peril, seize for a forfeiture to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified...." Gelston v. Hoyt, cited above, at 397.

This old rule is now an accepted part of federal law. Gelston v. Hoyt, Taylor v. U.S., Hammel v. Little, and Neal v. First National Bank, cited above under Authorities

Unfortunately, this common law immunity depends upon the success of the forfeiture proceedings. If forfeiture is denied, the common law allows the captors to be sued. If the seizure was clearly wrongful, this old rule seems just. But if the captors had probable cause to seize, the old rule leaves them in a perilous situation when the forfeiture is not perfected in the courts.

To correct this injustice, the first Congress of the United States provided

additional immunity to captors who have probable cause to seize property for federal forfeiture(Act of July 31, 1789, Sec. 36, 1 Stat. 47). The modern descendant of this law appears in Title 28, United States Code, Section 2465:

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

As a result of this statute, if there is no forfeiture, but a certificate of reasonable cause is issued, the captors are immune from suit for the seizure of the property. U.S. v. Tito Campanella Societa DiNavigazione, 217 F.2d 751(4 Cir. 1954).

If there is no forfeiture, and the court refuses to issue a certificate of reasonable cause, the captors are liable to both suit and judgment for wrongful seizure. Gelston v. Hoyt, 3 Wheat. 246, 4 L.Ed 381(1818).

Finally, if there is no forfeiture, and a certificate of reasonable cause is neither granted nor denied, the captors are liable to suit, but they can defend themselves against judgment by proving they had probable cause to make the seizure. Hammel v. Little, 87 F.2d 907(DC Cir. 1936); Agnew v. Haymes, 141 F.631(4 Cir. 19).

Comment: To the private citizen who has no independent right to take custody of another's property, the immunity afforded by these rules is absolutely essential. To the law enforcement officer who takes legal custody of property as evidence, or for safekeeping, or for some other official purpose unrelated to federal forfeiture, the immunity provided by these rules is welcome, but is not essential; as long as the officer has an independent right to take possession of the property, he cannot be liable for the acts of federal agents who subsequently take the property from him. Neal v. First National Bank, 158 P.2d 336(OKLA. 1945).

3. DEA Policy

The Drug Enforcement Administration does adopt significant seizures of property forfeitable under the Controlled Substances Act (21 U.S.C. 881). Officials having custody of property that is forfeitable under federal drug laws, but which is not forfeitable under their state law, should advise the nearest DEA office.

4. Rewards to Captors & Informers

From the ratification of the Constitution to the present, the United States Congress has awarded captors or informers a statutory share of forfeited property. Readers interested in tracing the history of these statutes should refer to U.S. v. Matthews, 19 S.Ct. 413 (1899) and Wilson v. U.S., 135 F.2d 1005 (3 Cir. 1943).

The current moiety, or reward, statute applicable to drug-related forfeitures is 19 U.S.C. 1619. It reads in part:

> "Any person not an officer of the United States who detects and seizes any...(property)...subject to forfeiture..., or who furnishes... original information...which...leads to a...forfeiture..., may be awarded ...25 per centum of the net amount recovered...not to exceed $50,000 in any case...."

This is a Customs law incorporated by reference into the forfeiture section of the federal drug statute. 21 U.S.C. 881(d).

a. Who Can Claim

The wording of the statute makes clear that only "persons" qualify

345-769 O - 81 - 14

for a reward. Groups, corporations, clubs, religions, political organizations, governments and so forth are barred from making a claim. In addition, the claimant must not be an officer of the United States.

The statute contains no other restrictions on who can make a claim, and the United States Supreme Court has cautioned judges against reading any further restrictions into such statutes. U.S. v. Matthews, 19 S.Ct. 413(1899). As a result, "any person not an officer of the United States" can claim a reward. This includes non-federal law enforcement officers and even persons outside the United States. 24 Op. Atty. Gen. 61.

If the claimant dies pending the outcome of the forfeiture proceedings, his legal representative can pursue the claim on behalf of the heirs. M'Lane v. U.S., 31 U.S. 404, 8 L.Ed. 443(1832); Jones v. Shore's Executor, 1 Wheat (U.S.) 462 (1816).

b. Seizure or Original Information

It is not necessary to be a captor to claim a reward. Informers who provide original information that results in a forfeiture can also lay claim to a reward. By "original information" is meant the first information provided concerning the crime giving rise to the forfeiture. Persons providing helpful information after the original information has been reported are not entitled to file a claim. Lacy v. U.S., 607 F.2d 951(Ct.Cl. 1979); Tyson v. U.S., 32 F. Supp. 135 (Ct.Cl. 1940); U.S. v. Simons, 7 F. 709 (EDMICH. 1881); 28 Op. Atty. Gen. 329(1910).

c. Recovery is Essential

The right to file a claim for a reward arises at the time the forfeitable property is first seized, but it is a conditional, or inchoate, right. It does not become fixed, or absolute, until the property has been declared forfeited and disposed of to the government's benefit. U.S. v. Morris, 23 U.S. 246, 6 L.Ed. 314 (1825). Events occurring after the seizure can deprive a claimant of all, or part, of his reward.

If the government refuses to adopt a seizure, the captor loses his right to an award. See U.S. v. Morris, cited above, at page 289.

If the government ultimately refuses to file a complaint, or dismisses a complaint, the captor or informer loses his right to an award. Again see U.S. v. Morris, at 289; and Confiscation Cases, 7 Wall (U.S.) 454 (1868).

If the government pardons, or remits, the forfeiture, either before or after the forfeiture proceedings, the captor or informer loses his right to an award. The Laura, 5 S.Ct. 881 (1885); and U.S. v. Morris, cited above.

If the government compromises, or mitigates the forfeiture, the captor or informer is limited to a share of what is received by the government as a result of the compromise or mitigation. M'Lane v. U.S., 31 U.S. 404, 8 L.Ed. 443 (1832); 1 Op. Atty. Gen. 259 (1819).

Finally, if the property is declared not to be forfeitable, there can be no reward.

Once property is forfeited and the government receives any benefit from the property (through sale or by putting it into official service), the captor's or informers' right to a reward becomes absolute; it becomes a "contract" which can be enforced in federal court. Wilson v. U.S., 135 F.2d 1005 (3 Cir. 1943); Tyson v. U.S., 32 F.Supp. 135 (Ct. Cl. 1940).

The measure of the reward is 25 per centum of the net recovery per case, not per item or per seizure; with a maximum of $50,000 per case. Cornman v. U.S., 409 F.2d 230 (Ct. Cl. 1969).

D. DELAY OF SEIZURE IS NO DEFENSE TO FORFEITURE

Property used illegally need not be seized immediately nor at the very first opportunity. Delay in seizing forfeitable property does not affect the government's right to pursue a civil forfeiture, as long as the forfeiture proceedings are begun within the Statute of Limitations. The federal Statute of Limitations on civil forfeitures is five years.

Authorities

19 U.S.C. 1621; 28 U.S.C. 2462

S.Ct: See Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974) (2 month delay).

8 Cir: O'Reilly v. U.S., 486 F.2d 208 (1973) (3 month delay).

6 Cir: U.S. v. Mills, 440 F.2d 647 (1971) (several hours delay).

5 Cir: Sanders v. U.S., 201 F.2d 158 (1953) (seizure "at a later time").

4 Cir: Weathersbee v. U.S., 263 F.2d 324 (1958) (3 month delay).

3 Cir: U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).

2 Cir: See U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940)(6 week delay).

1 Cir: Interbartolo v. U.S., 303 F.2d 34 (1962)(17 day delay).

ARIZ: In Re One 1962 VW Sedan, 464 P.2d 338 (1970); In Re One 1972 Ford Pick-up, 584 P.2d 559 (1978)(103 day delay illegal under State Statute requiring "prompt" seizure).

FLA: Mosley v. State, 363 So.2d 172 (App. 1978)(8 day delay); Knight v. State, 336 So.2d 385 (App. 1976)(one month delay).

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DISCUSSION

Occasionally, claimants argue that forfeitable property must be seized at the moment of illegal use or the right to forfeit it is lost. This is a hollow argument.

Requiring immediate seizure might jeopardize an ongoing investigation. It might prematurely reveal the identity of agents working in an undercover capacity. It might reveal the identity of confidential informants. Requiring the seizure of property at the first sign of probable cause would also pressure agents in doubtful cases to "seize first, and resolve questions about probable cause later." This would encourage violations of the Fourth Amendment.

Fortunately, there is no constitutional requirement that forfeitable property be seized immediately. The Fourth Amendment does not require the prompt or immediate seizure of either people (arrests) or property. Hoffa v. U.S., 87 S.Ct. 408, 417 (1966):

> "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon....Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause...."

In very rare cases, the Fifth Amendment Due Process clause might bar a forfeiture if the government purposely delayed a seizure in a bad faith attempt to gain a tactical advantage, and the delay seriously prejudiced an owner's ability to defend against the forfeiture. But, the burden would rest upon the claimant to prove both bad faith and prejudice before the forfeiture could be barred. See U.S. v. Lovasco, 97 S.Ct. 2044 (1977); U.S. v. Marion, 92 S.Ct. 455 (1971).

In the vast majority of cases there is no constitutional significance in a time lapse between the illegal use and the later seizure of forfeitable property. In addition, there is no

federal statute that requires forfeitable property to be seized immediately. And, the state Uniform Controlled Substances Act contains nothing that requires forfeitable property to be seized promptly.

Several states have statutes which have been interpreted as requiring prompt seizure of forfeitable property. See In Re One 1972 Ford Pick-up, 584 P.2d 559 (ARIZ. 1978). But even in these few states immediate seizure is not required.

Generally, as long as seizure is made and proceedings are begun within the Statute of Limitations, mere delay of seizure is no defense to forfeiture. As the Supreme Court noted in U.S. v. Ewell, 86 S.Ct. 773, 777 (1966):

> "the applicable statute of limitations ...is...the primary guarantee against bringing overly stale (prosecutions)."

The Statute of Limitations applicable to most federal civil forfeitures is five years (19 U.S.C. 1621):

> "No suit or action to recover any... forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered:... Provided further, That the time of the absence from the United States of... the property, shall not be reckoned within this period of limitation."

Note that the time begins to run when the offense is discovered, not necessarily when it occurs. This provision is made applicable to drug-related forfeitures by 21 U.S.C. 881(d). Also see 28 U.S.C. 2462.

E. PRE-SEIZURE NOTICE OR HEARING ARE NOT REQUIRED

Ordinarily, the United States Constitution requires that a person be given notice and an opportunity to be heard before he is deprived of his property. Forfeiture is a traditional exception to this rule. The seizure of forfeitable property without prior notice or prior hearing is constitutionally acceptable.

Authorities

S.Ct: Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974).

10 Cir: See Bramble v. Richardson, 498 F.2d 968 (1974).

9 Cir: U.S. v. One 1967 Porsche, 492 F.2d 893 (1974); and see Ivers v. U.S., 581 F.2d 1362 (1978).

5 Cir: U.S. v. One (1) 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (1974).

ALA: Kirkland v. State, 340 So.2d 1121 (App. 1976).

ARIZ: State ex rel Berger v. McCarthy, 548 P. 2d 1158 (1976).

GA: Blackmon v. B.P.O.E., 208 S.E.2d 483 (1974).

MASS: Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (App. 1978).

NEB: State v. One 1970 2-Door Sedan Rambler, 215 N.W.2d 849 (1974).

NM: Matter of One Cessna Aircraft, 559 P.2d 417 (1977).

NC: State v. Richardson, 208 S.E.2d 274 (App. 1974).

TENN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

WASH: State v. One 1972 Mercury Capri, 537 P. 2d 763 (1975).

DISCUSSION

Normally, the Due Process clauses of the Fifth and Fourteenth Amendments require governments to provide a person with notice and an opportunity to be heard before taking his property. Fuentes v. Shevin, 92 S.Ct. 1983 (1972). There are, however, "extraordinary situations" which permit governments to postpone giving notice and holding a hearing until after the seizure. These extraordinary situations all have three things in common:

1. The seizure serves an important government interest;

2. There is a need for speed; and

3. A responsible government officer initiates the seizure under a carefully worded statute (92 S.Ct. at 2000).

The seizure of forfeitable property has traditionally been recognized as one of these "extraordinary situations." See Fell v. Armour, 355 F.Supp. 1319 at 1326 (MDTENN. 1972)

First, widespread drug abuse, particularly among children and teenagers, poses a very serious threat to the well-being of society. Drug trafficking organizations that cater to this abuse are composed of three elements: (1) drugs, (2) people and (3) money and other assets. As long as the assets remain untouched, seized drugs and arrested people can always be quickly replaced. Depriving drug traffickers of their assets and operating tools is an essential step in crippling the drug traffic.

Second, forfeitable assets must be seized quickly. In the past, owners who became aware of the impending seizure and forfeiture of their property transferred title to a relative, attorney, or some innocent third party. The instinct to alienate property to avoid forfeiture is so common that a significant body of case law has developed within the area of forfeiture law on the effect of these "fraudulent" transfers. Defense counsel seem unusually quick to take assignments of forfeitable assets in consideration for their services. U.S. v. $22,640 in U.S. Currency, 615 F.2d 356 (5 Cir. 1980); U.S. v. Praetorius, 487 F.Supp. 13 (EDNY.1980); U.S. v. $11,580 in U.S. Currency, 454 F.Supp. 376 (MDFLA. 1978); U.S. v. One 1964 MG & $17,883 in U.S. Currency, 408 F. Supp. 1025 (WDWASH. 1976); U.S. v. One 1976 Chris-Craft Boat, 423 F.2d 1293 (5 Cir. 1970); Florida Dealers Growers Bank v. U.S., 279 F. 2d 673 (5 Cir. 1960); State v. Crampton, 568 P.2d 680 (Ore. 1977).

The best way to avoid the bad faith depletion of forfeitable assets, the removal of forfeitable assets, and the fraudulent transfer of forfeitable assets is to seize them quickly without prior notice of the impending proceedings.

Third, seizures for forfeiture are initiated by government officers who are specifically trained in the law of forfeiture and the law of search and seizure. They are under a duty to insure that probable cause exists to forfeit property before they initiate a seizure.

For these reasons, the seizure of forfeitable property without prior notice or prior hearing is constitutionally acceptable. Aside from this reasoning, it would seem foolish to require notice and a hearing prior to seizing the fruits and instrumentalities of a crime, but not to require notice and a hearing before seizing (arresting) the criminal.

> "It would be grossly inconsistent... to allow a deprivation of personal liberty by an arrest based on probable cause and yet not allow a deprivation of property without a prior hearing when there is probable cause to believe that the owner has used the property in violation of a statute providing for seizure. Certainly due process does not afford greater protection for property than it does for personal liberty. Due process does not entitle an individual to a hearing prior to arrest based upon probable cause. Similarly, due process does not entitle a person, who has used his property as an instrument of crime, to a hearing prior to seizure pursuant to statutory authority. To hold that due process requires a prior

hearing in this situation would be to ignore the delicate process of adjustment entrusted to us by the Constitution. The interests of the government and the well being of society demand that the officers of the law be able to seize property used as an instrument of crime in violation of a statute providing for seizure." U.S. v. One 1967 Porsche, 492 F.2d 893, 894 (1974).

V. PROCEEDINGS

A. FORFEITURE OCCURS AT THE MOMENT OF ILLEGAL USE

When a statute provides for forfeiture, the forfeiture takes place at the moment of illegal use, unless the statute provides otherwise. At that instant all rights and legal title to the property pass to the government. Seizure and formal proceedings simply confirm, or proclaim, the forfeiture that has already taken place. No third party can acquire a legally recognizable interest in the property after the illegal use.

Authorities

S.Ct: U.S. v. Stowell, 10 S.Ct. 244 (1890)(and cases cited therein).

10 Cir: 7 Fifths Old Grand-Dad Whiskey v. U.S., 158 F.2d 34 (1946).

9 Cir: Ivers v. U.S., 581 F.2d 1362 (1978); Simons v. U.S., 541 F.2d 1351 (1976); Stout v. Green, 131 F.2d 995 (1942); The Rethalulew, 51 F.2d 646 (1931).

8 Cir: O'Reilly v. U.S., 486 F.2d 208 (1973).

6 Cir: U.S. v. Mills, 440 F.2d 647 (1971).

5 Cir: U.S. v. One 1967 Chris-Craft 27 Foot Fiber Glass Boat, 423 F.2d 1293 (1970); Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (1960); Wingo v. U.S., 266 F.2d 421 (1959); The Sterling, 65 F.2d 439 (1933).

4 Cir: Weathersbee v. U.S., 263 F.2d 324 (1958); Harman v. U.S., 199 F.2d 34 (1952).

2 Cir: U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940).

1 Cir: Strong v. U.S., 46 F.2d 257 (1931).

SDGA: Walker v. U.S., 438 F.Supp. 251 (1977).

DHAWAII: U.S. v. Four (4) Pinball Machines, 429 F.Supp. 1002 (1977).

SDFLA: U.S. v. One (1) 43 Foot Sailing Vessel, 405 F.Supp. 879 (1975).

EDILL: Mayo v. U.S., 413 F.Supp. 160 (1976).

MDTENN: Fell v. Armour, 355 F.Supp. 1319 (1972).

DNJ: State of New Jersey v. Moriarity, 268 F.Supp. 546 (1967).

EDSC: U.S. v. One 1957 Model Tudor Ford, 167 F.Supp. 864 (1958).

EDNC: U.S. v. One 1954 Model Ford Victoria, 135 F.Supp. 809 (1955).

EDPA: U.S. v. One 1951 Oldsmobile Sedan, 129 F.Supp. 321 (1955).

DORE: U.S. v. One Oldsmobile Sedan, 23 F.Supp. 323 (1938).

DMASS: The Harpoon II, 71F. Supp. 1022 (1947)

CAL: People v. Grant, 127 P.2d 19 (App. 1942)

NJ: Farley v. $168,400.97, 259 A.2d 201 (1969).

ORE: State v. Crampton, 568 P.2d 680 (App. 1977).

TEX: State v. Cherry, 387 S.W.2d 149 (App. 1965).

DISCUSSION

When does the ownership (title) of forfeitable property pass to the government? Does it pass (vest) at the moment of illegal use? Does it pass at the time of seizure? Or does it pass when a formal judgment, or declaration of forfeiture is issued by the authorities? This question may seem overly academic, but the answer has significant consequences.

Under the old common law of England, the answer depended upon the character of the property. Real property, such as land and buildings, was forfeited at the moment of its illegal use, or at the moment of the criminal act.

At that instant all rights and legal title to the property passed to the government.

Personal property, on the other hand, was not forfeited until its owner was convicted, or a judgment of forfeiture was obtained. Ownership of cash, conveyances, equipment and other personal property did not pass to the government until formal proceedings against the owner and the property were completed

> "The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of the conviction shall be forfeited."
>
> "Therefore a traitor or felon may bona fide sell any of his chattels real or personal, for the sustenance of himself and family between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors have committed a treason or a felony." 4 Blackstone Commentaries on the Laws of England, 388 (1765).

NOTES

The old common law rules appear in both state and United States Supreme Court decisions. See Farley v. $168,400.97, 259 A.2d 201, at 204 (N.J. 1969) and U.S. v. Stowell, 10 S.Ct. 244, at 248 (1890). Today, there is no "common law" forfeiture; there can be no forfeiture in the United States unless it is specifically authorized by some statute. As a result, Congress and state legislatures are free to decide when ownership passes to the government under any particular forfeiture statute.

> "Where a forfeiture is given by a statute, the rule of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute." U.S. v. Grundy, 3 Cranch (7 U.S.) 337, 351, 2 L.Ed. 459 (1806)(Chief Justice John Marshall).

In the early American forfeiture statutes neither Congress nor state legislatures, bothered to specify exactly when forfeiture was to take place. As a result, the United States Supreme Court established a presumption that the forfeiture of both real and personal property takes place at the very moment of their illegal use, at the very moment of the criminal act, unless the forfeiture statute in question specifically states otherwise. U.S. v Grundy, 3 Cranch (7 U.S.) 337, 2 L.Ed. 459 (1806); U.S. v. 1960 Bags of Coffee, 8 Cranch (12 U.S.) 398, 3 L.Ed. 602 (1814); U.S. v. One Hundred Barrels Distilled Spirits, 81 U.S. (14 Wall) 44, 20 L.Ed. 815 (1872); U.S. v. Stowell, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1890).

> "...it must be admitted...beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases when the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent...." U.S. v. One Hundred Barrels Distilled Spirits, 81 U.S. at 56-57, 20 L.Ed. 816-817.

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This presumption is now uniformly followed in every state and federal jurisdiction. None of the following statutes specifies the time when forfeiture is to take place. Therefore, title to property forfeitable under these laws passes to the government at the moment of illegal use, at the moment of the criminal act:

> 21 U.S.C. 881, The civil forfeiture section of the federal Controlled Substances Act.
>
> U.C.S.A. Sec. 505, The civil forfeiture section of the state Uniform Controlled Substances Act.
>
> 21 U.S.C. 848, The criminal forfeiture section of federal law relating to Continuing Criminal Drug Enterprises.
>
> 18 U.S.C. 1963, The criminal forfeiture section of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Seizure and formal proceedings under these statutes do not change the time of forfeiture. Formal proceedings simply proclaim, or confirm, the forfeiture which has already taken place. They provide owners with an opportunity to be heard, as required by the Due Process clauses of the Fifth and Fourteenth Amendments. They memorialize, or provide a public record, of the transfer of ownership to the government. But they do not affect the time that forfeiture occurs.

Because forfeiture takes place at the moment of illegal use, no third party can acquire a legally recognizable interest in the property after the activity that subjects it to forfeiture.

1. Attorney Assignments

As noted earlier, on page 200 of this Guide, defense attorneys seem prone to taking

"assignments" of their client's interests in seized property as payment for their services. If the seized property is forfeitable, these attorney-assignments are worthless. Ownership of forfeitable property passes to the government at the moment of illegal use. Thereafter, the owner of record no longer has any legal rights left to assign. An attorney who takes an assignment of forfeitable property takes nothing by the assignment. The case law on forfeiture makes this quite clear.

While some attorneys might not be familiar with the case law on forfeitures, all attorneys taking assignments of property lawfully held by the federal government should be familiar with 31 U.S.C. 203, the Anti-Assignment of Claims Act. This statute bars the assignment of any interest in property being held by the federal government. It makes no difference whether the property is held as evidence, or for forfeiture, or for tax purposes, or for safekeeping. Interests in property in the possession of the United States Government cannot be assigned. See, for example, U.S. v. Praetorius, 487 F.Supp. 13 (EDNY. 1980).

2. Tax Liens

Federal, state, and local governments can impose liens on private property to enforce their tax laws. For example, the United States has a lien on all property and rights to property of a taxpayer who neglects or refuses to pay a tax for which he is liable. See Internal Revenue Code, section 6321.

A lien is a qualified right to control a person's property in an effort to collect a debt from him. The creation of a tax lien generally depends upon three events: (i) assessment of the tax, (ii) demand for payment, and (iii) refusal or failure to pay. The lien does not "attach," or come into being, until all three events occur. See, for example, Internal Revenue Code, section 6323. Until all this is done, it is possible for third parties to acquire valid legal interests in the taxpayer's property. If property is sold to satisfy a tax lien, the owner is entitled to a credit against his tax debt.

Contrast these characteristics of tax liens with the forfeiture laws. A forfeiture deprives an owner of all his rights in the property without any credit or compensation. The forfeiture occurs immediately upon commission of the illegal act. No third party can acquire rights in the property after the illegal use. These differences produce several interesting results.

a. Competing Governments

Suppose X receives $100,000 in exchange for a controlled substance, after which he is arrested and the money is seized by DEA agents for forfeiture. And suppose, after the seizure, state taxing authorities place a state tax lien on the money. Which government's claim prevails? The answer is simple: the forfeiture prevails. At the instant the money was exchanged for drugs, ownership of the money passed to the federal government. Thereafter, X had no interest left in the money. No one can take an interest in the money after its illegal use.

AGENTS HOLDING FORFEITABLE ASSETS SHOULD NOT RELEASE THEM TO TAXING AUTHORITIES OF OTHER GOVERNMENTS.

If one government seizes property for forfeiture, no other government can place a tax lien against the property. Farley v. $168,400.97, 259 A.2d 201 (N.J. 1969); Metropolitan Dade County v. U.S., F.2d (5 Cir. Jan. 30, 1981, (IV. 79-2038).

b. One Government's Options

Suppose you discover $500,000.00 of forfeitable money while executing a warrant at the home of a documented drug trafficker. And suppose the money is also evidence of a tax liability and can be subject to a tax lien. Since both claims can be asserted by the same government, which claim should take priority? Again, the forfeiture should take priority.

If you elect to forfeit the money, the owner loses the entire $500,000. He gets no compensation. He gets no credit. At the same time, the government can impose

345-769 0 - 81 - 15

a tax lien on his other non-forfeitable assets. But, if you elect not to forfeit the money and you impose a tax lien on it, part of the money might later be returned to the violator, and he will be entitled to a credit against his taxes for what the government keeps.

ALWAYS FORFEIT ALL FORFEITABLE ASSETS FIRST, AND ENFORCE A TAX LIEN ON WHAT REMAINS.

3. Fraudulent Transfers

Faced with impending seizure and forfeiture, violators often transfer forfeitable property to relatives or friends in hopes of avoiding forfeiture. In most instances the new "owner" pays nothing and has knowledge of the criminal activities of the violator.

Because forfeiture occurs at the moment of illegal use, these "fraudulent transfers" are ineffective. By the time the attempt is made to transfer the property, ownership has already passed to the government. See U.S. v. One 1967 Chris-Craft 27 Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970); Weathersbee v. U.S., 263 F.2d 324 (4 Cir. 1958); and DeBonis v. U.S., 103 F.Supp. 123 (WDPA. 1952).

4. Bona Fide Purchasers For Value

Like all other transferees, innocent purchasers cannot generally take a legal interest in forfeitable property. Even though they have no knowledge that the property is forfeitable, and they pay for it in an "arms length" transaction, they do not acquire ownership to the property. They are in the same unfortunate situation as people who unwittingly buy stolen property. 77 C.J.S. Sales Sec. 295 (e)(1952). Simons v. U.S., 541 F.2d 1351 (9 Cir. 1976); Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (5 Cir. 1960); Wingo v. U.S., 266 F.2d 421 (5 Cir. 1959); 7 Fifths Old Grand Dad Whiskey v. U.S., 158 F.2d 34 (10 Cir. 1946); U.S. v. One 1957 Model Tudor Ford, 167 F.Supp. 864 (EDSC. 1958); U.S. v. One 1954 Model Ford Victoria, 135 F.Supp. 809 (EDNC. 1955);

State v. Cherry, 387 S.W.2d 149 (Tex. App. 1965); and see Weathersbee v. U.S., 263 F.2d 323 (4 Cir. 1958).

> "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately ...; and the condemnation, when obtained, relates back to that times and avoids all intermediate sales and alienations even to purchasers in good faith." U.S. v. Stowell, 10 S.Ct. 244, 247 (1890) (emphasis not in original).

Because of the injustice of this rule, bona fide purchasers for value (BFP's) of forfeitable property can petition the executive branch for a pardon (remission) of the forfeiture. Once granted, they are, in effect, declared to be the new owner by order of the executive branch of government. Compare Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (5 Cir. 1960) with U.S. v. One 1967 Chris-Craft 27 Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970).

> "By its nature, the remission statute assumes the validity of the forfeiture but also assumes that outstanding interests in property and bona fide claims to property are not snuffed out by the ...(property's)...guilt. They continue viable, at least to the extent of permitting innocent persons to ask that the sovereign temper the strictness of the rule of forfeiture when there are equitable grounds for relief." Florida Dealers and Growers Bank, cited above, at 677.

In some instances, forfeiture statutes contain specific sections protecting property purchased by BFP's from forfeiture, provided the BFP can prove his innocence in acquiring the property. See 21 U.S.C. 881(a)(6), the Currency and Proceeds section of the federal drug forfeiture statute.

B. POST-SEIZURE NOTICE AND HEARING ARE REQUIRED

In forfeiture cases, the constitutional right of owners to notice and a hearing is simply postponed, not erased. Although pre-seizure notice or a hearing are not required, post-seizure notice and an opportunity to be heard must be provided at a meaningful time and in a meaningful way.

Authorities

19 U.S.C. 1602 - 1612

S.Ct: Robinson v. Hanrahan, 93 S.Ct. 30 (1972).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976).

3 Cir: Menkarell v. Bureau of Narcotics, 463 F.2d 88 (1972).

2 Cir: Lee v. Thornton, 538 F.2d 27 (1976).

CDCAL: U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (1978).

SDFLA: U.S. v. One (1) 1950 Burger Yacht, 395 F.Supp. 802 (1975).

NDMISS: Holladay v. Roberts, 425 F.Supp. 61 (1977).

EDMO: One 1964 Cadillac Sedan DeVille 4-Door v. U.S., 378 F.Supp. 416 (1974).

SDNY: Jaekel v. U.S., 304 F.Supp. 993 (1969).

MDTENN: Fell v. Armour, 355 F.Supp. 1319 (1972).

ALA: Kirkland v. State, 340 So.2d 1121 (App. 1976).

ARIZ: Matter of 1974 Chev. Camaro, 589 P.2d 475 (App. 1978); One Cessna 206 Aircraft, Etc. v. Saathoff, 577 P.2d 250 (1978); State ex rel Berger v. McCarthy, 548 P.2d 1158 (1976).

CAL: People v. One 1941 Chev. Coupe, 231 P. 2d 832 (1951).

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GA: Taylor v. State Bank of Jacksonville, 165 S.E.2d 920 (App. 19).

ILL: People v. One 1965 Oldsmobile, 284 N.E. 2d 646 (1972).

MASS: Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (App. 1978).

MICH: People v. One 1973 Pontiac Auto, 269 N.W.2d 537 (App. 1978).

NEB: State v. One 1970 2-Door Sedan Rambler, 215 N.W.2d 849 (1974).

NJ: Kutner Buick, Inc. v. Strelecki, 267 A. 2d 549 (Superior 1970).

NM: Matter of one Cessna Aircraft, 559 P.2d 417 (1977).

SD: State v. One Pontiac Auto, 270 N.W.2d 362 (1978); State v. Miller, 248 N.W.2d 377 (1976)

TEX: State v. Cherry, 387 S.W.2d 149 (App. 1965); State v. Richards, 301 S.W.2d 597 (1957).

WASH: State v. One 1972 Mercury Capri, 537 P. 2d 763 (1975); City of Everett v. Slade, 515 P.2d 1295 (1973).

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DISCUSSION

The Due Process clauses of the United States Constitution (in the 5th & 14th amendments) require that a person be given notice and an opportunity to be heard before he is deprived of his property, or of any important interests. Memphis Light, Gas & Water Div. v. Craft, 98 S.Ct. 1554 (1978)(loss of utilities); Goss v. Lopez, 95 S.Ct. 729 (1975)(suspension from public school); Fuentes v. Shevin, 92 S.Ct. 1983 (1972)(repossession of furniture); Bell v. Burson, 91 S.Ct.1586 (1971)(loss of driver's license); Goldberg v. Kelly, 90 S.Ct. 1011 (1970)(loss of welfare benefits); Sniadach v. Family Finance Corp., 89 S.Ct. 1820 (1969) (garnishment of wages).

In forfeiture cases no pre-seizure notice or hearing need be given; but post-seizure notice and hearing are absolutely required.

1. Notice

The right to a hearing is meaningless without notice of the proceedings. Walker v. Hutchinson, 77 S.Ct. 200, 202 (1956).

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, 657 (1950).

a. Method of Delivery

Several methods of delivering notice to interested parties may be acceptable, depending upon the facts of the case. The Constitution requires a method of delivery that is most likely to reach all interested parties. People v. One 1941 Chrysler 6 Touring Sedan, 180 P.2d 780 (Cal. App. 1947).

NOTES

1) Mere Seizure Is Not Notice

The mere seizure of property is not considered acceptable notice. Seizure certainly informs an owner that some government action is being taken against his property, but it does not give him the information he needs to contest the seizure in a hearing, such as who seized it, under what law, for what activity, etc. Windsor v. McVeigh, 93 U.S. 274 (1876); Fell v. Armour, 355 F.Supp. 1319, 1327 (MDTENN. 1972); and see Scott v. McNeil, 14 S.Ct. 1108 (1894); (f The Mary, 9 Cranch (U.S.) 126, 3 L.Ed 678 (1815).

2) Oral Notice Is Inadequate

Given the importance of notice, the amount of information which it must contain, and the inability of most persons to remember new facts, some form of written notice seems required. Verbally informing someone of a seizure and pending forfeiture proceedings is not constitutionally acceptable. Jaekel v. U.S., 304 F.Supp. 993 (SDNY. 1969).

3) Publication of Notice

Publication of notice in a newspaper of general circulation is acceptable only as to persons who are missing or unknown. Mullane, cited above. Although the likelihood of their being informed by publication is very remote, "the world must move on...." Proceedings cannot be held up indefinitely until all missing or unknown parties are found. Case of Broderick's Will, 21 Wall (U.S.) 503, 509 (1874).

When permitted, courts generally prefer and state statutes often require that publication be made in the county where the seizure took place. See Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3 Cir. 1972). But the Constitutional requirement of due process seems flexible enough to permit publication in other counties within the same judicial

jurisdiction. Security Bank v. California, 44 S.Ct. 108, 111 (1923).

Notice by publication is constitutionally inadequate as to interested persons whose names and addresses are known or are easily obtainable. Mullane, cited above; Robinson v. Hanrahan, 93 S.Ct. 30 (1972); Menkarell, cited above; Holladay v. Roberts, 425 F.Supp. 61 (NDMISS. 1977); Fell v. Armour, 355 F.Supp. 1319 (MDTENN. 1972); Jaekel, cited above. As to known parties, some form of written, personal notice is required, such as a letter.

4) Registered or Certified Mail

"However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, 660 (1950). As such, notice given in the form of a letter is constitutionally acceptable.

Actual receipt of the notice need not be shown. Tyler v. Judges of the Court of Registration, 55 N.E. 812, 814 (MASS. 1900). But, a reasonable effort must be made to determine the "true" address of interested parties. For example, mailing notice to an owner's home address when it is easy to learn that he is in prison, is not an acceptable method of notice. Robinson v. Hanrahan, 93 S.Ct. 30 (1972). Similarly, if notice is mailed to an owner of record, and he responds by saying he sold the property to a third party, a reasonable effort must be made to give notice to the newly identified owner. One Cessna 206 Aircraft, Etc. v. Saathoff, 577 P.2d 250 (ARIZ. 1978).

5) Personal Service

Personal service of a summons and complaint upon interested parties advising them of a forfeiture action undoubtedly satisfies the constitutional requirement of notice. Personal service is a classic form of notice which is always adequate in any type of proceedings. Mullane, cited above, at 657; see Holladay v. Roberts, 425 F.Supp. 61, 69 (NDMISS. 1977).

6) Actual Notice

Persons who have actual notice of forfeiture proceedings, who have the opportunity to participate, and who take full advantage of that opportunity, should not be permitted to attack the adequacy of the method of which they were notified. The Merino, 9 Wheat (U.S.) 391, 6 L.Ed 118 (1824), Wiren v. Eide, 542 F.2d 757, 763 (9 Cir. 1976); Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (MASS. App. 1978); State v. Cherry, 387 S.W.2d 149 (TEX. App. 1965).

b. Content

Due process does not require a notice to be in any special format. The content is what is critical. "The contents of the notice must be such as to insure that the owner of the seized...(property)...be afforded the constitutionally required meaningful opportunity to be heard." Fell v. Armour, 355 F.Supp. 1319, 1329 (MDTENN. 1972). In general, the following information is required.

1) Description of Seized Property

The seized property must be described in such detail that a person can tell whether it is his; otherwise, the notice is inadequate. Boswell's Lessee v. Otis, 9 How (U.S.) 336 (1850). And see U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (CDCAL. 1978).

Persons having an interest in the property need not be identified in the notice, Castillo v. McConnico, 18 S.Ct. 229 (1898), unless their names are reasonably needed to identify the object

2) Identity of Responsible Official(s)

Interested parties have a right to know who seized their property (what agency

of government) and who they must deal with to try to get it back (officials in the decision making process). U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (CDCAL. 1978).

3) Time & Place of Seizure

The time and place of seizure must be specified, because it affects where and when the forfeiture proceedings will take place. Parties need this information to prepare. U.S. v. Eight (8) Rhodesian Stone Statues, cited above.

4) Citations of Legal Authority

A statement of the legal authority under which the seizure was made is also required. Holladay v. Roberts, 425 F. Supp. 61 (NDMISS. 1977); Fell v. Armour, 355 F.Supp. 1319 (MDTENN. 1972).

"In a democracy, it is a cardinal principle that when the government undertakes action affecting the rights of a citizen to liberty or property, it must announce the authority under which it is acting. For example, one who is arrested has the right to know the charge; one who is immediately deprived of possession of his property by a declaration of taking in a condemnation proceeding is entitled to know the legal authority for the condemnation. 40 U.S.C. Sec. 258a. And even a traffic or parking ticket contains a statement of the ordinance or law alleged to have been violated. To know the legal basis for the government's action is the indispensable predicate for a citizen to exercise his right to contest the validity of that action. Cf. Groppi v. Leslie, 404 U.S. 496, 502, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972). In the context of a...forfeiture, the citizen can neither adequately prepare his petition for remission nor exercise other legal remedies which may be available to him unless he is aware of what law he is alleged to have broken." U.S. v. Eight (8) Rhodesian Stone Statues, cited above, at 202.

5) Available Procedures

Interested parties must be provided with an opportunity to be heard. Therefore, the procedures for challenging the seizure, and for seeking relief, must be identified in the notice. Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3 Cir. 1972); U.S. v. Eight (8) Rhodesian Stone Statues, Holladay v. Roberts, and Fell v. Armour, cited above.

6) Appraised Value

If the proceedings are in any way dependent upon the value of the seized property, then the government's appraisal of value must be in the notice. Menkarell v. Bureau of Narcotics, cited above.

7) Time Limits

Any limitations placed upon the time periods allowable in which to respond, or to challenge the seizure, or to seek relief, must be contained in the notice. Holladay v. Roberts, and Fell v. Armour, cited above.

8) Penalty for Inaction

The penalty for failure to file within the time limits must also be stated. Holladay v. Roberts, and Fell v. Armour, cited above.

There may be minor errors in the notice, as long as the resulting notice adequately advises persons of these basic elements. Grannis v. Ordean, 34 S.Ct. 779 (1914).

2. Some Kind of "Hearing"

In the case of Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974), the United States Supreme Court held that

the constitutional right to notice and a hearing in forfeiture actions could be postponed until after seizure. It did not hold it could be totally eliminated. Just a few months after the Calero decision, Mr. Justice White summed it up in Wolf v. McDonnell, 94 S.Ct. 2963, 2975 (1974):

> "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."

Although the need for post-seizure notice and hearing in forfeiture cases is clear, a question remains as to what kind of hearing is required - a full trial, a personal appearance before the decision maker, a mere opportunity to submit written evidence, or simply a chance for a claimant to tell his side of the story in writing or by phone?? The term "hearing" is a flexible term; it does not necessarily mean a full scale judicial-type trial. Memphis Light, Gas & Water Div. v. Craft, 98 S.Ct. 1554 (1978); Mathews v. Eldridge, 96 S.Ct. 893 (1976); Goss v. Lopez, 95 S.Ct. 729 (1975); and see Friendly, "Some Kind of Hearing," 123 U.Pa. L.Rev. 1267-1317 (1975).

Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit has identified eleven (11) possible "building blocks" of a hearing (123 U.Pa.L.Rev. at 1279):

1) An unbiased decision maker;

2) Notice of the proposed action and the government's reasons for it;

3) An opportunity to explain why the action should not be taken;

4) A right to call witnesses;

5) A right to know evidence against you;

6) A right to have the decision based only on the evidence presented;

7) A right to be represented by counsel;

8) The making of a record;

9) A statement of reasons for the decision;

10) Public attendance; and

11) Potential court review.

Of course, not all, not even most of these elements are required in every case. In Mathews v. Eldridge, cited above, the Supreme Court recognized three factors to consider, or "balance," in determining which of the hearing safeguards should be imposed:

1) The importance of the private rights affected by the government's action;

2) The risk of mistake associated with the form of hearing used; and

3) The burden on the government of imposing additional hearing requirements.

Because there are three distinct types of forfeiture proceedings (Summary, Judicial, and Administrative), these factors must be applied to each.

Summary forfeiture proceedings are used exclusively for property characterized as contraband per se, such as marihuana, heroin, molotov cocktails, moonshining stills, and so forth. Summary forfeiture is really no "proceedings" at all; none of the eleven (11) hearing safeguards are granted. No notice is given, beyond the mere fact of seizure. No opportunity is provided to challenge the destruction of such property.

Despite the total lack of any notice or hearing, attacks against Summary forfeiture proceedings are rare. Very few people are willing to complain that "their" heroin, "their" bomb, or "their" sawed-off shotgun is being illegally held. The likelihood of successfully challenging Summary forfeiture seems remote. First, the right to possess contraband per se is non-existent. Second,

NOTES

the risk of mistakenly destroying contraband per se is small. Third, the burden on the government of conducting hearings before destroying contraband per se, particularly the large number of weapons and drugs seized every day, would be great. Therefore, it seems certain that no notice or hearing is required under the Constitution. See Moore v. Brett, 137 P.2d 539 (OKL. 19).

Judicial forfeiture proceedings consist of a full civil trial. They contain all the eleven (11) safeguards identified by Judge Friendly as elements of a hearing. Therefore, it seems certain that Judicial forfeiture proceedings satisfy the due process right to notice and a hearing.

The debate over the right to a hearing in forfeiture cases centers on so-called "Administrative" forfeiture proceedings. See Clark, Penalties & Forfeitures, 60 Minn. L.R. 379 at 496 (1976). Because a discussion of this issue depends upon an understanding of the details of these proceedings, it is reserved for the end of the Administrative forfeiture section of this chapter.

NOTES

C. UNREASONABLE DELAY IN STARTING PROCEEDINGS AFTER SEIZURE IS UNLAWFUL

Civil forfeiture actions must be started as soon as practicable after seizure. Unnecessary delay between the seizure and the start of formal proceedings violates owner's rights to prompt post-seizure notice and hearing. Although courts differ on the effect of delay, they all agree that any unreasonable delay is unconstitutional.

Authorities

21 U.S.C. 881(b); U.C.S.A. 505(c)
19 U.S.C. 1602, 1603, 1604

S.Ct: U.S. v. Thirty-Seven (37) Photographs, 91 S.Ct. 1400 (1971)(more than 14 days unreasonable in First Amendment cases).

10 Cir: White v. Acree, 594 F.2d 1385 (1979) (9-month delay not unreasonable); Sarkisian v. U.S., 472 F.2d 468 (1973) (14-month delay unreasonable).

9 Cir: Ivers v. U.S., 581 F.2d 1362 (1978)(18-month delay not unreasonable); U.S. v. One 1970 Ford Pickup, 564 F.2d 864 (1977) (11-month delay unreasonable); U.S. v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (1976)(6-week delay not unreasonable).

8 Cir: U.S. v. One 1973 Buick Riviera Auto, 560 F.2d 897 (1977)(5-month delay not unreasonable).

5 Cir: Castleberry v. A.T.F., 530 F.2d 672 (1976) (38-day delay not unreasonable); U.S. v. One (1) 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (1974)(9 month delay not unreasonable).

4 Cir. States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (1974).

3 Cir: U.S. v. Premises Known As 608 Taylor Ave., 584 F.2d 1297 (1978)(7-month delay seriously suspect).

2 Cir: Lee v. Thornton, 538 F.2d 27 (1976); In Re Behrens, 39 F.2d 561 (1930).

NOTES

1 Cir: U.S. v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1975)(12½-month delay unreasonable); Shea v. Gabriel, 520 F. 2d 879 (1975).

SDNY: U.S. v. One 1978 Cadillac Sedan DeVille, F.Supp. (79 Civ 601 WCC, Jan. 7, 1980)(4½ month delay not unreasonable).

CDCAL: U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (1978)(18-month delay unreasonable); U.S. v. One Volvo 2 Dr. Sedan, 393 F.Supp. 843 (1975)(2 month delay not unreasonable); U.S. v. A Quantity of Gold Jewelry, 379 F.Supp. 283 (1974)(22-month delay unreasonable); U.S. v. One 1971 Opel G.T., 360 F.Supp. 638 (1973)(13½-month delay unreasonable).

SDGA: U.S. v. One (1) Douglas A-26B Aircraft, 436 F.Supp. 1292 (1977)(11 1/2 month delay unreasonable).

EDMICH: U.S. v. One 1973 Dodge Van, 416 F.Supp. 43 (1976)(6-month delay not unreasonable).

DNEV: U.S. v. One 1973 Ford LTD, 409 F.Supp. 741 (1976)(14-month delay not unreasonable).

WDWASH: U.S. v. One 1964 MG, 408 F.Supp. 1025 (1976)(8-month delay not unreasonable).

SDFLA: U.S. v. One (1) 43 Foot Sailing Vessel, 405 F.Supp. 879 (1975)(11-month delay not unreasonable).

SDOHIO: Boston v. Stephens, 395 F.Supp. 1000 (1975)(6-month delay unreasonable).

ALA: Kirkland v. State, 340 So.2d 1121 (App. 1976)(16-day delay not unreasonable).

ARIZ: State ex rel Berger v. McCarthy, 548 P.2d 1158 (1976)(61-day delay unreasonable).

ILL: People v. 1963 Cadillac Coupe, 231 N.E.2d 445 (1967)(3½-month delay unreasonable).

IOWA: State v. One Hundred Twenty-Six Dollars, 251 N.W.2d 216 (1977)(9-month delay unreasonable)

NOTES

MD: Geppi v. State, 310 A.2d 768 (App. 1973)(9-month delay unreasonable); Gatewood v. State, 301 A.2d 498 (App. 1973)(4-month delay not unreasonable).

MICH: People v. One 1973 Pontiac Auto, 269 N.W. 2d 537 (App. 1978)(5-week delay not unreasonable).

NJ: State v. One (1) Ford Van, 381 A.2d 387 (App. 1977)(14-month delay unreasonable).

WASH: City of Everett v. Slade, 515 P.2d 1295 (1973)(2-month delay unreasonable).

345-769 O - 81 - 16

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DISCUSSION

Both statutes and the Constitution prohibit unreasonable delay in beginning forfeiture proceedings after seizure.

1. Due Process demands speed

The constitutional right to post-seizure notice and hearing is meaningless, unless it is provided within a reasonable time. Every court to consider the issue has held that unreasonable delay in the initiation of civil forfeiture proceedings after seizure, violates the Due Process rights of owner-claimants. See Authorities cited above.

2. Statutes require speed

The constitutional need for speed is reflected in most forfeiture statutes which, either expressly or by interpretation, impose a duty of prompt action on officials involved with forfeiture.

For example, most warrantless seizures of forfeitable property made under the drug laws are made under U.C.S.A. Sec. 505(b)(4) and 21 U.S.C. 881(b)(4). Both of these state and federal provisions end with the directive:

> "In the event of seizure pursuant to paragraph...(4) of this subsection, PROCEEDINGS under subsection(d) of this section SHALL BE INSTITUTED PROMPTLY." (Emphasis not in original).

Therefore, the forfeiture provisions of both state and federal drug laws prohibit unreasonable delay.

The reference to subsection (d) in the federal Controlled Substances Act refers to 21 U.S.C. 881(d), which states:

> "All provisions of law relating to the seizure...and condemnation of property for violation of the customs laws...shall apply...insofar as applicable and not inconsistent...."

NOTES

This reference over, or link to, the customs laws imposes an additional need for speed in federal cases. Section 1602 of the customs laws (19 U.S.C.) states:

> "It shall be the duty of any officer, agent, or other person authorized by law to make seizures...to report every such seizure IMMEDIATELY to the appropriate...officer...." (Emphasis not in original).

Section 1603 (19 U.S.C.) provides:

> "Whenever a seizure...is made... and legal proceedings by the United States attorney in connection with such seizure...are required, it shall be the duty of the appropriate...officer to report PROMPTLY such seizure ...to the United States attorney... and to include in such report a statement of all the facts...." (Emphasis not in original).

Finally, Section 1604 (19 U.S.C.) provides:

> "It shall be the duty of every United States attorney IMMEDIATELY to inquire into the facts of cases reported to him...and if it appears probable that any...forfeiture has been incurred... for...which the institution of proceedings in the United States district court is necessary, FORTHWITH to cause the proper proceedings to be commenced ...WITHOUT DELAY...." (Emphasis not in original).

Unreasonable delay at any stage in the initiation of civil forfeiture proceedings violates the express wording of these statutes.

Statutes which fail to expressly require speed have been, and should be, interpreted to require prompt action. U.S. v. Thirty-Seven (37) Photographs, 91 S.Ct. 1400 (1971); Ivers v. U.S., 581 F.2d 1362 (9 Cir. 1978); Lee v. Thornton, 538 F.2d 27 (2 Cir. 1976); States Marine Lines, Inc. v. Shultz, 498 F. 2d 1146 (4 Cir. 1974); Sarkisian v. U.S., 472 F.2d 468 (10 Cir. 1973).

3. What is Unreasonable delay?

The chorus of decisions has not produced a harmonious answer.

a. Flexibility of Limits

How much delay is unreasonable seems to be a question to be decided in the light of the facts of each case. In U.S. v. Thirty-Seven (37) Photographs, the Supreme Court noted "that constitutionally permissible limits may vary in different contexts...." 91 S.Ct. 1400 at 1407 (1971). Nevertheless, some generalizations are possible.

1) Literary Material

Books, photographs and other literary materials can, in rare instances, be subject to forfeiture. For example, 19 U.S.C. 1305(a) provides for the forfeiture of illegally imported obscene materials. And 21 U.S.C. 881 (a)(5) and U.C.S.A. 505(a)(5) provide for the forfeiture of books and records kept by drug violators. Because of the possible clash between the forfeiture of writings and the constitutional rights to Freedom of Speech, Freedom of the Press, and the Right to Privacy, the Supreme Court has held that forfeiture proceedings of such material must be started within 14 days and completed within 60 days after seizure. U.S. v. Thirty-Seven (37) Photographs, cited above.

2) Vehicles at the Border

Seizure of vehicles and other means of personal transportation at the border creates special problems. A person deprived of his car at a remote border point will probably be stranded until a decision is made on the validity of the seizure. Balancing the harshness to the owner of any delay, against the cost to the government in holding an immediate hearing, the United States Court of Appeals for the Second Circuit held in Lee v. Thorton, 538 F.2d 27 (1976) that requests by an owner for relief must be answered within 24 hours, and if they are not granted, a hearing (including an oral appearance) must be provided within 72 hours.

3) Other Conveyances

Given the pervasive use of vehicles by our society, and the increased dependence upon private transportation which accompanies such use, the seizure of any vehicle or conveyance is likely to work a hardship on the private owner. See Tedeschi v. Blackwood, 410 F.Supp. 34 at 44 (D.CONN. 1976). Moreover, a vehicle is a "wasting asset;" it can depreciate by as much as 25 percent per year. See U.S. v. One 1971 Opel G.T., 360 F.Supp. 638 at 641 (CDCAL. 1973). Therefore, although the seizure of a vehicle within the United States does not involve the same certainty of extreme hardship associated with seizure at the border, forfeiture proceedings must still be started promptly.

On the other hand, given the various officials involved (seizing officer, his supervisor, government custodian, administrative personnel, prosecuting attorney, etc.), some delay in the process of starting forfeiture seems inevitable. Balancing these factors, all but two of the more than thirty state and federal courts to rule on this issue have held delays of up to two months not to be unreasonable. Delays of less than two months are not per se unlawful.

CAUTION: The two month rule is merely a "guestimate" of what is likely to be considered acceptable; it is not a license to unnecessarily delay cases for up to two months.

4) Non-Wasting Assets (Money)

Longer delays might be acceptable when the seized property is gold, cash, land or some other non-wasting asset. See Ivers v. U.S., cited above (cash); White

v. Acree, cited above (jewelry). But the question has yet to be litigated.

b. How is it measured?

Generally, courts examine the period of time from the seizure of the property to the final act needed to initiate the proceedings. In judicial forfeiture cases, courts will scrutinize any delay up to the filing of the complaint for forfeiture. In administrative cases, they might examine the entire process, but delay in providing notice to interested parties seems to be the critical point.

c. Must delay cause harm?

Courts split over whether delay must cause harm before it can be considered illegal. Several have suggested that delay in beginning forfeiture is not unreasonable unless it causes economic injury or prejudices the ability to defend against the forfeiture. White v. Acree, 594 F.2d 1385 at 1390 (10 Cir. 1979); Ivers v. U.S., 581 F.2d 1362 at 1373 (9 Cir. 1978); U.S. v. One 1973 Ford LTD, 409 F.Supp. 741 at 743 (DNEV. 1976); U.S. v. One 1978 Cadillac Sedan DeVille, F.Supp. (SDNY. Jan 7, 1980, No. 79 Civ. 601 WCC).

At least one court has held that delay can be considered unreasonable, and a violation of due process, without any proof that the delay caused harm. U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 at 205 (CDCAL. 1978). The authors of this Guide believe this decision to be the correct view. Recently, the United States Supreme Court held that a person denied the right to a hearing can receive damages in a lawsuit without establishing he was harmed. Carey v. Piphus, 98 S.Ct. 1042 at 1054 (1978). In the words of the High Court:

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, ...we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."

4. Can delay be excused?

Assuming delay has occurred and it appears to be unreasonable, it could be excusable.

a. By claimant's tactics

The United States Supreme Court has said: "No seizure or forfeiture will be invalidated for delay...where the claimant is responsible for extending either administrative action or judicial determination beyond the allowable time limits...." U.S. v. Thirty-Seven (37) Photographs, 91 S.Ct. 1400 at 1407 (1971). Based upon this statement, courts have excused delay caused by a claimant's tactics. Ivers v. U.S., 581 F.2d 1362 (9 Cir. 1978); U.S. v. One (1) 43 Foot Sailing Vessel, 405 F.Supp. 879 (SDFLA. 1975).

b. By a prosecution

Frequently, property seized for civil forfeiture will also have the status as evidence in a related criminal prosecution. This is especially true of drug money. In such cases, can the initiation of the civil forfeiture proceedings be delayed until after the criminal case is completed?

Although the courts have yet to decide, the probable answer is "no." For a number of reasons, civil forfeitures should be started even when criminal proceedings are pending. First, an owner's right to notice and hearing in a civil forfeiture action is theoretically unrelated to any criminal proceedings. We have already seen, at page 6 of this Guide, that a civil forfeiture action is considered to be totally independent of any criminal action taken against anyone.

Second, the need for speed in civil forfeiture cases is created by statutes as well

as by the Constitution. None of these statutes contains any language permitting delay because of a related prosecution.

Third, assuming property seized as evidence is also subject to civil forfeiture, or to some other government claim, fundamental fairness requires that government put an owner on notice of what claims it intends to pursue. How else could an owner begin to prepare a defense to such claims? And, if government never intends to return property, shouldn't it alert the owner, rather than deceiving him into believing his property is being held "temporarily" as evidence? Congress has already required that the federal government put notice in a criminal indictment if it intends to criminally forfeit property as a result of a conviction. Rule 7(c)(2), Fed.R.Cr.P.; U.S. v. Hall, 521 F.2d 406 (9 Cir. 1975). Although this criminal rule does not apply to civil forfeiture (Rule 54(b)(5) Fed.R.Cr.P.), the underlying reasoning of giving fair warning to claimants applies to all forfeitures.

Finally, in many cases neither the government nor claimants will be prejudiced by pursuing a criminal prosecution and a civil forfeiture simultaneously. If good cause should exist for avoiding simultaneous litigation, the proper approach would be to file the civil forfeiture promptly and move to stay the forfeiture action pending the outcome of the criminal prosecution. This puts claimants on notice of the government's intent to seek forfeiture of property held as evidence. It permits the courts to scrutinize the government's reasons for delaying the civil litigation. It allows claimants time to begin preparing their defense to forfeiture and to preserve needed evidence for the civil proceedings. And it protects the criminal action from civil discovery that would be made in the forfeiture action.

When both civil and criminal proceedings arise out of the same or related transactions, both sides are, for good cause shown, entitled to a stay of the civil action until disposition of the criminal matter. Campbell v. Eastland, 307 F.2d 478 (5 Cir. 1962); U.S. v. One 1967 Buick Hardtop Electra, 304 F.Supp. 1402 (WDPA. 1969); U.S. v. One 1967 Ford Galaxie, 49 F.R.D. 295 (SDNY. 1970); U.S. v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (SDNY 1966); U.S. v. Bridges, 86 F.Supp. 931 (SDCAL. 1949); U.S. v. 30 Individually Cartoned Jars..."Ahead Hair Restorer...," 43 F.R.D. 181 (DDEL. 1967); U.S. v. $2,437 U.S. Currency, 36 F.R.D. 257 (EDNY. 1964); Kaeppler v. Jas. H. Matthews & Co., 200 F.Supp. 229 (EDPA. 1961); Perry v. McGuire, 36 F.R.D. 272 (SDNY. 1964); and see U.S. v. Currency, et al, 626 F.2d 11 (6 Cir. July 14, 1980, 78 - 1162).

DO NOT DELAY FILING A CIVIL FORFEITURE UNTIL CRIMINAL PROCEEDINGS HAVE ENDED.

c. By remission requests

As explained in the Remission Chapter of this Guide, claimants are entitled to ask for relief, or "remission," from the executive branch of government - ususally the Attorney General. If granted, remission effectively "pardons" their property from forfeiture. See 19 U.S.C. 1618. If an owner files for remission before forfeiture proceedings have begun, may the government delay starting the formal proceedings until the request for remission has been decided? There are three conflicting views on the subject?

Several courts have held that the filing of a petition for remission automatically justifies delaying the beginning of proceedings against the property. White v. Acree, 594 F.2d 1385 (10 Cir. 1979); U.S. v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1 Cir. 1975); U.S. v. One 1964 MG, 408 F.Supp. 1025 (WDWASH. 1976).

> "...where parties file for administrative relief, without asking for institution of court proceedings on the legal issues, they may not complain of abridgment of their rights to procedural due process during a reasonable period for investigation

...(of their request)...."
White v. Acree, 594 F.2d at 1390.

There are a number of good reasons for this position. Remission proceedings are less formal and less costly then judicial forfeiture proceedings. If remission is granted, no judicial proceedings will be required; burdensome court actions can often be avoided by deciding remission requests first. This also avoids the complications of pursuing administrative and court proceedings at the same time. See Ivers v. U.S., 581 F.2d 1362 at 1370 (9 Cir. 1978).

Other courts have held that a petition for remission does not automatically justify delay in starting forfeiture proceedings. But, these courts believe an owner can expressly ask that proceedings be delayed. U.S. v. One 1976 Cadillac Coupe DeVille, (4 Cir. April 14, 1980, No. 78-1002, Unpublished); Ivers v. U.S., 581 F.2d 1362 (9 Cir. 1978).

"We hold...the mere filing of a petition for remission...does not excuse the government from its obligation to commence prompt judicial proceedings until that petition is decided. This does not, of course, preclude the parties from agreeing that judicial action should be postponed pending the resolution of an administrative claim; it simply prevents the unilaterial adoption of that course by the government." Ivers at 1372.

A third body of courts has held that a request for remission never justifies the delaying of forfeiture proceedings, because prompt action is required by statute and cannot be waived by a claimant. U.S. v. One (1) Douglas A-26B Aircraft, 436 F.Supp. 1292 (SDGA. 1977); Boston v. Stephens, 395 F.Supp. 1000 (SDOHIO. 1975); U.S. v. A Quantity of Gold Jewelry, 379 F.Supp. 283 (CDCAL. 1974); U.S. v. One 1971 Opel GT, 360 F.Supp. 638 (CDCAL. 1973).

5. Effect of Delay

Although all courts agree that unreasonable delay is unconstitutional, they differ on its effects.

a. Mandamus

If unreasonable delay occurs a claimant can bring an action, in the nature of Mandamus, to force the government to begin forfeiture proceedings or abandon the seizure. See page 297 of this Guide for a more detailed discussion of this issue.

To some courts, Mandamus is the only remedy they will grant based upon delay. Castleberry v. A.T.F., 530 F.2d 672 (5 Cir. 1976); In Re Behrens, 39 F.2d 561 (2 Cir. 1930).

b. Damages

As already noted, denial of due process can result in a lawsuit for money damages. Carey v. Piphus, 98 S.Ct. 1042 (1978).

Unreasonable delay can subject the Federal Government to damages under the Tucker Act, 28 U.S.C. 1346(a)(2).

State governments and state officers can be sued for damages for delay, under the Civil Rights Acts. 42 U.S.C. 1983, 28 U.S.C. 1343(3).

Federal agents can be personally sued for damages for delay under the doctrine of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 91 S.Ct. 1999 (1971); States Marine Lines v. Shultz, 498 F.2d 1146 (4 Cir. 1974).

c. Bar to Forfeiture

In the vast majority of courts, unreasonable delay is treated as a complete defense to forfeiture; it totally bars the right to forfeit the property.

D. SUMMARY FORFEITURE

Summary forfeiture proceedings are really no "proceedings" at all. No notice is given of the seizure. No forfeiture file is created. No hearing, whatsoever, is conducted. Property subject to summary forfeiture is peremptorily forfeited and destroyed.

Understandably, this procedure is reserved for property such as sawed-off shotguns, molotov cocktails, moonshine whiskey, heroin and other "contraband per se." Both the Federal Controlled Substances Act and the state Uniform Controlled Substances Act authorize the summary forfeiture of Schedule I drugs, and plants from which Schedule I and II drugs can be derived. 21 U.S.C. 881(f), (g)(1); UCSA 505(f)(g).

NOTES

NOTES

E. JUDICIAL FORFEITURE

Judicial forfeiture proceedings consist of a full civil trial. The Government is the plaintiff. The forfeitable property is the defendant. Persons claiming rights in the property can appear in the proceedings to defend their interests.

Judicial forfeiture proceedings are required under the federal drug laws whenever the property subject to civil forfeiture is appraised at more than $10,000 in value. 21 U.S.C. 881(d); 19 U.S.C. 1610.

This section briefly discusses the discretion of prosecutors relative to civil forfeitures, the jurisdiction of federal courts, the official court documents used in the proceedings, discovery of an opponent's evidence before trial, intervention of proper parties, the right to jury trial, the rules of evidence, and the unusual burdens of proof in civil forfeiture cases.

1. Prosecutorial Discretion

All prosecutors have wide discretion in pursuing criminal charges. State prosecutors have a similarly wide discretion in pursuing civil forfeitures. Matter of One 1965 Ford Econoline Van, 591 P.2d 569 (Ariz. App. 1979); State v. One 1968 Buick Electra, 301 A.2d 297 (Del. Sup. Ct. 1973); People v. One 1965 Oldsmobile, 284 N.E.2d 646 (Ill. 1972); Prince George's County v. One (1) 1969 Opel, 298 A.2d 168 (Md. App. 1973); State v. Crampton, 568 P.2d 680 (Ore. 1977).

The discretion of federal prosecutors is considerably more restricted in regard to civil forfeitures. Section 1604 of the customs laws (19 U.S.C.) provides:

NOTES

> "It shall be the duty of every United States Attorney . . . if it appears probable that any . . . forfeiture has been incurred. . . for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted . . . unless . . . (he) . . . decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted. . . ."

Despite the discretion seemingly granted at the end of this provision, both the Executive Branch and Congress have always taken the position that federal officials must pursue all civil forfeitures that have a probability of success and that do not clearly conflict with the public interest. Read as a whole, the forfeiture statutes emphasize accountability and central control over seized property. See 19 U.S.C. 1602, 1603, 1604, 1617, and 18 U.S.C. 1915.

For this reason, the Attorney General has dramatically restricted the power of United States Attorneys to compromise civil forfeiture claims in seized property, both before and after forfeiture proceedings have been filed. The compromise of more that $250,000 of a civil forfeiture claim must be approved by the Attorney General himself. 28 CFR Subpart Y, 0.160; 19 U.S.C. 1617; 21 U.S.C. 881(d). The compromise of more than $60,000 (but not more than $250,000) of a civil forfeiture claim must be approved by the Assistant Attorney General of the Criminal Division, if the forfeiture is based upon the drug laws. 28 CFR Subpart K, 0.55(c) and (d); Subpart Y, 0.160, 0.168; Appendix to Subpart Y, Criminal Division Memo No. 375, Directive No. 2. The power to compromise less than $60,000 of a civil forfeiture claim has been delegated to all United States Attorneys.

But, a check has been placed on even this limited power. If the agency which seized the property objects in writing to the proposed compromise of a civil forfeiture claim by the United States Attorney, the matter must be referred to Washington, D.C. to obtain the approval of the Assistant Attorney General of the Criminal Division; the United States Attorney loses his power to effect a compromise. 28 CFR Appendix to Subpart Y, Criminal Division Memo No. 375, Directive No. 2,(d). Compromises made in violation of these regulations are void; they do not bind the United States. See Roe v. U.S. Attorney, 489 F.Supp. 4 (ED N.Y. 1979), aff'd F.2d , No. 79-6250 (2nd Cir. October 15, 1980). For this reason, the U.S. Attorney's Manual cautions attorneys to consult with seizing agencies before compromising a civil forfeiture. U.S. Attorneys Manual 9-38.000.

The purpose of all these provisions is to prevent federal attorneys from routinely bargaining away the rightful property claims of the United States. The Justice Department has gone so far as to apply these restrictions to the return of civilly forfeitable property as part of a criminal plea bargain. In a telegraphic message to all U.S. Attorneys on March 1, 1978 (reprinted in DOJ Narcotics Newsletter, Vol. II, No. 4. p. 6), then Assistant Attorney General Benjamin Civiletti cautioned:

> "United States Attorneys are reminded that vehicles, aircraft, vessels, and other property seized for civil forfeiture pursuant to the provisions of the Comprehensive Drug Abuse Prevention and Control Act . . . are

NOTES

not normally subject to return to a violator under a plea bargaining agreement. In all cases where it is essential to include the return of the . . . (property) . . . as a part of the plea prior approval of the head of the section having jurisdiction of the forfeiture is required."

Every official involved with property seized for forfeiture, including federal attorneys, requires explicit authority before he can relieve the property from the civil forfeiture claims of the United States. It is a criminal offense to relieve seized property from forfeiture without such authority:

"Whoever, being an officer of the United States, without lawful authority compromises or abates or attempts to compromise or abate any claim of the United States . . . for any . . . forfeiture, or in any manner relieves or attempts to relieve any person, vessel, vehicle, merchandise or baggage therefrom, shall be fined not more than $5,000 or imprisoned not more than two years or both." 18 U.S.C. 1915.

2. Jurisdiction

Once a decision has been made to begin judicial forfeiture proceedings, the next issue is what court has jurisdiction over the property.

a. Federal Jurisdiction

State courts have no power or authority over property that has been seized for federal forfeiture. Actions concerning property held for federal forfeiture can be filed only in federal court. 28 U.S.C. 1345, 1355; Gelston v. Hoyt, 3 Wheat (U.S.) 246, 4 L.Ed 381 (1818); Heidritter v. Elizabeth Oil Cloth Co., 5 S.Ct. 135 (1884).

b. On Land

If the seizure of forfeitable property takes place on land within the United States, the federal district court within whose territory the seizure takes place has exclusive jurisdiction over the forfeiture. 28 US.C. 1355, 1395(b); Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims (28 U.S.C. Appnd); U.S. v. Larkin, 28 S.Ct. 417 (1908); U.S. v. One 1974 Cessna, 432 F.Supp. 364 (D SC. 1977); cf Westfall Oldsmobile v. U.S. 243 F.2d 409 (5 Cir. 1957).

The place of seizure, not the place where the property was illegally used, determines which federal court has the power to hear the case. The Merino, 9 Wheat (U.S.) 391, 6 L.Ed 118 (1824); The Slavers, 2 Wall (U.S.) 383, 403, 17 L. Ed 911 (1864).

After seizure, the Government can, for convenience, store property outside the federal district where it was seized. 21 U.S.C. 881(c)(2). But this does not change the jurisdiction over the forfeiture. Jacobs v. Tenney, 316 F.Supp. 151 (D. Del. 1970).

c. On U.S. Waters

If the seizure of forfeitable property takes place on navigable waters within the United States, any federal district court into whose territory the property is brought has jurisdiction over the forfeiture. 28 U.S.C. 1355, 1395(d); The Halcon, 63 F.2d 638 (5 Cir. 1933); U.S. v. 1,572 Cases of Assorted Liquors, 4 F.Supp. 1017 (E.D. NY 1933).

345-769 0 - 81 - 17

NOTES

d. Foreign Seizures

If the seizure takes place on the high seas or any place outside the United States territory, again, any federal district court into whose territory the property is brought has jurisdiction over the forfeiture. 28 U.S.C. 1355, 1395(d); The Merino, 9 Wheat (U.S.) 391, 6 L.Ed 118 (1824).

e. No Change of Venue

Despite the existence of a federal statute allowing the transfer of civil actions to a more convenient location, 28 U.S.C. 1404(a), federal courts have consistently denied requests to transfer civil forfeiture actions from the district where the property was seized. Fettig Canning Co. v. Steckler, 188 F.2d 715 (7 Cir. 1951); Clinton Foods Inc. v. U.S., 188 F.2d 289 (4 Cir. 1951); U.S. v. 91 Packages, 93 F.Supp 763 (DNJ. 1950); U.S. v. 11 Cases, 94 F.Supp. 925 (D. Ore. 1950).; U.S. v. 353 Cases Mountain Valley Mineral Water, 117 F.Supp. 110 (W.D. Ark. 1953); U.S. v. An Article of Drug, 308 F.Supp. 1405 (M.D. GA. 1969); U.S. v. An Article of Drug Consisting of 110 Cartons more or less Labeled "Instant Trim", 349 F.Supp. 603 (W.D. PA. 1972).

3. Pleadings

"Pleadings" are the formal written statements containing the claims and defenses of the parties to a lawsuit. Pleadings provide the court with jurisdiction over the case. They set limits to the number of issues that will be argued. They give each party notice of the controversy and an opportunity to prepare a defense. In civil cases, the two basic pleadings are called the "complaint" (filed by the plaintiff, or suing party), and the "answer" (filed by the defendant).

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a. Libel - Complaint

A judicial forfeiture action begins when the Government files a special kind of complaint called a "libel". 36 Am. Jur. 2d, Forfeitures & Penalties, Sec. 37; 28 U.S.C. 2461. Generally, a libel must contain:

1) A verification on oath or solemn affirmation of the truth of its contents. cf U.S. v. 935 Cases of Tomato Puree, 136 F.2d 523 (6 Cir. 1943).

2) A description of the property to be formally arrested. A detailed description is desirable, but more general descriptions are legally acceptable. The particularity of a search warrant is not required. Continental Grain Co. v. The Barge FBL-585, 80 S.Ct. 1470, 1474 (1960).

3) A statement that the property has been seized, or will be shortly seized, within the territorial jurisdiction of the court. The Brig Ann 9 Cranch (U.S.) 289 (1815); Continental Grain Co., cited above; Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4 Cir. 1955); 28 U.S.C. 1395.

4) Whether the seizure was on land, or on navigable waters, or outside the United States. This determines whether the case will be handled as part of the court's Admiralty jurisdiction, or whether it will be a common law suit with a possible jury trial. U.S. v. The Antoinetta, 156 F.2d 138 (3 Cir. 1946); 28 U.S.C. 1395.

5) A statement of the offense justifying forfeiture.

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The statement of the offense need not contain many facts or details. It is sufficient if it simply mimmicks the wording of the forfeiture statute that has been violated. Confiscation Cases, 87 U.S. 92, 22 L.Ed 320 (1874); U.S. v. The Neurea, 19 How (U.S.) 92, 15 L.Ed 531 (1856); The Merino, 9 Wheat (U.S.) 391, 6 L.Ed 118 (1824); The Samuel, 9 Wheat (U.S.) 9, 4 L.Ed 23 (1816).

For example, a satisfactory statement of an offense under the "Exchange" money section of 21 U.S.C. 881(a)(6) would be "that on or about October 10, 1980, said $50,000 in United States Currency was furnished by John Jones in exchange for a controlled substance in violation of 21 U.S.C. 841(a)(1) and 881(a)(6)."

Alternative offenses can be joined together as long as each would be grounds for forfeiture. Confiscation Cases and The Emily, cited above. For example, a satisfactory statement of alternative offenses under 21 U.S.C. 881(a)(6) would be "that on or about October 10, 1980, said $100,000 in United States Currency was furnished or was intended to be furnished in exchange for a controlled substance or was intended to facilitate an exchange, of controlled substances in violation of 21 U.S.C. 841(a)(1) and 881(a)(6)."

The content of a libel in federal forfeiture actions is now governed by the Supplemental Rules For Certain Admiralty and Maritime Claims (28 U.S.C. Appendix, F.R. Civ.P.). See Rule A; also see Rule 81(a)(2), F.R.Civ.P.; U.S. v. $5,372.85 In U.S. Coin & Currency, 283 F.Supp. 904 (SDNY 1968); U.S. v. $3,976.62 In Currency, 37 F.R.D. 564 (SDNY 1975). Rules C(2) and E(2)(a) codify all the above principles.

NOTES

Once a libel (complaint) is filed, the clerk of the court issues a warrant of arrest for the property; this is called a "Monition." The monition orders the United States Marshal to formally attach the property and detain it in his custody until further order of the court, and to give notice to all persons having anything to say why the property should not be forfeited. Rules C(3) and (4) (Supplemental Rules); Bryan v. Ker, 32 S.Ct. 26 (1911); Re Cooper, 12 S. Ct. 453 (1892).

b. Claim & Answer

Only persons claiming a right to possession of the seized property can file an answer in defense of forfeiture. To establish their right to file an answer they must file a "claim" asserting an ownership or possessory interest in the property. Rule C(6) of the Supplemental Rules. Exactly who qualifies as a claimant is discussed in the next section.

The answer to the libel is similar in form to an answer under the Federal Rules of Civil Procedure. Facts alleged in the libel and not denied in the answer will be taken as true by the court. Strong v. U.S., 46 F.2d 257 (1 Cir. 1931).

4. Standing of the Parties

Not everyone has the right to defend property from forfeiture. Only parties with good faith interests in the property can contest forfeiture. These parties are characterized by lawyers as having "Standing"; in other words, they have a personal stake in the outcome of the case. Parties without standing have no business in the proceedings.

NOTES

a. Claimants

Parties who have a possessory interest in seized property have standing to contest forfeiture; they are referred to as "claimants." 19 U.S.C. 1608, 1613 and 1615. Owners generally qualify as claimants. They usually have an immediate, or some future, right to possession of their property. Boyd v. U.S., 6 S.Ct. 524, 536 (1886).

If, on the other hand, an owner is merely a "strawman", if he is merely a "paper owner", if total possession and control belong to another, he does not have standing as a claimant. See U.S. v. One 1976 Lincoln Continental Mark IV, 584 F.2d 266 (8 Cir. 1978); U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (8 Cir. 1972); U.S. v. One 1967 Chris-Craft 27 Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970); U.S. v. One 1971 Porsche Coup Auto, 364 F.Supp. 745 (EDPA 1973); U.S. v. One 1954 Model Ford Victoria Auto, 135 F.Supp. 809 (EDNC 1955).

A person can have a right to possess property without necessarily being the owner. Remember the old saw: "Possession is nine points of the law." See Cribbet, Principles of the Law of Property, (F.P. Inc. 1962). The mere right to possess seized property gives a party standing to contest its forfeiture as a claimant. Berkowitz v. U.S., 340 F.2d 168 (1 Cir. 1965).

The possessory interest of a claimant must be in the seized property itself. It is not enough to merely assert an interest in the area (house, car, container, etc.) from which the property is seized. For example, a party who asserts a right to a safety deposit box, but does not assert a possessory interest in money found in the box, does not have standing as a claimant to prevent the forfeiture of the money. U.S. v. Fifteen Thousand Five Hundred Dollars, 588 F.2d 1359 (9 Cir. 1977).

NOTES

The possessory interest of a claimant must have existed before the seizure of the property. No one can take a recognizable possessory interest in property once it has been seized by the Government. (The property is said to be in custodia legis.) U.S. v. One 1967 Chris-Craft 27 Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970); and see U.S. v. One 1964 MG, Etc., 408 F.Supp. 1025 (WDWASH 1976); U.S. v. $11,580 in U.S. Currency, 454 F.Supp. 376 (MDFLA 1978); U.S. v. One 1954 Model Ford Victoria Auto, 135 F.Supp. 809 (EDNC 1955).

Claimants are entitled to file an answer to the libel, to discover the Government's evidence and to demand a jury trial. In effect, they make themselves defendants to the suit. Rule C(6), Supplemental Rules.

b. Intervenors

Parties with non-possessory interests in seized property, such as lienors, do not qualify as claimants; they cannot file an answer, engage in discovery or demand a jury trial. Missouri Investment Corp. v. U.S., 32 F.2d 511 (6 Cir. 1929).

But, they should be permitted to intervene, under Rule 24 of the Federal Rules of Civil Procedure, to protect their limited interests. U.S. v. One 1961 Cadillac Hardtop Auto, 207 F.Supp. 693 (EDTENN 1962). The distinction between a "claimant" and an "intervenor" was neatly stated in The Two Marys, 12 Fed. 152 (SDNY 1882):

> "A 'claimant'. . . is a person who assumes the position of a defendant and demands the redelivery to himself of the vessel arrested. An 'intervenor'. . . is one who, without demanding the redelivery . . . seeks only the protection of his interest . . . ."

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c. Suppression of Evidence

Claimants have standing to contest the admissibility of evidence that was obtained in violation of their Fourth or Fifth Amendment rights. Boyd v. U.S. 6 S.Ct. 524 (1886); Plymouth Sedan v. Pennsylvania, 85 S.Ct. 12466; Berkowitz v. U.S., 340 F.2d 168 (1 Cir. 1965).

Courts disagree whether claimants in forfeiture cases have standing to contest the admissibility of evidence obtained in violation of someone else's rights. Compare U.S. v. One 1976 Cadillac Seville, 477 F.Supp. 879 (ED Mich 1979); with U.S. v. One Gardner Roadster, 35 F.2d 777 (WDWASH. 1929); U.S. v. One Fargo Truck, 46 F.2d 171 (SDTEX. 1930); U.S. v. One 1963 Cadillac, 250 F.Supp. 183 (WDMO. 1966). In Rakas v. Illinois 99 S.Ct. 421 (1978), the Supreme Court held that only those persons whose rights are violated have standing to suppress illegally obtained evidence. Unless the Supreme Court changes its views, claimants should not be able to suppress evidence in forfeiture proceedings that was not obtained in violation of their rights.

5. Discovery

Discovery of an opponent's evidence before trial is controlled by Rules 26 through 37 of the Federal Rules of Civil Procedure. U.S. v. One 1965 Buick, 392 F.2d 672 (6 Cir. 1968); U.S. v. One 1961 Lincoln Continental Sedan, 360 F.2d 467 (8 Cir. 1966); Utley Wholesale Co. v. U.S., 308 F.2d 157 (5 Cir. 1962).

Because civil forfeiture proceedings are not criminal actions, the discovery rules followed in criminal proceedings do not apply. Rule 54(b)(5), F.R.Crim.P.; U.S. v. 110 Bars of Silver, 508 F.2d 799 (5 Cir. 1975) (Jenck's Act does not apply to civil forfeiture actions).

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Any party can, for good cause, move to stay discovery in civil forfeiture cases, particularly if discovery will interfere with a related criminal proceeding. See pages 232-233 for a list of cases on point.

6. Jury Trial Is Available For Property Seized On Land

Federal forfeiture cases involving seizures on land, or on non-navigable waters, are triable to a jury. Forfeitures of property seized on navigable waters, or on the high seas, or anywhere outside the United States, are triable without a jury under federal admiralty law. Virtually all states provide the right to jury trial in forfeiture cases.

Authorities

S.Ct.: C.J. Hendy Co. v. Moore, 63 S.Ct. 499 (1943); 443 Cans of Egg Product v. U.S., 33 S.Ct. 50 (1912); U.S. v. 422 Casks of Wine, 1 Pet. (U.S.), 547, 7 L.Ed 257 (1828); The Sarah, 8 Wheat (U.S.) 391, 5 L.Ed 644 (1823); The Betsey and Charlotte, 4 Cranch (U.S.) 443, 21 L.Ed 673 (1808); LaVengeance, 3 DALL (U.S.) 297, 1 L.Ed 610 (1796).

9 Cir: Kennedy v. U.S. 44 F.2d 57 (1930).

8 Cir: M & M Securities Co. v. Harvey, 59 F.2d 574 (1932).

7 Cir: U.S. v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (1980).

5 Cir: Vandevander v. U.S., 172 F.2d 100 (1949); Reynal v. U.S., 153 F.2d 929 (1945).

1 Cir: Pierce Arrow Sales Corp. v. U.S., 32 F.2d 849 (1929).

CAL: People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (1951).

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MISS: See Donovan v. Mayor of Vicksburg, 29 Miss. 247 (1885).

NY: Colon v. Lisk, 47 N.E. 302 (1897).

OKL: Keeter v. State, 198 P. 866 (1921).

ORE: State v. 1920 Studebaker Touring Car, 251 P. 701 (1926).

TEX: See Lorance v. State, 172 S.W. 2d 386 (App. 1943).

7. Evidence

Earlier we saw that hearsay is admissible in forfeiture proceedings to the same extent that it is admissible in any "probable cause" hearing. Even hearsay from informants can be admitted to establish probable cause for forfeiture. See page 20 of this guide for a discussion and list of authorities.

As to other evidentiary matters, the Federal Rules of Evidence apply in civil forfeiture proceedings. Rule 1101(e) of the Rules state:

> "In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein . . . (including):
>
> * * *
>
> "actions for fines, penalties, or forfeitures under . . . the Tariff Act of 1930 (19 U.S.C. 1581-1624) . . . ."

Drug related forfeitures come under these provisions. 21 U.S.C. 881(d).

NOTES

8. Burden of Proof

A party bringing a civil law suit has the burden of producing enough evidence to pursuade the judge that he has a legally sufficient case which could be acceptable to a jury. If he fails, the judge will quickly dismiss the suit; the jury will never be permitted to consider it. Once he satisfies this initial burden, the defendant is permitted to produce evidence in his defense. In the end, the party bringing the suit must persuade the jury of the truth of his claim. If the jury remains undecided (ie. "it's a toss up"), the suing party loses.

Note that the burden of producing evidence shifts during the trial from the suing party to the defendant. On the other hand, the burden of persuasion never shifts; it is always on the party bringing the suit. He is said to have the "burden of proof". Sweeney v. Erving, 33 S.Ct. 416 (1913).

In civil forfeiture cases, the burden of proof is on the Government to produce enough evidence to persuade the judge that probable cause exists to believe the property is forfeitable. In this regard, the burden of proof in civil forfeiture cases is the same as in all other civil cases. Once the judge determines that probable cause for forfeiture has been shown, the burden of proof (including the burden of producing evidence and the burden of persuasion) shifts to the defendant, or claimant! 19 U.S.C. 1615. Page 29 contains a string of cases on point.

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This makes civil forfeiture cases significantly different than other civic actions. Once the Government establishes probable cause for forfeiture, as determined by the judge, the defendant must produce some evidence in defense of the property. If he does not, the judge must direct a verdict in favor of the Government. Buckley v. U.S., 45 U.S. (4 How) 251, 259, 11 L.Ed 961 (1846); Taylor v. U.S., 44 U.S. (3 How.) 197, 211, 11 L.Ed 559 (1845); cf U.S. v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7 Cir. 1980).

NOTES

F. ADMINISTRATIVE FORFEITURE

Administrative forfeiture proceedings are a halfway house between summary forfeiture and judicial forfeiture. Written notice of the proposed forfeiture is provided to all parties. Notice is also published in a local newspaper. There is an opportunity to explain why forfeiture should not be declared. Claimants can be represented by counsel. A file, or record, is kept of all relevant documents and correspondence. The decision on forfeiture is made by a Department of Justice attorney, based upon the information in the file. He then provides a brief written statement to the parties concerning the reasons for his decision. Finally, erroneous decisions concerning the forfeitability of the property are subject to judicial review.

1. APPRAISAL

Once property is seized for forfeiture, its value must be appraised by the Government. 19 U.S.C. 1606; 21 CFR 1316.74. If the property is valued at over $10,000, the case must be referred to the United States Attorney for institution of judicial forfeiture proceedings. 19 U.S.C. 1610; 21 CFR 1316.78. If the property is valued at $10,000 or less, it is subject to administrative forfeiture. 19 U.S.C. 1607, 1609, 1618, 21 CFR 1316.75-77.

2. NOTICE OF FORFEITURE

Administrative forfeiture begins with the giving of notice of the seizure and of the Government's intent to forfeit the property. 19 U.S.C. 1607; 21 CFR 1316.75. See page 214 of this Guide for a detailed discussion of the content and manner of giving notice.

Faced with this information, a claimant can choose two basic courses of action. He can demand his day in court by filing a claim and cost bond of $250 under 19 U.S.C. 1608, thereby ending the administrative forfeiture proceedings and forcing the institution of judicial forfeiture. Or, he can allow the administrative proceedings to continue and file his petition for relief under 19 U.S.C. 1618.

3. CLAIM & BOND

The election to demand a judicial proceeding or to accept an administrative proceeding is entirely up to the claimant. If he chooses judicial forfeiture, he must, within 20 days after notice, file a $250 bond with the seizing agency, together with a demand (claim) that judicial proceedings be initiated by the United States Attorney. 19 U.S.C. 1608; 21 CFR 1316.76.

An indigent claimant can file a claim demanding judicial forfeiture together with a sworn affidavit or sworn statement that he cannot afford to post the $250 bond. If the value of the seized property is relatively small, the $250 bond requirement will be waived by the Government. Requiring a $250 bond from a truly indigent party is unconstitutional. Wiren v. Eide, 542 F.2d 757 (9 Cir. 1976); Lee v. Thorton, 538 F.2d 27 (2 Cir. 1976); Fell v. Armour, 355 F. Supp. 1319 (MDTENN. 1972).

Subject to a few exceptions, which appear on page 299 of this Guide, the failure to file a claim and cost bond within a 20-day period, subjects a claimant's property to the administrative forfeiture process:

10 Cir: Bramble v. Richardson, 498 F.2d 968 (1974).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976).

8 Cir: Glup v. U.S., 523 F.2d 557 (1975).

7 Cir: U.S. v. Amore, 335 F.2d 329 (1964).

6 Cir: Epps v. A.T.F. 495 F.2d 1373 (1974); U.S. v. Filing, 410 F.2d 459 (1969); Rice v. Walls, 213 F.2d 693 (1954).

5 Cir: See Fisburn v. Jackson, 55 F.2d 934 (NDTEX. 1932).

4 Cir: Milkint v. Morgenthau, 92 F.2d 266 (1937).

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2 Cir: Colacicco v. U.S., 143 F.2d 410 (1944).

NDTEX: U.S. v. Ten Firearms & Twenty-Four Rounds, 444 F. Supp. 305 (1977).

EDNY: Jary Leasing Corp v. U.S., 254 F. Supp. 157 (1966).

WDPA: U.S. v. One 1955 Oldsmobile Sedan "98", 181 F. Supp. 903 (1960).

4. PETITION PROCESS

To contest an administrative forfeiture, or to request a pardon, a claimant must file a petition with the executive official responsible for the seizure. 19 U.S.C. 1618. Petitions involving administrative forfeitures under the federal Controlled Substances Act must be addressed to the Administrator of the Drug Enforcement Administration and filed with the local DEA office within 30 days of the receipt of the notice of seizure. 21 CFR 1316.79-80. A detailed explanation of the contents of a petition and the manner of filing begins at page 282 of this Guide.

A petition can serve two purposes. First, a petition can be used to question or challenge, the actual forfeitability of the property. Second, assuming the property has been illegally used and is forfeitable, a petition can request a pardon and return of the property.

Under 19 U.S.C. 1618 of the Customs laws, a petition can be granted if the determining official "finds the existence of such miligating circumstances as to justify...remission..." If there has been a wrongful seizure of the property, if it is not actually subject to forfeiture, if a good defense exists to forfeiture, then circumstances are present that not only justify but seem to require remission. The Bureau of Customs which has had the responsibility of interpreting and administering this statute since 1790, adheres to this view. The Customs' remission regulations provide:

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"If it is definitely determined that the act or omission forming the basis of a... forfeiture claim did not in fact occur, the claim shall be canceled..." 19 CFR 171.31.

Despite a regulation to the contrary (28 CFR 9.5b), the longstanding police of the Department of Justice has been to grant remission and return property which is clearly not forfeitable under the law.

The regulation of the Bureau of Customs and the practice of the Department of Justice are, apparently, based both upon 19 U.S.C. and the opinion of Mr. Justice Johnson in U.S. v. Morris, 23 U.S. 246, 297, 6 L.Ed 314 (1825):

"Many defenses are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the act to the party defendant. He who supposes his case not to come within the construction of a law, or that the law is repealed, expired, or unconstitutional, cannot be visited with moral offense, either in the act charged or defense of it."

* * *

"(R)esisting the...(forfeiture)...on the one hand, while he sues for remission on the other amount to no more than this, that he denies having violated the law; but if the...(determining official)...thinks otherwise, he then petitions for grace, on the ground of ... mistake ..."

Once a petition is filed, the claims asserted in it will be investigated. The remission statute provides: "In order to enable him to ascertain the facts, the ...(determining official)... may issue a commission to any ... officer to take testimony upon such petition..." 19 U.S.C. 1618. In the case of drug-related forfeitures, a DEA agent will be assigned to interview all petitioners, and all other interested parties, and to prepare an official report of the interviews and all other facts revealed by his investigation. 28 CFR 9.4(b); 21 CFR 1316.81.

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This report, the petition of the claimant, all relevant correspondence and documents, and the original investigator's reports that led to the seizure are sent to Washington, D.C., where they are viewed by Justice Department attorneys assigned to the Office of Chief Counsel of the Drug Enforcement Administration. 28 CFR 9.4(c). Claimants, or their counsel, can, and frequently do write and telephone these attorneys to discuss their cases. After a thorough review, a ruling, together with reasons, is mailed to the claimant, 28 CFR 9.4(d), who then has ten days to request a reconsideration of a negative ruling. 28 CFR 9.4(e).

As explained later in this Guide (page 299), clearly erroneous determinations by these decision-makers concerning the forfeitability of property, or serious errors in procedure can be appealed to the federal courts under the Tucker Act, 28 U.S.C. 1346(a)(2). On the other hand, if property is clearly forfeitable and no serious errors have been made in procedure, the denial of a "pardon" is not reviewable by the courts. See pages 278-279 of the chapter of Remission.

5. CONSTITUTIONALITY

We saw earlier (page 219) that some kind of hearing is required before a person is finally deprived of his property. Wolf v. McDonnell, 94 S. Ct. 2963, 2975 (1944).

In certain instances, government can require a person to post a bond or pay a fee to obtain the required hearing. Fees cannot be required when extremely sensitive interests are involved, such as the right to obtain a divorce. Boddie v. Connecticut, 91 S. Ct. 780 (1971). Similarly, fees cannot be required from indigents, who are unable to pay the, even though non-sensitive

345-769 O - 81 - 18

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property interests are involved. Wiren v. Eide, 542 F.2d 757 (9 Cir. 1976); Lee v. Thornton. 538 F.2d 27 (2 Cir. 1976); Fell v. Armour, 355 F. Supp. 1319 (MDTENN. 1972). But, if merely economic interests are at stake (such as property rights), and if a rational basis exists for imposing a fee, then the denial of a hearing to a non-indigent person who fails to pay the fee is not unconstitutional. Ortwein v. Schwab, 93 S.Ct. 1172 (1973); U.S. v. Kras, 93 S. Ct. 631 (1973).

Claimants of seized property valued at $10,000 or less have the right to a full hearing in judicial forfeiture proceedings if they file a claim and $250 cost bond as required by 19 U.S.C. 1608.

The imposition of a $250 bond requirement to obtain a judicial proceeding is rational. The cost of proceedings is high. A fee helps defray some of the cost and, more importantly, helps to discourage frivolous suits over clearly forfeitable property. Therefore, claimants who fail to file a claim and post a $250 bond, cannot complain that they have been denied their right to a hearing on the forfeiture.

Assuming the bond requirement does not pass constitutional muster, the administrative forfeiture process itself provides a sufficient opportunity for claimants to be heard.

As already noted, in addition to requesting a pardon, claimants can challenge the basis for forfeiture by filing a petition under 19 U.S.C. 1618. The petition process provides: (1) a relatively unbiased decision-maker, namely, a Department of Justice attorney in Washington, D.C., (2) notice of the proposed forfeiture, in the form of a letter and newspaper publications, with a brief statement of the grounds for forfeiture; (3) an opportunity to explain in a petition, in an interview with a government agent, and in letters and phone conversations with the

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deciding official, why forfeiture should not be declared; (4) a right to have witnesses present written statements; (5) a right to be represented by counsel; (6) a right to a statement of reasons for the decision; and (7) a right to court review under the Tucker Act, 28 U.S.C. 1346(a)(2), of erroneous forfeiture determinations or defective procedures. Clearly, this process provides seven of the eleven safeguards identified as building blocks of a due process "hearing". Friendly, "Some Kind of Hearing." 123 U.P.A.L. Rev. 1267-1317 (1975).

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VI. REMISSION

This chapter explains remission of forfeiture; including: what is it; who qualifies for it; who can grant it; and how to obtain it.

A. REMISSION MEANS PARDON

The United States Supreme Court has held that remission is a form of pardon. The Laura, 5 S.Ct. 881 (1885); U.S. v. Morris, 23 U.S. 246, 6 L.Ed. 314 (1825). In addition, the high court has defined a "pardon" to be:

> "a work of mercy, whereby the king forgiveth any offense, right, title, debt, or duty." Jones v. Shore, 1 Wheat (US) 462,470 4 L.Ed. 136 (1816).

Because there is no legal right to a pardon, there is no legal right to remission of a civil forfeiture. The granting of remission is purely a matter of grace.

Remission is distinct from the determination that property is forfeitable. A request for remission presumes property is forfeitable. Instead, it seeks a pardon based upon the peculiar facts of the case. 28 CFR 9.5(b).

> "(Remission). . . presupposes, that the offense has been committed, and the forfeiture attached according to the letter of the law, and affords relief for inadvertencies, and unintentional error." U.S. v. Morris, 23 U.S. at 291 (1825).

B. AN EXECUTIVE POWER

Article 2, Section 2, clause 1 of the United States Constitution grants the power of pardon to the President:

> "And he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

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Note that this power applies to "offenses", not just to crimes. And, the only kind of punishment excepted is impeachment. Therefore, the President has the power to remit or pardon, both the civil and criminal forfeitures incurred as a result of offenses against the United States. The Laura, 5 S.Ct. 881 (1885).

This presidential power is not exclusive. Congress has, from the very beginning of the United States, given remission power to certain federal Cabinet officers, such as the Secretary of the Treasury, the Secretary of Commerce, and the Attorney General. The Laura, 5 S.Ct. 881 (1885).

Many state constitutions give their Governor or their chief executive, the power to remit state forfeitures. The power may be express, or it may be implied as part of the pardon power. 26 Am. Jur. 2d, Forfeitures & Penalties, Sec. 49; 59 Am. Jur. 2d, Pardon & Parole, Sec. 25.

Although Congress can give federal courts the power to remit civil forfeitures, it has done so in only one class of cases: forfeitures under the liquor laws. See The Liquor Law Repeal and Enforcement Act of 1935, 49 Stat. 878, now 18 U.S.C. 3617. With the exception of the liquor laws, remission of federal forfeitures is a power vested exclusively in the President and Cabinet officers of the Executive Branch.

The power to remit drug related forfeitures under 21 U.S.C. 881 of the Controlled Substances Act belongs to the Attorney General of the United States. 21 U.S.C. 881(d); 19 U.S.C. 1618; Executive Order No. 6166, June 10, 1933 (following 5 U.S.C. 901).

NOTES

C. STANDARD FOR RELIEF

The first federal remission statute was passed in 1790 as part of the customs laws. It gave the Secretary of the Treasury power to remit a forfeiture if:

> ". . . in his opinion . . . the forfeiture . . . shall have been incurred without willful negligence, or any intention of fraud in the person . . . incurring the same. . . ." (1 Stat. 122) (emphasis not in the original)

This negligence standard appears in virtually every federal remission statute from 1790 to 1922: 1 Stat. 122 (1790); 1 Stat. 275 (1792); 2 Stat. 454 (1808); 2 Stat. 502 (1808); 2 Stat. 510 (1809), 2 Stat. 701 (1812); 3 Stat. 92 (1813); 3 Stat. 617 (1821); 3 Stat. 739 (1823); 9 Stat. 593 (1851); 12 Stat. 257 (1861); 12 Stat. 271 (1861); 12 Stat. 405 (1862); 12 Stat. 739 (1863); 13 Stat. 198 (1864); 14 Stat. 169 (1866); 15 Stat. 242 (1868); 16 Stat. 179 (1870); 17 Stat. 325 (1872); 18 Stat. 190 (1874); 26 Stat. 567 (1897); 36 Stat. 87 (1909).

The Tarrif Act of 1922 slightly modified this standard. Section 618 of the Act (42 Stat. 987) (now 19 U.S.C. 1618) allowed the appropriate Cabinet officer to grant remission "if he finds that such . . . forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to . . . violate the law, or finds the existence of such mitigating circumstances as to justify . . . remission or mitigation . . . ." And see 46 Stat. 757,758 (1930). The added language is so open-ended, it is difficult to determine why it was added. The history of the 1922 law is silent on the subject.

Except for the general negligence standard, none of these statutes provides any specific guidance on when remission should be granted.

The Cabinet officers responsible for granting remission for almost a century and a half must have formulated internal standards on how the remission statutes should be applied. But none of their decisional criteria, none of their accumulated experience, none of their internal rules were ever published.

The Prohibition Era (1920-1933) eventually brought the internal standards to public light. It is a matter of common knowledge that the Prohibition Act was widely violated. Seizures and remissions escalated dramatically. After Prohibition, Congress experimented with giving the remission power in liquor cases to the federal courts. To accomplish this, the internal practices of Cabinet officers were studied closely and were enacted into law as the standards to be applied by the courts (49 Stat. 878) (now 18 U.S.C. 3617(b):

> ". . . (T)he court shall not allow . . . any claimant . . . remission . . . until he proves (1) that he has an interest in such . . . (property) . . ., as owner or otherwise, which he acquired in good faith; (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws . . ., and (3) . . . (that he at no time had any knowledge or reason to believe that the possessor had any record or reputation for related crimes) . . . ." (1935).

In the years since 1935, the federal courts have developed a large body of case law refining this old remission standard. The old standards, developed in case law, are now published in various remission regulations. See, for example, 28 CFR Part 9 (Dept. of Justice), 19 CFR 171 (Dept. of Treasury - Customs), and 31 CFR 15 (Dept. of Treasury - IRS).

NOTES

NOTES

1. A PETITIONER MUST PROVE HE DESERVES REMISSION

The burden is always upon a petitioner to establish he deserves relief under the remission standards.

Authorities

19 U.S.C. 1618; 28 CFR 9.5; 19 CFR 171.13

10 Cir.: U.S. v. One 1957 Ford Custom Tudor, 264 F.2d 682 (1959); U.S. v. One 1939 Model DeSoto Coupe, 119 F.2d 516 (1941).

9 Cir.: Wilson Motor Co. v. U.S., 96 F.2d 29 (1938)

8 Cir.: U.S. v. Cook & B. Motor Co., 89 F.2d 648 (1937)

7 Cir.: U.S. v. National Discount Corp., 104 F.2d 611 (1939)

5 Cir.: U.S. v. One 1950 Lincoln Sedan, 196 F.2d 639 (1952); U.S. v. One 1941 Model Ford Coach, 138 F.2d 506 (1943)

2 Cir.: U.S. v. C.I.T. Corp., 93 F.2d 469 (1937)

DSC: U.S. v. One 1961 Oldsmobile, 250 F.Supp. 969 (1966)

DSC: U.S. v. One 1964 Chevrolet Impala, 247 F.Supp. 329 (1965)

WDVA: U.S. v. One 1956 Plymouth 4-Door Sedan, 198 F.Supp. 36 (1961)

EDTENN: U.S. v. One 1942 Plymouth Sedan, 89 F.Supp. 884 (1950)

MDGA: U.S. v. One 1936 Model Ford Coach, 58 F.Supp. 802 (1944).

EDKY: U.S. v. One 1941 Chrysler Sedan, 46 F.Supp. 897 (1942)

EDPA: U.S. v. One Ford Coach, 24 F.Supp. 1959 (1938)

DMINN: U.S. v. 1938 Buick Sedan, 24 F. Supp. 739 (1938).

EDNY: U.S. v. One Terraplane Sedan, 23 F. Supp. 710 (1938)

MDPA: U.S.v. One Chrysler Sedan, 18 F. Supp. 684 (1937)

DWYO: U.S. v. One Ford V-8 Truck, 17 F. Supp. 439 (1936)

WDKY: U.S. v. One 1936 Model LaFayette Coupe Auto, 14 F.Supp. 1003 (1936)

EDILL: U.S. v. One 1933 Ford V-8 Coach, 14 F.Supp. 243 (1936)

2. HIS GOOD FAITH INTEREST

A person seeking remission must prove he has a property interest in the seized assets and that it was acquired in good faith.

a. A Property Interest

A petitioner must prove he has a property interest in the asset as owner, mortgagee, lienor, secured party or otherwise. He must support his claim with bills of sales, contracts, deeds, mortgages, security agreements, or other documentary evidence, 28 CFR 9,5; 19 CFR 171.13.

b. Strawman

A "strawman" is one who only appears to be the owner. His name is on the documentary evidence of ownership, but the property is not really his. The title of a strawman is merely a fiction which the courts and executive officers will ignore. Strawman will not be granted remission. 28 CFR 9.6(e).

NOTES

1) Lack of Consideration

Except for gifts, interests in property are obtained by exchanging something of legal value for them; in other words, they are bought. The thing of value given in exchange is technically called "consideration". If a person's name appears on ownership papers, but he gave no consideration for the property, it is likely he is a strawman. Unless he can prove the property was a gift, remission will be denied. See Harman v. U.S., 199 F.2d 34 (4th Cir. 1952); U.S. v. One 1956 Dodge Coronet 2-Door Sedan, 150 F.Supp. 503 (WDARK 1957); U.S. v. One 1954 Mercury 2-Door Sedan, 128 F.Supp. 891 (EDVA 1955).

2) Control by Another

If a person's name appears on ownership papers, but another had almost exclusive possession and control of the property, the nominal owner is probably a strawman. Unless the owner can satisfactorily explain why he allowed another habitual use of the property, his petition will be denied. 28 CFR 9.6(d), 19 CFR 171.13(a); and see U.S. v. One 1942 Plymouth Sedan, 89 F.Supp. 884 (ED TENN 1950).

3) Lack of Need

If the nominal owner has no need, or use, for the property, he is probably a strawman. For example, if his name appears on a car title, but he does not know how to drive, he will be considered a strawman, and remission will probably be denied. See U.S. v. One 1942 Plymouth Sedan, 89 F.Supp. 884 (ED TENN. 1950).

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4) Family Members

It is common knowledge that parents frequently keep vehicles in their names for insurance purposes, but in fact, they have made a gift of the property to a child who has paid nothing for the property and who has complete use and control of it. In these circumstances, parents will be presumed to be strawmen. See U.S. v. One 1971 Porsche Coupe, 364 F.Supp. 745 (ED PA. 1973); U.S. v. One 1956 Dodge Coronet 2-Door Sedan, 150 F.Supp. 503 (WD ARK. 1957).

More frequently, petitions by family members will be denied because they had knowledge of a spouse's or child's illegal activities. This is discussed later in this section.

5) Suspicious Circumstances

If there are any suspicious circumstances that raise serious doubts about the good faith interest of a petitioner, remission will be denied. U.S. v. One 1936 Model Ford Coach, 58 F.Supp. 802 (MD GA. 1944).

c. After-Acquired Title

Because forfeiture occurs at the moment of illegal use, no one can later take an enforceable interest in forfeitable property. However, a bona fide purchaser of an interest in forfeitable property can seek remission. Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (5 Cir. 1960).

If he paid for his interest and if he had no knowledge it was forfeitable, remission will probably be granted. But, if the so-called "purchase" took place after seizure - at a time when the Government had possession - in all likelihood, the buyer is a strawman.

NOTES

3. HIS LACK OF KNOWLEDGE

Earlier in this Guide, we identified five levels of innocence, or fault, of an owner regarding the illegal use of his property:

(1) The owner was NOT CONVICTED of any related crime, but was involved in the illegal use.

(2) The owner was NOT INVOLVED in the illegal use, but was aware of it.

(3) The owner was IGNORANT of the illegal use, but was negligent in lending his property.

(4) The owner was NOT NEGLIGENT in lending his property, but could have done more to prevent its illegal use.

(5) The owner HAD DONE EVERYTHING REASONABLY POSSIBLE TO PREVENT THE ILLEGAL USE of his property. (A very high standard of care).

Level (4), the NON-NEGLIGENT owner, best describes the standard used to grant remission in federal cases.

a. Ignorance of Illegal Use

A petitioner must prove he had no knowledge or reason to believe his property would be used to violate the law. 19 U.S.C. 1618; 18 U.S.C. 3617(b)(2); 28 CFR 9.5(b), 9.5(c)(2); 19 CFR 171.13(a).

7 Cir: U.S. v. One 1941 Cadillac Sedan, 145 F.2d 296 (1944).

6 Cir: One 1941 Ford ½ Ton Pickup Truck v. U.S., 140 F.2d 255 (1944).

5 Cir: U.S. v. Dodd, 205 F.2d 260 (1953).

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4 Cir: U.S. v. North Carolina Nat. Bank, 336 F.2d 248 (1964).

2 Cir: U.S. v. CIT Corp, 93 F.2d 469 (1937).

b. Ignorance of Record

A petitioner must also prove that he had no knowledge or reason to believe the person to whom he entrusted his property had any record for related crime. 19 U.S.C. 1618; 18 U.S.C. 3617(a)(3); 28 CFR 9.2(j), 9.5(c)(3); 19 CFR 171.13(a).

Generally, the term "record" means arrests followed by convictions for crimes of the same general character as the offense resulting in forfeiture. Two or more such convictions is definitely a record, regardless of when the convictions occurred. 28 CFR 9.2(j):

10 Cir: U.S. v. One 1937 LaSalle Sedan, 116 F.2d 356 (1940).

6 Cir: U.S. v. One 1957 Ford Fairlane 500, 304 F.2d 419 (1962).

3 Cir: U.S. v. One 1951 Ford Pick-up 3/4 Ton Truck, 199 F.2d 450 (1952).

Multiple convictions are not always required. A single arrest and conviction will be considered a record if it occurred within ten years of the offense resulting in forfeiture. 28 CFR 9.2(j):

5 Cir: U.S. v. One 1950 Lincoln Sedan, 196 F.2d 639 (1952).

In certain instances, even a conviction may not be required. An arrest, or series of arrests, as to which charges were dismissed for reasons other than acquittal or lack of evidence, can be considered a record. 28 CFR 9.2(j):

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ED MICH: U.S. v. One 1951 Chevrolet Delivery Sedan, 116 F.Supp. 830 (1953).

ND OHIO: U.S. v. One 1937 Ford Truck, 29 F.Supp. 278 (1939).

c. Ignorance of Reputation

A petitioner must also prove he had no knowledge or reason to believe that the person to whom he entrusted his property had any reputation for related crime. 19 U.S.C. 1618; 18 U.S.C. 3617 (a)(3); 28 CFR 9.2(k), 9.5 (c)(3); 19 CFR 171.13(a).

The term "reputation" means repute with a substantial number of persons in the community, or with a substantial number of law enforcement officers in the community, or with a law enforcement agency. 28 CFR 9.2(k):

10 Cir: U.S. v. One 1958 Pontiac Sedan, 308 F.2d 893 (1962)

8 Cir: Commercial Credit Corp. v. U.S. 175 F.2d 905 (1949).

6 Cir: Manufacturers Acceptance Corp. v. U.S., 193 F.2d 622 (1951).

5 Cir: U.S. v. One 1960 Ford Pickup Truck, 306 F.2d 106 (1962).

4 Cir: U.S. v. One Hudson Coupe, 1938 Model, 110 F.2d 300 (1940).

3 Cir: U.S. v. Ford Truck, 115 F.2d 864 (1940).

2 Cir: U.S. v. One 1935 Dodge Rack-Body Truck, 88 F.2d 613 (1937).

Mere suspicion among officers that someone is violating the law is not a reputation. There must be specific, articulable facts that officers can relate that are known to the agency or law enforcement community:

5 Cir: U.S. v. G.M.A.C., 296 F.2d 246 (1961).

4 Cir: U.S. v. Shell, 212 F.2d 789 (1954).

MD NC: U.S. v. One 1950 Model Buick 2-Door Sedan, 137 F.Supp. 643 (1955).

WD SC: U.S. v. One 1949 Model Pontiac Coach, 121 F.Supp. 436 (1954).

WD KY: U.S. v. One 1940 Ford Coach, 43 F.Supp. 593 (1942).

ED NY: U.S. v. One Terraplane Sedan, 23 F.Supp. 710 (1938).

d. Lack of Negligence

Note that a petitioner must prove not only that he had no actual knowledge of illegal use, record, or reputation, but also that there were no facts or circumstances that would give him reason to believe the property would be illegally used, or the borrower had a record or reputation. In effect, he must prove a lack of negligence in lending his property:

5 Cir: Federal Credit Co. v. U.S., 109 F.2d 121 (1940).

4 Cir: CIT Corp. v. U.S., 86 F.2d 311 (1936).

ED NC: U.S. v. One 1955 Model Two-Door Cadillac Coupe DeVille, 136 F. Supp. 304 (1955).

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ND OHIO: U.S. v. One 1937 Ford Truck, 29 F.Supp. 278 (1939).

D MASS : U.S. v. One 1938 Buick Sedan, 29 F.Supp. 752 (1939).

D MASS : U.S. v. One 1935 Chevrolet Truck, 14 F.Supp. 777 (1936).

e. Imputing Knowledge

In several circumstances, a petitioner will be presumed to have had knowledge, and will face a serious problem of proving he deserves remission. These circumstances generally have three characteristics in common: (i) a high probability the petitioner had knowledge; (ii) a high risk of collusion between the petitioner and the violator; and (iii) the limited ability of investigators to objectively get to the truth of the matter.

1) Family Members

A mere family relationship between a petitioner and the violator does not necessarily justify imputing knowledge to the petitioner:

WD MO: U.S. v. One 1941 2 Ton Truck, 95 F.Supp 214 (1951).

But, if the violator has a record or reputation for drug-related crime, a member of his immediate family, or his paramour, is very likely to know of it. Knowledge will be imputed to such a petitioner, and a mere statement that he lacked knowledge will not qualify him for remission. 19 CFR 171.13(a):

NOTES

345-769 0 - 81 - 19

CONTINUED

3 OF 5

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10 Cir: Jones v. U.S., 330 F.2d 809 (1964).

7 Cir: U.S. v. One 1941 Cadillac Sedan, 145 F.2d 296 (1944).

5 Cir: U.S. v. Dodd, 205 F.2d 260 (1953).

4 Cir: Shelliday v. U.S., 25 F.2d 372 (1928).

ED SC: U.S. v. One 1961 Four-Door Cadillac Sedan, 236 F.Supp 563 (1964).

D MD: U.S. v. One Plymouth Coupe, 14 F.Supp 610 (1936).

ED TENN: U.S. v. One 1942 Plymouth Sedan, 89 F.Supp. 884 (1950).

ED VA: U.S. v. One Ferguson Farm Tractor, 125 F.Supp 580 (1954).

WD ARK: U.S. v. One 1956 Dodge Coronet 2-Door Sedan, 150 F.Supp 503 (1957).

Similarly, if drug-related activities occurred in the home of the violator, knowledge of those activities will be imputed to petitioners who share that home, such as paramours or family members. Again, a simple assertion that they lacked knowledge will not be sufficient to grant them remission. 19 CFR 171.13(a):

SD MISS: U.S. v. One 1960 Ford Convertible, 209 F.Supp 247 (1962).

ED VA: U.S. v. One 1954 Mercury 2-Door Sedan, 128 F.Supp. 891 (1955).

WD MO: U.S. v. One 1941 Ford 2 Ton Truck, 95 F.Supp. 214 (1951).

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2) Business Association

In certain cases, the existence of a business relationship between a petitioner and the law violator will justify imputing knowledge to the petitioner. If the petitioner is a corporation, partnership, principal or entity that acts through, and can be bound by its agents, the knowledge of the agent will be imputed to the petitioner.

5 Cir: U.S. v. One 1952 Chevrolet Pickup Truck, 213 F.2d 797 (1954); U.S. v. One 1950 Model Mercury Sedan, 207 F.2d 528 (1953); Beaudry v. U.S., 106 F.2d 987 (1939).

MD GA: U.S. v. One 1956 Model 4-Door Pontiac Catalina, 159 F.Supp. 955 (1957).

D MINN: U.S. v. One Buick Sedan, 24 F.Supp 739 (1938).

MD PA: U.S. v. One Chrysler Sedan, 18 F.Supp. 684 (1937)

f. Refusal to Give Evidence

A petitioner who refuses to cooperate in providing evidence needed to decide his petition, will be presumed to have guilty knowledge. As a result, his petition will be denied:

4 Cir: Snead v. U.S., 217 F.2d 912, cert. den. 75 S.Ct. 532 (1955)

6 Cir: One 1941 Ford ½ Ton Pickup Truck v. U.S., 140 F.2d 225 (1944).

NOTES

g. After-Acquired knowledge

If a petitioner acquired knowledge of the illegal use, or record, or reputation after he had lost control of his property and could do nothing to correct the situation, remission will probably be granted. Guilty knowledge acquired when nothing can be done about the illegal use, should not defeat a petition for remission:

10 Cir: U.S. v. One 1949 Chevrolet Coach, 200 F.2d 120 (1952).

5 Cir: U.S. v. Farrior Motor Co, 198 F.2d 68 (1952).

WD KY: U.S. v. One 1940 Mercury Coach Auto, 43 F.Supp 515 (1942).

D. REMISSION IS AN ACT OF GRACE

Earlier in this Guide we saw that legislatures frequently establish statutory exceptions to forfeiture. Once a claimant proves the property fits within a statutory exception, forfeiture must be denied. The same principle does not apply to remission. As a form of pardon, no one has an absolute right to remission, even if the remission standards appear satisfied.

Authorities

19 U.S.C. 1618; 18 U.S.C. 3617(b); 28 CFR 9.6(f)

10 Cir: U.S. v. One 1958 Pontiac Sedan, 308 F.2d 893 (1962); U.S. v. Chieftan Pontiac Co., 218 F.2d 115 (1954); Aetna Finance Co. v. U.S., 191 F.2d 63 (1951); U.S. v. One 1937 LaSalle Sedan, 116 F.2d 356 (1940).

9 Cir: Wilson Motor Co., v. U.S., 96 F.2d 29 (1938).

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8 Cir: City Nat. Bank & Trust Co. v. U.S., 163 F.2d 820 (1947).

7 Cir: U.S. v. One 1941 Cadillac Sedan, 145 F.2d 296 (1944).

6 Cir: (contra) Universal Credit Co. v. U.S., 91 F.2d 388 (1937).

5 Cir: G.M.A.C. v. U.S., 249 F.2d 183 (1957); One 1950 Mercury Coupe v. U.S. 213, F. 2d 133 (1954); U.S. v. Williams, 200 F.2d 500 (1952); Beaudry v. U.S., 106 F.2d 987 (1939).

4 Cir: Harris v. U.S., 215 F.2d 69 (1954); Busic v. U.S., 149 F.2d 794 (1945); CIT Corp. v. U.S., 89 F.2d 977 (1937).

2 Cir: U.S. v. CIT Corp., 93 F.2d 469 (1937); U.S. v. One 1935 Dodge Rackbody Truck, 88 F.2d 613 (1937).

D SC: U.S. v. One 1961 Oldsmobile, 250 F. Supp. 969 (1966).

ND FLA: U.S. v. One 1959 Mercury Montclair 4-Door Sedan. 185 F.Supp. 44 (1960).

SD ALA: U.S. v. One 1955 Model Ford Sedan, 161 F.Supp 817 (1958).

MD GA: U.S. v. One 1956 Model 4-Door Pontiac Catalina, 159 F.Supp. 955 (1957).

ED NC: U.S. v. One 1955 Model Two-door Cadillac Coupe DeVille, 136 F.Supp. 304 (1955).

ED NC: U.S. v. One 1954 Model Ford Victoria, 135 F.Supp. 809 (1955).

ED ARK: U.S. v. One 1953 Pontiac Coupe, 126 F.Supp 853 (1954).

WD ARK: U.S. v. One 1940 Plymouth Coupe, 43 F.Supp. 370 (1942).

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ED MICH: U.S. v. One 1951 Chevrolet Delivery Sedan, 116 F.Supp. 830 (1953).

WD MO: U.S. v. One 1947 DeSoto Sedan, 87 F.Supp. 1005 (1949).

WD KY: U.S. v. One 1935 Plymouth Sedan, 36 F.Supp. 261 (1941).

WD VA: U.S. v. One 1939 Ford Coach Auto, 28 F.Supp 306 (1939).

WD VA: U.S. v. One Ford Coach, 20 F. Supp. 44 (1937).

D MD: U.S. v. One Plymouth Coupe, 14 F.Supp. 610 (1936).

D ME: U.S. v. One 1935 Chevrolet Coupe, 13 F.Supp. 986 (1936).

E. MITIGATION

Except for costs, remission does not involve a money penalty. Mitigation, on the other hand, is the granting of remission on condition that the petitioner pay a money penalty for the return of his property.

Mitigation may be granted when the remission standards are not met, but there are extenuating circumstances that justify some limited form of relief. 28 CFR 9.6(a).

F. FEDERAL COURTS CAN'T REMIT DRUG-RELATED FORFEITURES

By law, the authority to grant relief from a drug-related forfeiture is given exclusively to the United States Attorney General. Federal courts have no authority to remit or mitigate a drug-related forfeiture. And, they have no power to review the Attorney General's decision on a petition for remission or mitigation. Remission and mitigation are matter of "Executive grace".

NOTES

Authorities

19 U.S.C. 1618; 21 U.S.C. 881(d)

S.Ct: Dorsheiner v. U.S., 7 Wall. 166, 74 U.S. 166, 19 L.Ed 187 (1868); U.S. v. Morris, 23 U.S. 246, 6 L.Ed. 314 (1325); and see Califano v. Sanders, 97 S.Ct. 980 (1977).

10 Cir: U.S. v. Kemp, 186 F.2d 808 (1951); U.S. v. One 1941 Plymouth Sedan, 153 F.2d 19 (1946).

9 Cir: U.S. v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (1976); Simons v. U.S. 497 F.2d 1046 (1974); U.S. v. One 1967 Ford Mustang, 457 F.2d 931 (1972); U.S. v. Bride, 308 F.2d 470 (1962); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: U.S. v. One 1973 Buick Riviera, 560 F.2d 897 (1977); U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974).

7 Cir: U.S. v. One 1958 Pontiac Coupe, 298 F.2d 421 (1962).

6 Cir: U.S. v. One 1961 Cadillac, 337 F.2d 730 (1964)

5 Cir: U.S. v. One 1970 Buick Riveria, 463 F.2d 1168 (1972); U.S. v. Addison, 260 F.2d 908 (1958); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S. v. One 1952 Model Ford Sedan, 213 F.2d 252 (1954); U.S. v. Gramling, 180 F.2d 498 (1950).

4 Cir: The Pilot, 43 F.2d 491 (1930)

3 Cir: See U.S. v. Fields, 425 F.2d 883 (1970).

2 Cir: See U.S. v. Heckinger, 163 F.2d 472 (1947).

1 Cir: U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

Discussion

Remission is a form of pardon. The Laura, 5 S.Ct. 881 (1885). Historically, courts have not been given the authority to review pardon decisions.

The first Congress of the United States gave the Secretary of the Treasury "the power" to remit forfeitures if "in his opinion" they were incurred without negligence or intent to violate the law (1 Stat. 122). As early as 1825, the Supreme Court explained that this power was exclusive and is not subject to review:

> "It is not competent for any other tribunal . . . to call in question the competency of the evidence, or its sufficiency, to procure the remission. The Secretary of the Treasury is, by the law, made the exclusive judge of these facts, and there is no appeal from his decision. The law declares, that . . . he shall have power to mitigate, or remit, such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if in his opinion, the same shall have been incurred without willful negligence, or any intention of fraud, in the person or persons incurring the same. The facts are submitted to the Secretary, for the sole purpose of enabling him to form an opinion, . . . and the correctness of his conclusion therefrom no one can question." U.S. v. Morris, 23 U.S. 246 at 284, 285, 6 L.Ed 314 (1825) (emphasis is in the original).

The language of the remission statutes has changed slightly over the past 200 years, but the intent and effect is the same. Remission is a pardon, an act of grace, and is not reviewable by the courts.

G. CONSTITUTIONALITY

Few reported cases deal with the constitutionality of the remission scheme. See The Laura, 5 S.Ct. 881 (1885); and U.S. v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (9 Cir. 1976). This is not surprising. The possibility of mounting a successful attack against the remission laws seems extremely remote.

Before our Constitution was written, England made a practice of giving executive officers the remission power. St. 27 Geo.III.c.32. The framers of our Constitution must have approved of the practice, because shortly after our Constitution was adopted, many of them sat in our first Congress and they promptly enacted a remission statute (1 Stat. 122, 1790). For almost 200 years, this law has been re-enacted with only slight changes. As the Supreme Court noted in The Laura, these historical facts are strong evidence of the remission law's constitutionality:

> "The construction placed upon the constitution by the first act of 1790 . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is conclusive." 5 S.Ct. 881 at 883 (1885).

Two centuries have almost passed, and the remission scheme is now "written in stone". It will not be easy to budge.

H. PETITIONING FOR RELIEF

To obtain remission or mitigation, a written petition must be filed with the executive officer having remission power. The Justice Department and Drug Enforcement Administration regulations on the remission process are reprinted in full in the next two sections of this chapter. The following is merely an overview.

NOTES

1. To Whom Addressed

Petitions for remission under the federal Controlled Substances Act should be addressed to the Administrator of the Drug Enforcement Administration if the value of the property is appraised at $10,000 or less (28 CFR 9.4(a), 21 CFR 1316.79), or to the Attorney General of the United States if the property is appraised at more than $10,000 (28 CFR 9.3(a), 21 CFR 1316.79).

2. Content

The petition must contain all the information needed to determine whether remission should be granted. Remember, the burden of proof is on the petitioner to demonstrate he is entitled to remission. 28 CFR 9.5.

a. Description of property

The petition must include a complete detailed description of the property, including serial numbers, motor numbers, or any other identifying marks. The date and place of seizure should also be included. 28 CFR 9.5(a)(1), 21 CFR 1316.79(b)(1).

b. Proof of interest

The interest of the petitioner in the described property must be proved by bills of sale, contracts, deeds, mortgages, or other documentary evidence. 28 CFR 9.5(a)(2), 21 CFR 1316.79(b)(2).

c. Acquired in good faith

The petitioner must explain how he acquired his interest in the property, particularly when he acquired it and what he paid for it.

If the property was a gift, the circumstances of the gift should be described in detail.

NOTES

If the property was under the control of another who caused the seizure, the reason that person had control of the property must be explained in detail. See 19 CFR 171.13(a).

d. Lack of knowledge

The petitioner must establish in the petition that he had no knowledge, or reason to believe, that his property was being, or would be used illegally. 28 CFR 9.5(c)(2). If the person causing the seizure has a record or reputation for drug-related crime, the petitioner must also establish he had no knowledge or reason to know, of that reputation or record. 28 CFR 9.5(c)(3).

If the petitioner lives with, or is an immediate family member of, the drug violator, an extended explanation is required concerning the ignorance of the petitioner of the violator's activities, record or reputation.

3. Sworn form

Petitions addressed to the Administrator of the Drug Enforcement Administration must be sworn to and signed by the petitioner, not by his attorney. 21 CFR 1316.79(a). Petitions signed by an attorney may be rejected by DEA unless a satisfactory explanation is included as to why the petitioner did not sign.

Petitions addressed to the Attorney General must also be sworn to, but may be signed by the petitioner or by his attorney upon information and belief. 28 CFR 9.3(a).

4. False statements

A false statement made in a petition may subject the petitioner, or his attorney, to criminal prosecution. 18 U.S.C. 1001.

5. Copies

The petition should be submitted in triplicate. 28 CFR 9.3(a), 9.4(a), 21 CFR 1316.79(a).

6. Where to file

The petition should be filed with the United States Attorney for the district in which the property was seized if it is appraised at more than $10,000 28 CFR 9.3(a), or with the Regional Director of the Drug Enforcement Administration for the district in which the seizure occurred if it is appraised at $10,000 or less. 28 CFR 9.4(a), 21 CFR 1316.79(a).

7. When to file

The petition should be filed within 30 days of the date the petitioner received notice of the seizure. Petitions filed after 30 days will be accepted only if the property has not been sold or placed into service. 21 CFR 1316.80.

Subpart E—Seizure, Forfeiture, and Disposition of Property

§ 1316.71 Definitions.

As used in this subpart, the following terms shall have the meanings specified:

(a) The term "Act" means the Controlled Substances Act (84 Stat. 1242; 21 U.S.C. 801) and/or the Controlled Substances Import and Export Act (84 Stat. 1285; 21 U.S.C. 951).

(b) The term "custodian" means the officer required under § 1316.72 to take custody of particular property which has been seized pursuant to the Act.

(c) The term "property" means a controlled substance, raw material, product, container, equipment, money or other asset, vessel, vehicle, or aircraft within the scope of the Act.

(d) The terms "seizing officer," "officer seizing," etc., mean any officer, authorized and designated by § 1316.72 to carry out the provisions of the Act, who initially seizes property or adopts a seizure initially made by any other officer or by a private person.

(e) The term "Regional Administrator" means the Regional Administrator of the Administration.

(f) Any term not defined in this section shall have the definition set forth in sections 102 and 1001 of the Act (21 U.S.C. 802 and 951) and in § 1301.02 of this chapter.

§ 1316.72 Officers who will make seizures.

For the purpose of carrying out the provisions of the Act, all special agents of the Administration are authorized and designated to seize such property as may be subject to seizure.

§ 1316.73 Custody and other duties.

An officer seizing property under the Act shall store the property in a location designated by the custodian, generally in the judicial district of seizure. The Regional Administrators are designated as custodians to receive and maintain in storage all property seized pursuant to the Act. The Regional Administrators are also authorized to dispose of any property pursuant to the Act and any other applicable statutes or regulations relative to disposal, and to perform such other duties regarding such seized property as are imposed on the District Directors of the U.S. Customs Service with respect to seizures under the customs laws.

§ 1316.74 Appraisement.

The custodian shall appraise the property to determine the domestic value at the time and place of seizure. The domestic value shall be considered the retail price at which such or similar property is freely offered for sale. If there is no market for the property at the place of seizure, the domestic value shall be considered the value in the principal market nearest the place of seizure.

§ 1316.75 Advertisement.

(a) If the appraised values does not exceed $10,000, the custodian shall cause a notice of the seizure and of the intention to forfeit and sell or otherwise dispose of the property to be published once a week for at least 3 successive weeks in a newspaper of general circulation in the judicial district in which the seizure occurred.

(b) The notice shall: (1) Describe the property seized and show the motor and serial numbers, if any; (2) state the time, cause, and place of seizure; and (3) state that any person desiring to claim the property may, within 20 days from the date of first publication of the notice, file with the custodian a claim to the property and a bond with satisfactory sureties in the sum of $250.

§ 1316.76 Requirements as to claim and bond.

(a) The bond shall be rendered to the United States, with sureties to be approved by the custodian, conditioned that in the case of condemnation of the property the obligor shall pay all costs and expenses of the proceedings to obtain such condemnation. When the claim and bond are received by the custodian, he shall, after finding the documents in proper form and the sureties satisfactory, transmit the documents, together with a description of the property and a complete statement of the facts and circumstances surrounding the seizure, to the United States Attorney for the judicial district in which the seizure was made for the purpose of proceeding to a condemnation of the property in the manner prescribed by law. If the documents are not in satisfactory condition when first received, a reasonable time for correction may be allowed. If correction is not made within a reasonable time the documents may be treated as nugatory, and the case shall proceed as though they had not been tendered.

(b) The filing of the claim and the posting of the bond does not entitle the claimant to possession of the property, however, it does stop the summary forfeiture proceedings. The bond posted to cover costs may be in cash, certified check, or on Treasury Department Form 171 with satisfactory sureties. The costs and expenses secured by the bond are such as are incurred after the filing of the bond including storage cost, safeguarding, court fees, marshal's costs, etc.

§ 1316.77 Summary forfeiture.

If the appraised value does not exceed $10,000, and a claim and bond are not filed within the 20 days hereinbefore mentioned, the custodian shall declare the property forfeited. The custodian shall prepare the Declaration of Forfeiture and forward it to the Administrator of the Administration as notification of the action he has taken. Thereafter, the property shall be retained in the custodian's district or delivered elsewhere for official use, or otherwise disposed of, in accordance with official instructions received by the custodian.

§ 1316.78 Judicial forfeiture.

If the appraised value is greater than $10,000 or a claim and satisfactory bond have been received for property appraised at $10,000 or less, the custodian shall transmit a description of the property and a complete statement of the facts and circumstances surrounding the seizure to the U.S. Attorney for the judicial district in which the seizure was made for the purpose of instituting condemnation proceedings. The U.S. Attorney shall also be furnished the newspaper advertisements required by § 1316.75.

§ 1316.79 Petitions for remission or mitigation of forfeiture.

(a) Any person interested in any property which has been seized, or forfeited either summarily or by court proceedings, may file a petition for remission or mitigation of the forfeiture. Such petition shall be filed in triplicate with the Regional Administrator for the judicial district in which the seizure occurred. It shall be addressed to the Administrator if the property is subject to summary forfeiture pursuant to § 1316.77, and addressed to the Attorney General if the property is subject to judicial forfeiture pursuant to § 1316.78. The petition must be executed and sworn to by the person alleging interest in the property.

(b) The petition shall include the following: (1) A complete description of the property, including motor and serial numbers, if any, and the date and place of seizure; (2) the petitioner's interest in the property, which shall be supported by bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and, (3) the facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify remission or mitigation.

(c) Where the petition is for restoration of the proceeds of sale, or for value of the property placed in official use, it must be supported by satisfactory proof that the petitioner did not know of the seizure prior to the declaration of condemnation of forfeiture and was in such circumstances as prevented him from knowing of the same.

§ 1316.80 Time for filing petitions.

(a) In order to be considered as seasonably filed, a petition for remission or mitigation of forfeiture should be filed within 30 days of the receipt of the notice of seizure. If a petition for remission or mitigation of forfeiture has not been received within 30 days of the notice of seizure, the property will either be placed in official Government service or sold as soon as it is forfeited. Once property is placed in official use, or is sold, a petition for remission or mitigation of forfeiture can no longer be accepted.

(b) A petition for restoration of proceeds of sale, or for the value of property placed in official use, must be filed within 90 days of the sale of the property, or within 90 days of the date the property is placed in official use.

§ 1316.81 Handling of petitions.

Upon receipt of a petition, the custodian shall request an appropriate investigation. The petition and the report of investigation shall be forwarded to the Administrator. If the petition involves a case which has been referred to the U.S. Attorney for the institution of court proceedings, the custodian shall transmit the petition to the U.S. Attorney for the judicial district in which the seizure occurred. He shall notify the petitioner of this action.

28 CFR

PART 9—REMISSION OR MITIGATION OF CIVIL FORFEITURES

Sec.

§ 9.1 Purpose and scope.

The following definitions, regulations and criteria are designed to reflect the intent of Congress relative to the remission or mitigation of forfeiture of certain property as set out in section 1618 of Title 19, United States Code, and are applicable only to those civil forfeitures which arise under the Contraband Transportation Act, Comprehensive Drug Abuse Prevention and Control Act of 1970, customs laws, Federal Alcohol Administration Act and other laws relating to gambling, firearms, and liquor (except the Indian Liquor Laws), and which are assigned to the supervision of the Criminal Division or the Drug Enforcement Administration by the Attorney General or his duly authorized delegate (§§ 0.55(d), 0.100 of this chapter).

§ 9.2 Definitions.

As used in this part:

(a) The term "Attorney General" means the Attorney General of the United States or his delegate.

(b) The term "related crime" means any crime similar in nature to that which gives rise to the seizure of property for forfeiture, for example, where property is seized for a violation of the Federal laws relating to liquor, a "related crime" would be any previous offense involving a violation of the Federal laws relating to liquor or the laws of any State or political subdivision thereof relating to liquor.

(c) The term "determining official" means the official who has the authority to grant or deny petitions for remission or mitigation of forfeitures of property incurred under the laws referred to in § 9.1.

(d) The terms "net equity," "net lien," and "net interest" mean the actual interest a petitioner has in property seized for forfeiture at the time a petition for remission or mitigation of forfeiture is granted by the determining official: *Provided, however,* That in computing a petitioner's actual interest the determining official shall make no allowances for unearned interest, finance charges, dealer's reserve, attorney's fees or other similar charges.

(e) The term "owner" means the person who holds primary and direct title to the property seized for forfeiture.

(f) The term "person" means an individual, partnership, corporation, joint business enterprise, or other entity capable of owning property.

(g) The term "petition" means the petition for remission or mitigation of forfeiture.

(h) The term "petitioner" means the person applying for remission or mitigation of the forfeiture of seized property.

(i) The term "property" means property of any kind capable of being owned or possessed.

(j) The term "record" means an arrest followed by a conviction, except that a single arrest and conviction and the expiration of any sentence imposed as a result of such conviction, all of which occurred more than 10 years prior to the date the petitioner acquired its interest in the seized property, shall not be considered a record: *Provided, however,* That two convictions shall always be considered a record regardless of when the convictions occurred: *And provided further,* That the determining official may, in his discretion, consider as constituting a record, an arrest or series of arrests to which the charge or charges were subsequently dismissed for reasons other than acquittal or lack of evidence.

(k) The term "reputation" means repute with a law enforcement agency or among law enforcement officers or in the community generally, including any pertinent neighborhood or other area.

(l) The term "violator" means the person whose use of the property in violation of the law subjected such property to seizure for forfeiture.

§ 9.3 Procedure relating to judicial forfeitures.

(a) A petition for remission or mitigation of forfeiture shall be addressed to the Attorney General, and shall be sworn to by the petitioner, or by his counsel upon information and belief, and shall be submitted in triplicate to the U.S. attorney for the judicial district in which the property is seized.

(b) Upon receipt of a petition, the U.S. attorney shall direct the seizing agency to investigate the merits of the petition and to submit a report thereon to him. Upon receipt of such report, the U.S. attorney shall forward a copy thereof together with the petition and his recommendation as to allowance or denial of the petition to the Assistant Attorney General, Criminal Division.

(c) Upon receipt of a petition and report thereon, the Assistant Attorney General shall assign it to the appropriate section of the Criminal Division which shall prepare a report based upon the allegations of the petition and the report of the seizing agency. No hearing shall be held. Upon the basis of the report prepared in this section, the Chief of the section shall either grant the petition by remission or mitigation of the forfeiture or shall deny it.

(d) If the Chief of the section grants a petition or otherwise mitigates the forfeiture, he shall cause appropriate notices of such action to be mailed to the petitioner or his attorney and to the appropriate U.S. attorney. The U.S. attorney shall be advised of the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures to be followed in order for the petitioner to obtain a release of the property, or, in the case of a chattel mortgagee and at the petitioner's option, to obtain his net equity in said property. The Chief of the section shall advise the petitioner or his attorney to confer with the U.S. attorney as to such terms and conditions.

(e) If the Chief of the section denies a petition, he shall cause appropriate notices of such action to be mailed to the petitioner or his attorney and to the appropriate U.S. attorney. Such notice shall specify the reason the petition was denied. The notice also shall advise the petitioner or his attorney that a request for reconsideration of the denial of the petition may be submitted to the Assistant Attorney General, Criminal Division, in accordance with paragraphs (j) through (m) of this section.

(f) A petition for restoration of the proceeds of sale or for value of forfeited property, if retained or delivered for official use of a Government agency, may be submitted in cases in which the petitioner: (1) Did not know of the seizure prior to the declaration or condemnation of forfeiture; and (2) was in such circumstances as prevented him from knowing thereof. Such a petition shall be submitted pursuant to paragraph (a) of this section and within 3 months from the date the property is sold or otherwise disposed of.

(g) The Assistant Attorney General shall not accept a petition in any case in which a similar petition has been administratively denied by the seizing agency prior to the referral of the case to the U.S. attorney for the institution of forfeiture proceedings.

(h) The Assistant Attorney General shall accept and the Chief of the section shall consider petitions submitted in judicial forfeiture proceedings under the Internal Revenue liquor laws only prior to the time a decree of forfeiture is entered. Thereafter, District Courts have exclusive jurisdiction over the rest.

(i) In all other forfeiture cases, the Assistant Attorney General shall accept and the Chief of the section shall consider petitions until the property is sold or placed in official use or otherwise disposed of according to law.

(j) Within 20 days from the date of the notice of the denial of a petition for remission or mitigation, a request for reconsideration of the denial, based on evidence recently developed or not previously considered, may be submitted to the Assistant Attorney General, Criminal Division, for referral to the appropriate Section Chief. The applicant shall simultaneously submit a copy to the appropriate U.S. attorney.

(k) Upon receipt of a copy of a request for reconsideration of the denial of a petition the U.S. attorney shall withhold further action in the case pending advice from the Assistant Attorney General, Criminal Division, of the action taken on the request by the appropriate Section Chief.

(l) If the U.S. attorney does not receive a copy of a request for reconsideration within the prescribed period he shall proceed with the forfeiture.

(m) Only one request for reconsideration of a denial of a petition shall be considered.

§ 9.4 Procedure relating to administrative narcotic forfeitures.

(a) A petition for remission or mitigation of forfeiture of property seized for narcotic violations that is subject to administrative forfeiture (appraised value of $10,000 or less) shall be addressed to the Administrator of the Drug Enforcement Administration (DEA). Such a petition shall be filed in triplicate with the regional administrator of DEA for the judicial district in which the seizure occurred.

(b) Upon receipt of a petition for property subject to administrative forfeiture the regional administrator of DEA shall have an investigation of the petition conducted. The completed petition investigation and the recommendation of the regional director on the petition will be forwarded to the Administrator of DEA.

(c) Upon the receipt of a petition and a report thereon by the Administrator of DEA, he shall assign it to the Office of Chief Counsel where a ruling shall be made, based on the petition and the report of investigation. No hearing shall be held. The ruling on the petition shall be made by the Chief Counsel or Deputy Chief Counsel of DEA.

(d) Notice of the granting or the denial of a petition for property subject to administrative forfeiture shall be mailed to the petitioner or his attorney. If the petition is granted, the conditions of relief and the procedure to be followed in order to obtain the release of the property shall be set forth. If the petition is denied, the petitioner shall be advised of the reasons for such denial.

(e) A request for consideration of the denial may be submitted within 10 days from the date of the letter denying the petition. Such request shall be addressed to the Administrator of DEA for referral to the Office of the Chief Counsel and shall be based on evidence recently developed or not previously considered.

(f) Additional information concerning property subject to seizure for narcotic violations is contained in 21 CFR 316.71-316.81.

§ 9.5 General administrative procedures.

(a) Petitions shall be sworn and shall include the following information in clear and concise terms:

(1) A complete description of the property, including serial numbers, if any, and the date and place of seizure.

(2) The interest of the petitioner in the property, as owner, mortgagee or otherwise, to be supported by bills of sale, contracts, mortgages, or other satisfactory documentary evidence.

(3) The facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify remission or mitigation.

(b) The Determining Official shall not consider whether the evidence is sufficient to support the forefeiture since the filing of a petition presumes a valid forfeiture. The determining official shall consider only whether the petitioner has satisfactorily established his good faith and his innocence and lack of knowledge of the violation which subjected the property to seizure and forfeiture, and whether there has been compliance with the standards hereinafter set forth.

(c) The determining official shall not remit or mitigate a forfeiture unless the petitioner:

(1) Establishes a valid, good faith interest in the seized property as owner or otherwise; and

(2) Establishes that he at no time had any knowledge or reason to believe that the property in which he claims an interest was being or would be used in a violation of the law.

(3) Establishes that he at no time had any knowledge or reason to believe that the owner had any record or reputation for violating laws of the United States or of any State for related crime.

§ 9.6 Provisions applicable to particular situations.

(a) Mitigation: In addition to his discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of his discretion, mitigate forfeitures of seized property. This authority may be exercised in those cases where the petitioner has not met the minimum conditions precedent to remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner in addition to any other sums chargeable as a condition to remission. This penalty is considered as an item of cost payable by the petitioner.

(b) Rival claimants: If the beneficial owner of property and the owner of a security interest in the same property each files a petition, and if both petitions are found to be meritorious, relief from a forfeiture shall be granted to the beneficial owner and the petition of the owner of the security interest shall be denied.

(c) Leasing agreements: (1) A person engaged in the business of renting property shall not be excused from establishing compliance with the requirements of § 9.5.

(2) A lessor who leases property on a long term basis with the right to sublease shall not be entitled to remission or mitigation of a forfeiture of such property unless his lessee would be entitled to such relief.

(d) Voluntary bailments: A petitioner who allows another to use his property without cost and who is not in the business of lending money secured by property or of renting property for profit, shall be granted remission or mitigation of forfeiture upon meeting the requirements of § 9.5.

345-769 O - 81 - 20

(e) Straw purchase transactions: If a person purchases in his own name property for another who has a record or reputation for related crimes, and if a lienholder knows or has reason to believe that the purchaser of record is not the real purchaser, a petition filed by such a lienholder shall be denied unless the petitioner establishes compliance with the requirements of § 9.5 as to both the purchaser of record and the real purchaser. This rule shall also apply where money is borrowed on the security of property held in the name of the purchaser of record for the real purchaser.

(f) Notwithstanding the fact that a petitioner has satisfactorily established compliance with the administrative conditions applicable to his particular situation, the Determining Official may deny relief if there are unusual circumstances present which in his judgment provide reasonable grounds for concluding that remission or mitigation of the forfeiture would be inimical to the interests of justice.

§ 9.7 Terms and conditions of remission.

(a) The terms and conditions of remission or mitigation of forfeitures in cases subject to judicial forfeiture proceedings (property appraised over $2,500 when seized or a claim and cost bond filed) shall, at a minimum, require that a petitioner pay the costs and expenses incident to the seizure of the property including any court costs and accrued storage charges. However, if the petitioner's interest in the property is derived from a lien thereon, the petitioner shall pay an amount equal to all costs and expenses incident to the seizure including any court costs and accrued storage charges or the amount by which the appraised value of the property exceeds the petitioner's net interest therein, whichever is greater. The appraised value at the time of seizure is used for the purposes of these rules.

(b) Where a complaint for forfeiture has been filed with the District Court, a lienholder shall also be required to furnish the U.S. attorney with: (1) An instrument executed by the registered owner and any other known claimant of an interest in the property, if they are not in default, releasing their interest in such property, or (2) if the registered owner or any other known claimant is in default, an agreement to save the Government, its agents and employees harmless from any and all claims which might result from the grant of remission.

(c) Alternatively, a lienholder may elect to permit the litigation to proceed to judgment. In that event, the court shall be advised that the Department has allowed the petition for remission of the forfeiture and shall be requested to order the property sold by the U.S. Marshal at public sale and the proceeds thereof to be distributed as follows:

(1) Payment to the petitioner of an amount equal to his net equity if the proceeds are sufficient or the net proceeds otherwise, after deducting from the petitioner's interest an amount equal to the Government's costs and expenses incident to the seizure, forfeiture and sale, including court costs and storage charges, if any;

(2) Payment of such costs and expenses;

(3) Payment of the balance remaining, if any, to the Government.

(d) If a complaint for forfeiture has not been filed, the petitioner, if he is a lienholder, in addition to paying an amount equal to all costs and expenses incident to the seizure, including any court costs and accrued storage charges, or an amount by which the appraised value of the property exceeds his net interest therein, whichever is greater, shall:

(1) Furnish an instrument executed by the registered owner and any other known claimant of an interest in the property releasing their interest in such property, or

(2) Furnish an agreement to hold the Government, its agents and employees harmless from any and all claims which might result from the grant of remission.

(e) The determining official may impose such other terms and conditions as may be appropriate.

(f) Upon compliance with the terms and conditions of remission or mitigation in cases subject to judicial forfeiture proceedings, the U.S. attorney shall take appropriate action to effect the release to the petitioner of the property involved and to dismiss the complaint if one has been filed or otherwise dispose of the matter by forfeiture, sale and distribution of the proceeds therefrom as set forth herein.

(g) In any case, if the owner of record or any other claimant wishes to contest the forfeiture, judicial condemnation of the property shall be consummated, the court shall be apprised of the granting and terms of the remission or mitigation by the Attorney General, and the court shall be requested to frame its decree of forfeiture accordingly.

(h) Where the owner of property elects not to comply with the conditions imposed upon the release of such property to said owner by way of relief, the custodian of such property may be authorized to sell it. From the proceeds of the sale the custodian shall deduct and retain for the account of the Government all costs incident to the seizure and forfeiture plus the costs of sale, and shall pay said owner the balance, if any.

(i) Where remission or mitigation is allowed to a person holding a security interest who is thereby eligible to have the property released to such person upon compliance with the terms and conditions of remission or mitigation, the property may nevertheless be retained by the Government for official use by an appropriately designated Department or Agency thereof upon payment by it to such person of an amount equal to such person's net equity, less an amount equal to the Government's costs and expenses incident to the seizure and forfeiture including court costs and storage charges, if any, and upon payment by it to the U.S. Marshal of an amount equal to such costs and expenses.

VII. JUDICIAL REVIEW

A. JUDICIAL FORFEITURES

A final judgment in a judicial forfeiture proceeding is subject to appeal, just as any other civil action. 28 U.S.C. 1291. Generally, the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure (28 U.S.C.) apply to the review of federal judicial forfeitures. U.S. v. One 1972 Chevrolet Blazer, 563 F. 2d 1386 (9 Cir. 1977); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (9 Cir. 1976); U.S. v. One 1965 Buick, 392 F.2d 672 (6 Cir. 1968); U.S. v. One 1961 Linc. Cont. Sedan, 360 F.2d 467 (8 Cir. 1966); Utley Wholesale Co. v. U.S., 308 F.2d 157 (5 Cir. 1962).

Findings of fact made by the trial court will not be set aside unless they are clearly erroneous. Rule 52(a), F.R. Civ. P; 443 Cans Of Egg Product, 33 S. CT. 50 (1912); The Olinde Rodrigues, 19 S. Ct. 851 (1899).

When the Government appeals, it must move to stay any lower court order on returning the property. Continued possession of forfeitable property (the res) is essential to the appellate courts' jurisdiction.

B. ADMINISTRATIVE FORFEITURES

Earlier we saw that federal courts cannot remit drug-related forfeitures (page 278), nor do they have the power to review the Attorney General's decisions or remission. Similarily, we saw that the failure to file a claim and cost bond generally precludes a claimant from taking an administrative forfeiture into federal court (page 254). As the following sections show, judicial review of administrative forfeitures is very limited.

NOTES

1. FORFEITABLE PROPERTY CANNOT BE RETURNED IN CRIMINAL PROCEEDINGS

All courts have the inherent power in a criminal proceeding to suppress and return property illegally seized as evidence. This power is frequently contained in rules controlling searches and seizures by law enforcement officers, such as Rule 41(e) of the Federal Rules of Criminal Procedure. It is a power limited to property seized solely as evidence. It does not apply to property being held for the purpose of forfeiture.

Authorities

Rule 54(b)(5), Fed.R.Cr.P.(18 U.S.C.)

9 Cir: U.S. v. Filing, 410 F.2d 459 (1969).

8 Cir: U.S. v. Rapp, 539 F.2d 1156 (1976); Goodman v. Lane, 48 F.2d 32 (1931).

7 Cir: U.S. v. Amore, 335 F.2d 329 (1964).

3 Cir: U.S. v. Premises Known as 608 Taylor Ave., 584 F.2d 1297 (1978); U.S. v. Fields, 425 F.2d 883 (1970).

2 Cir: McClendon v. Rosetti, 460 F.2d 111 (1972).

DC Cir: Welsh v. U.S., 220 F.2d 200 (1955).

2. THE FEDERAL TORT CLAIMS ACT DOES NOT APPLY TO FORFEITURES

The Federal Tort Claims Act makes the United States government liable for the negligent or wrongful conduct of federal employees occurring within the scope of their employment. However, the Act specifically excludes lawsuits based upon any claim arising out of the detention of goods. Therefore, the Act does not apply to claims based upon forfeitures.

Authorities

28 U.S.C. 1346, 2671-2680, 2680(c)

7 Cir: U.S. v. 1500 Cases, More or Less, Etc., 249 F.2d 382 (1957).

5 Cir: U.S. v. One (1) 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (1974).

2 Cir: Compare U.S. v. Artieri, 491 F.2d 440 (1974) with Alliance Assurance Co. v. U.S., 252 F.2d 529 (1958).

CDCAL: A-Mark, Inc. v. U.S., 428 F.Supp. 138 (1977).

CDCAL: U.S. v. One 1971 Volvo 2-Door Sedan, 393 F.Supp. 843 (1975).

SDGA: Walker v. U.S., 438 F.Supp. 251 (1977).

DIDAHO: U.S. v. Articles of Food, Etc., 67 F.R.D. 419 (1975).

EDILL: See Mayo v. U.S., 425 F.Supp. 119 (1977)(Contra).

DKAN: Chambers v. U.S., 107 F.Supp. 601 (1952).

DMD: See Jones v. F.B.I., 139 F.Supp. 38 (1956).

EDMO: U.S. v. One 1951 Cadillac Coupe DeVille, 125 F.Supp. 661 (1954); Newstead v. U.S., 258 F.Supp. 250 (1966).

WDPA: See DeBonis v. U.S., 103 F.Supp. 123 (1952)(Contra).

DSC: S. Schonfeld Co., Inc. v. SS Akra Tenaron, 363 F.Supp. 1220 (1973).

DSD: Bambulas v. U.S., 323 F.Supp. 1271 (1971).

3. COURTS CANNOT MANDAMUS (ORDER) THE OUTCOME OF ADMINISTRATIVE DECISIONS ON FORFEITURE

If property is seized for forfeiture and proceedings are not started promptly, a court can order the responsible official to begin the proceedings or abandon the seizure. If a petition for remission is filed and the government ignores it, a court can order the responsible official to make a decision on the petition. The means used to force officials to do their jobs is called a Writ of Mandamus. This Writ has a very important limitation: it cannot tell officials how to perform or how to decide. Courts cannot order the outcome of administrative forfeiture decisions. They cannot order the outcome of decisions on remission or mitigation of forfeiture.

Authorities

28 U.S.C. 1651(a), The All Writs Act.

5 Cir: Castleberry v. A.T.F., 530 F.2d 672 (1976); U.S. v. One 1971 Buick Riviera, 463 F.2d 1168 (1972).

2 Cir: In Re Behrens, 39 F.2d 561 (1930).

DC Cir: U.S. ex rel Walter E. Heller & Co. v. Mellon, 40 F.2d 808 (1930).

4. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT APPLY TO FORFEITURES

We have seen that federal courts cannot remit drug-related forfeitures. We have also seen that federal courts have no jurisdiction over administrative forfeitures if a claim and cost bond is not filed. By law, the authority over these matters has been given exclusively to the United States Attorney General. Therefore, the Administrative Procedure Act cannot be used by the courts to review agency decisions on forfeitures.

Authorities

5 U.S.C. 701-706

S.Ct: See Califano v. Sanders, 97 S.Ct. 980 (1977).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976) (contra)(of questionable validity after Califano v. Sanders).

8 Cir: U.S. v. One 1973 Buick Riviera, 560 F.2d 897 (1977).

6 Cir: U.S. v. One 1961 Cadillac, 337 F.2d 730 (1964).

MDFLA: Griekspoor v. U.S., 433 F.Supp. 794 (1977).

SDGA: Walker v. U.S., 438 F.Supp. 251 (1977).

EDNY: Jary Leasing Corp. v. U.S., 254 F. Supp. 157 (1966); U.S. v. One 1946 Plymouth Sedan, 73 F.Supp. 88 (1946).

5 UNCONSTITUTIONAL FORFEITURES CAN BE REVIEWED BY THE COURTS

Although courts are very limited in their authority over forfeitures, they are not completely powerless. They have the right to review forfeitures involving:

1. Clearly non-forfeitable property;
2. Constitutionally defective statutes; or
3. Constitutionally defective procedures.

Both the Tucker Act (Court of Claims) and the Civil Rights Act give the courts this power.

Authorities

28 U.S.C. 1346(a)(2), Tucker Act.
42 U.S.C. 1983, 28 U.S.C. 1343(3), Civil Rights Act

Ct.Cl: Doherty v. U.S., 500 F.2d 540 (1974).

10 Cir: Lowther v. U.S., 480 F.2d 1031 (1973).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976); Simons v. U.S., 497 F.2d 1046 (1974).

8 Cir: U.S. v. Rapp, 539 F.2d 1156 (1976); U.S. v. Sturgeon, 529 F.2d 993 (1976); Glup v. U.S., 523 F.2d 557 (1975).

7 Cir: Pasha v. U.S., 484 F.2d 630 (1973).

6 Cir: U.S. v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882 (1973).

5 Cir: Castleberry v. A.T.F., 530 F.2d 672 (1976); U.S. v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (1972).

3 Cir: Menkarell v. Bureau of Narcotics, 463 F.2d 88 (1972).

2 Cir: Lee v. Thornton, 538 F.2d 27 (1976); McClendon v. Rosetti, 460 F.2d 111 (1972).

SDNY: Jaekel v. U.S., 304 F.Supp. 993 (1969).

DMASS: Melendez v. Shultz, 356 F.Supp. 1205 (1973).

NDMISS: Holladay v. Roberts, 425 F.Supp. 61 (1977).

MDTENN: Fell v. Armour, 355 F.Supp. 1319 (1972).

NOTES

NOTES

VIII. CRIMINAL FORFEITURE: COMPARED

Thusfar, this Guide has limited itself to discussing civil forfeitures. As we have seen, civil forfeitures are in rem proceedings against property which has been involved in some wrong. Civil forfeitures are totally independent of any criminal action taken against anyone. The Palmyra, 12 Wheat (U.S.) 1, 6 L. Ed. 531 (1827).

A second kind of forfeiture, known as "criminal" forfeiture, was recognized under English Common Law. In old England, all property of a convicted felon was forfeited to the King as a form of punishment. The proceedings to establish a criminal forfeiture were in personam - against the individual - and their success depended entirely upon criminally convicting the owner.

THERE CAN BE NO CRIMINAL FORFEITURE WITHOUT A CONVICTION OF THE OWNER.

In 1790, the first Congress of the United States prohibited these criminal forfeitures. (1 Stat 117, c.9, Sec. 24, now 18 U.S.C. 3563). As a result, criminal forfeitures were unheard of in the United States for 180 years. In 1970, Congress resurrected the concept by inserting criminal forfeiture provisions in two federal statutes: 1) The Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962, 1963); and 2) The Controlled Substances Act, Continuing Criminal Enterprise Offense (21 U.S.C. 848).

Like their ancient predecessors, these two criminal forfeiture provisions are in personam actions against a criminal defendant, and are absolutely dependent upon convicting the defendant of the substantive offense.

A. RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted by Congress on October 19, 1970. The main purpose of RICO is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." Senate Report No. 91-617, 91st Cong., 1st Sess. 80 (1969).

To accomplish this, RICO contains four separate offenses, 18 U.S.C. 1962(a), (b), (c) & (d), which provide for fines and imprisonment and mandatory criminal forfeiture. 18 U.S.C. 1963. In summary form, the elements of RICO are:

ANY PERSON who commits

CERTAIN CRIMES as part of a

PATTERN (2 or more) OF RACKETEERING from which he

ACQUIRES WITH DIRTY MONEY

or

ACQUIRES BY ILLEGAL ACTS

or

ILLEGALLY USES

AN INTEREST IN AN ENTERPRISE affecting commerce

Shall Forfeit Upon Conviction

THAT INTEREST in the enterprise
and
EVERYTHING AFFORDING A SOURCE OF INFLUENCE OVER THE ENTERPRISE.

The remainder of this section discusses each of these basic elements. A chart comparing the elements of RICO with 21 U.S.C. 848 appears on page 327 of this Guide.

1. ANY PERSON

Each criminal provision of RICO expressly applies to "any person." RICO defines "any person" as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. 1961(c).

Based upon this language, courts have held that RICO is not limited to members of traditional organized crime families. U.S. v. Campanale, 518 F.2d 352 (9 Cir. 1975); U.S. v. Mandel, 415 F.Supp. 997 (DMD. 1976); U.S. v. Amato, 367 F.Supp. 547 (SDNY. 1973).

RICO punishes conduct, regardless of the status of the offender.

2. CERTAIN CRIMES

RICO lists 24 federal and 8 state felonies which are considered "racketeering activity." 18 U.S.C. 1961(1). The list, which is inclusive, is:

State Felonies (Punishable by imprisonment of more than one year)

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Narcotics or Dangerous Drugs

Federal Felonies (in Title 18, U.S. Code)

9. Bribery (Sec. 201)
10. Sports Bribery (Sec. 224)
11. Counterfeiting (Sec. 471-473)
12. Theft of Interstate Shipment (Sec. 659)
13. Embezzlement of Pension & Welfare funds (Sec. 664)
14. Extorting Credit (Sec. 691-894)
15. Transmitting Gambling Info. (Sec. 1084)
16. Mail Fraud (Sec. 1341)
17. Wire Fraud (Sec. 1343)
18. Obstructing Justice (Sec. 1503)
19. Obstructing Criminal Investigation (Sec. 1510)
20. Obstruction of State or Local Law Enforcement (Sec. 1511)
21. Interference with Commerce thru Robbery or Extortion (Sec. 1951)
22. Racketeering (Sec. 1952)
23. Transporting Wagering Paraphernalia (Sec. 1953)
24. Unlawful Welfare Fund Payments (Sec. 1954)

25. Conducting Illegal Gambling Business (Sec. 1955)
26. Interstate Transportation of Stolen Property (Sec. 2314, 2315)
27. White Slave Traffic (Sec. 2421, 2424)

Federal Felonies (in Title 29, U.S. Code)

28. Illegal Payments to Labor Organizations (Sec. 186)
29. Embezzlement from Union Funds (Sec. 501(c))

Federal Felonies (under any law of the U.S. involving

30. Bankruptcy Fraud
31. Fraud in Sale of Securities
32. Felonious Manufacture or Other Dealing in Narcotic or Dangerous Drugs.

Any combination of these crimes can form a pattern of racketeering activity, as explained in the next section.

Note that drug offenses appear twice in the list (Nos. 8 & 32).

3. PATTERN (2 or more) OF RACKETEERING

RICO defines a "Pattern of Racketeering" as:

> "...at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act or racketeering activity..." 18 U.S.C. 1961(5).

The definition does not discuss the need for some connection between the crimes used to form a pattern. But the Senate Report on RICO indicates that a pattern of racketeering does not exist unless the crimes used to establish the pattern are related in some way.

> "The target of...(RICO)... is...not sporadic activity. The infiltration of legitimate businesses normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity, plus relationship, which combine to produce a pattern." S.Rep. No. 90-617, 91st Cong., 1st Sess. 158 (1969).

Simply proving that two of the 32 crimes listed in RICO were committed within a ten-year period is not enough to establish "a pattern" of racketeering. U.S. v. Stofsky, 409 F.Supp. 609 (SDNY. 1973), aff'd 527 F.2d 237 (2 Cir. 1975); cf U.S. v. Elliot, 571 F.2d 880 (5 Cir. 1978).

The separate acts of racketeering must have:

i) a Similar Purpose
U.S. v. DiFrancesco, 604 F.2d 769 (2 Cir. 1979); U.S. v. Clemones, 577 F. 2d 1247 (5 Cir. 1978); U.S. v. Burnsed, 566 F.2d 882 (4 Cir. 1977).

ii) or Similar Results
U.S. v. Nacrelli, 468 F.Supp. 241 (ED PA. 1979).

iii) or Similar Participants
U.S. v. Morris, 532 F.2d 436 (5 Cir. 1976).

iv) or Similar Victims
U.S. v. Chavanec, 467 F.Supp. 41 (SD NY. 1979).

v) or Similar Methods of Commission
U.S. v. Weatherspoon, 581 F.2d 595 (7 Cir. 1978); U.S. v. Brown, 555 F. 2d 407 (5 Cir. 1977); U.S. v. Kaye, 556 F.2d 855 (7 Cir. 1977); U.S. v. Stofsky, 527 F.2d 237 (2 Cir. 1975),

or must be otherwise related and not isolated events. See 18 U.S.C. 3575(e)(1970).

345-769 O - 81 - 21

Finally, the crimes forming a pattern of racketeering must be connected in one of the following three ways to an enterprise.

a. ACQUIRES WITH DIRTY MONEY

RICO's first criminal offense, 18 U.S.C. 1962(a), provides:

> "It shall be unlawful for any person who has received any income derived...from a pattern of racketeering activity or through collection of an unlawful debt,...to use or invest... such income...in the acquisition of any enterprise which is engaged in...interstate or foreign commerce."

Basically, this section makes it a crime to acquire an interest in an enterprise with "dirty money" from racketeering.

PROVING THIS OFFENSE REQUIRES TRACING

The method of tracing is the same for RICO as it is for the Currency & Proceeds section of 21 U.S.C. 881(a)(6) - DEA's civil forfeiture statute. But, since RICO is a criminal statute, and since every element of a criminal statute must be proven "beyond a reasonable doubt," the tracing requirements of RICO are much more demanding.

Tracing dirty money to a business beyond a reasonable doubt is very rarely possible. See Schultz, Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970, 83 Yale L.J. 1491 (1974); and Blakey, "On the Waterfront: RICO and Labor Racketeering, 17 Am. Cr. L. R. 341, 356 (1980).

For this reason, section 1962(a) of RICO will seldom be useful. Cases in which this section has been successfully employed include:

U.S. v. Alvarado, Cr. No. 76-318 (SDCAL. 1976)

U.S. v. McPartland, Cr. No. 76-52 (DORE. 1976)

U.S. v. McNary, Cr. No. 77-1023 (NDILL. 1976)

b ACQUIRES BY ILLEGAL ACTS

RICO's second criminal offense, 18 U.S.C. 1962(b), provides:

> "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt, to acquire...any interest, or control of any enterprise which is engaged in...interstate or foreign commerce."

Basically, this section makes it a crime to acquire an interest in, or control of, an enterprise by illegal acts of racketeering. "Elbowing" into an enterprise by extortion, bribery, or by any combination of the 32 crimes listed in RICO is the gist of this offense.

Cases in which this section has been used include:

U.S. v. Parness, 503 F.2d 430 (2 Cir. 1974)

U.S. v. Gambino, Cr. No. 77-1336 (2 Cir. 1977)

U.S. v. Ricciardi, Cr. No. 707-73 (DNY. 19)

c. ILLEGALLY USES

RICO's third criminal offense, 18 U.S.C. 1962(c), provides:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

This section makes it a crime to use an enterprise to commit acts of racketeering. Cases involving this section include:

U.S. v. Sutton, 605 F.2d 260 (6 Cir. 1979)

U.S. v. Swiderski, 593 F.2d 1246 (DC Cir. 1978)

U.S. v. Huber, 603 F.2d 387 (2 Cir. 1979)

U.S. v. Mandel, 591 F.2d 1347 (4 Cir. 1979)

U.S. v. Nerone, 563 F.2d 836 (7 Cir. 1977)

U.S. v. Brown, 555 F.2d 407 (5 Cir. 1977)

U.S. v. Regan, Cr. No. 76-1908 (4 Cir. 1977)

U.S. v. Hawes, 529 F.2d 472 (5 Cir. 1976)

U.S. v. Campanale, 518 F.2d 352 (9 Cir. 1975)

U.S. v. Dennis, 458 F.Supp. 197 (EDMO. 1978)

U.S. v. McMongle, 437 F.Supp. 721 (EDPA. 1977)

U.S. v. Field, 432 F.Supp. 55 (SDNY. 1977)

U.S. v. Forsythe, 429 F.Supp. 715 (WDPA. 1977)

U.S. v. Hansen, Cr. No. 76-129 (EDWIS. 19)

4. AN INTEREST IN AN ENTERPRISE

RICO defines "enterprise" as:

> "...any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4).

Businesses and labor unions are considered enterprises:

U.S. v. Swiderski, 593 F.2d 1246 (DC Cir. 1978) (restaurant used as front for cocaine trafficking)

U.S. v. Brown, 583 F.2d 659 (3 Cir. 1978) (car dealer)

U.S. v. Weatherspoon, 581 F.2d 595 (7 Cir. 1978) (beauty school)

U.S. v. Campanale, 518 F.2d 352 (9 Cir. 1975) (labor union)

U.S. v. Parness, 503 F.2d 430 (2 Cir. 1974) (foreign hotel)

U.S. v. DePalma, 461 F.Supp. 778 (SDNY. 1978) (theater)

Government units are considered enterprises:

U.S. v. Grzywacz, 603 F.2d 682 (7 Cir. 1979)

U.S. v. Frumento, 563 F.2d 1083 (3 Cir. 1977)

U.S. v. Rubin, 559 F.2d 975 (5 Cir. 1977)

U.S. v. Brown, 555 F.2d 407 (5 Cir. 1977)

U.S. v. Barone, Cr. No. 78-185-WMH (SD FLA. 1979)

U.S. v. Mandel, 415 F.Supp. 997 (DMD. 1976) (contra)

Foreign enterprises are included within RICO:

U.S. v. Parness, 503 F.2d 430 (2 Cir. 1974) (foreign hotel)

Courts disagree over whether the term "enterprise" includes illegal combinations of individuals associated solely to engage in racketeering activity. A minority of courts believes that RICO is only intended to prevent racketeers from infiltrating legitimate businesses. Therefore,

they interpret "enterprise" to apply only to "legitimate" businesses or organizations that have an existence separate from the racketeering activity:

U.S. v. Turkette, F.2d (1 Cir. 23 Sept. 1980, No. 79-1545, 1546)

U.S. v. Anderson, F.2d (8 Cir. 7 Aug. 1980, 27 Cr.L.R. 2518)

U.S. v. Sutton, 605 F.2d 260 (6 Cir. 1979)

The use of RICO against individuals associated solely to commit crimes and not connected to any so-called "legitimate" business will be impossible in these judicial jurisdictions.

The majority of courts, on the other hand, has interpreted "enterprise" to include combinations of persons associated purely for illegal purposes:

U.S. v. Rone, 598 F.2d 564 (5 Cir. 1979)

U.S. v. Aleman, 609 F.2d 298 (7 Cir. 1979)

U.S. v. Cappetto, 502 F.2d 1351 (7 Cir. 1974)

U.S. v. Elliot, 571 F.2d 880 (5 Cir. 1978)

U.S. v. McLaurin, 557 F.2d 1064 (5 Cir. 1977)

U.S. v. Morris, 532 F.2d 436 (5 Cir. 1976)

U.S. v. Hawes, 529 F.2d 472 (5 Cir. 1976)

U.S. v. Altese, 542 F.2d 104 (2 Cir. 1976)

U.S. v. Fineman, 434 F.Supp. 189 (EDPA. 1977)

U.S. v. Winstead, 421 F.Supp. 295 (NDILL. 1976)

U.S. v. Castellano, 416 F.Supp. 125 (ED NY. 1975)

Finally, the enterprise tied to a pattern of racketeering activity must have some impact, however minimal, on interstate or foreign commerce. 18 U.S.C. 1962; U.S. v. Cappetto, 502 F.2d 1351 (7 Cir. 1975); U.S. v. Fineman, 434 F.Supp. 189 (EDPA. 1977).

5. Shall Forfeit Upon Conviction

Forfeiture is one of the criminal penalties imposed by section 1963(a) of RICO:

> "Whoever violates any provision of section 1962...shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

This criminal forfeiture provision is MANDATORY; upon conviction, the court must order forfeiture under RICO. U.S. v. L'Hoste, 609 F.2d 796 (5 Cir. 1980).

Unlike the criminal forfeiture of a felon's entire estate permitted under early English law, the forfeiture required by RICO is somewhat narrow. U.S. v. Grande, 620 F.2d 1026 (4 Cir. 1980). Property forfeitable under RICO is limited to:

a. THAT INTEREST in the enterprise

Section 1963(a)(1) requires the forfeiture of "any interest he has acquired or maintained in violation of section 1962 ...." Several consequences flow from this wording.

First, criminal forfeiture has always been a matter of personal liability. Historically, only property belonging to the convicted felon could be subject to criminal forfeiture. Section 1963 reflects this limitation by referring only to interests which "he" - the defendant - has acquired or maintained in violation of RICO. Property belonging to innocent third parties generally cannot be subject to criminal forfeiture under RICO. This subject is discussed in more detail in the Remission section of this chapter.

Second, only that interest in the enterprise that was illegally acquired or maintained under section 1962 is forfeitable under section 1963(a)(1). Section 1962 of RICO makes it a crime to: (i) acquire an interest in an enterprise with dirty money; or (ii) acquire an interest in an enterprise by illegal acts; or (iii) illegally use an interest in an enterprise.

When section 1963(a)(1) talks of forfeiting "any interest...acquired or maintained in violation of section 1962," it is logical to conclude it is referring to interests in the enterprise. RICO does not reach income, proceeds or profits from racketeering, unless it happens to be invested in the enterprise under section 1962(a). As a general rule:

PROFITS ARE NOT FORFEITABLE UNDER RICO

U.S. v. Marubeni America Corp, 611 F. 2d 763 (9 Cir. 1980)

U.S. v. Thevis, 474 F.Supp. 117 (NDGA. 1979)

U.S. v. Meyers, 432 F.Supp. 456 (WDPA. 1977), rev'd on other grounds in U.S. v. Forsythe, 560 F.2d 1127 (3 Cir. 1977)

U.S. v. Mannino, Cr. No. 79-744 (SDNY. 21 April 80)

Compare this restrictive approach of RICO with 21 U.S.C. 848(a)(2)(A) and 21 U.S.C. 881(a)(6), which reach all profits or proceeds of the illegal activity. For an excellent discussion of RICO's forfeiture provisions see Taylor, Forfeiture Under 18 U.S.C. 1963 - RICO's Most Powerful Weapon, 17 Am.Cr.L.R. 379 (1980).

b. EVERYTHING AFFORDING A SOURCE OF INFLUENCE OVER THE ENTERPRISE

The language of section 1963(a)(2), quoted earlier, seems broad enough to cover almost anything that affords a source of influence over the enterprise.

It can even force office holders (e.g., governors, union officials) to forfeit their right to office. U.S. v. Rubin, 559 F.2d 975 (5 Cir. 1977).

6. RICO Conspiracies

"Conspiracy" is defined as an agreement between two or more persons to commit a substantive crime. The substantive crime need not actually be committed; the mere agreement, or partnership, to commit the crime is itself considered an offense.

Generally, a conspirator is criminally responsible for all crimes committed by his co-conspirators in furtherance of the conspiracy. Pinkerton v. U.S., 66 S.Ct. 1180 (1946).

Until the passage of RICO, two forms of conspiracies were recognized by the law: "Wheels" and "Chains."

a. Wheel Conspiracies

A "Wheel" conspiracy consists of one person at the "hub," who conspires individually with two or more persons who make up the "spokes" of the wheel. Unless the persons forming the spokes are aware of each other and agree with each other to achieve a common, illegal goal, the wheel is incomplete - it lacks a "rim" tying everyone together into one objective. Kotteakos v. U.S., 66 S.Ct. 1239 (1946).

Wheel conspiracies are very hard to prosecute, because a common agreement between the spokes is difficult to prove. Without good evidence of a "rim," there can be no conviction of the whole wheel. Also, without good evidence of a rim, the government is prohibited from even trying all the members of the wheel in one proceeding. This forces prosecutors to try a series of smaller conspiracies, each consisting of the hub and one of the spokes. As a result, only the person at the hub faces responsibility for all the crimes of the organization. Each spoke escapes responsibility for the crimes of the other spokes.

b. Chain Conspiracies

A "Chain" conspiracy exists when the criminal goal of the chain is absolutely dependent upon the successful participation of every member of the conspiracy. In other words, a chain conspiracy exists where, either by the nature of the goal, or by actual knowledge, each member, or "link," understands that the success of the scheme depends upon everyone in the chain. Blumenthal v. U.S., 68 S.Ct. 248 (1947).

Chain conspiracies are relatively easy to prosecute, as long as the members can be shown to have one common, interdependent goal, such as drug smuggling. U.S. v. Gonzalez, 491 F.2d 1202 (5 Cir. 1974); U.S. v. Bynum, 485 F.2d 490 (2 Cir. 1973); Sigers v. U.S., 321 F.2d 843 (5 Cir. 1963). But if an organization engages in a variety of crimes, having different goals (arson, murder, loansharking, drug trafficking, etc.) the ability to hold everyone responsible for all the organization's activities becomes very difficult under the chain conspiracy theory. U.S. v. Miley, 513 F.2d 1191 (2 Cir. 1975); U.S. v. Bertolotti, 529 F.2d 149 (2 Cir. 1975). And, without evidence that everyone has one common goal, all the members cannot be tried together in one proceeding.

c. Enterprise Conspiracies

RICO avoids the practical limitations on proving wheel and chain conspiracies by creating a new offense: "Enterprise Conspiracy."

Section 1962(d) makes it a separate crime to conspire to violate any of the three substantive offenses found in RICO, 18 U.S.C. 1962(a), (b) & (c). In effect, it makes an agreement to participate in an enterprise by engaging in a pattern of racketeering activity a new crime. U.S. v. Elliot, 571 F.2d 880 (5 Cir. 1978).

The enterprise may have a variety of different goals; so everyone is not in one chain. All of its members, or spokes, may not be aware of each other's various illegal activities; so there is no rim for the wheel. It does not matter. All that need be shown is each member's agreement to participate in the organization - the "enterprise" - by committing two or more acts of racketeering.

Enterprise Conspiracy facilitates mass trials. Everyone charged with conspiracy to participate in a RICO enterprise can be prosecuted together in one criminal proceeding.

In addition, Enterprise Conspiracy imposes separate, additional, criminal liability for agreeing to join a criminal organization.

The exact scope, or ramifications, of this new offense remains to be seen. But, Enterprise Conspiracy could be a major advance in what has been a long, losing war on organized crime.

7. RICO Bibliography

Readers interested in dissecting RICO should find these sources helpful:

U.S. Dep't. of Justice, Explanation of the Racketeer Influenced and Corrupt Organizations Statute (4th ed.)

Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. 1961-68: Broadest of the Federal Criminal Statutes, 69 J.Cr. L. & Criminology 1 (1978).

Blakey, "On the Waterfront:" RICO and Labor Racketeering, 17 Am.Cr.L.R. 341 (1980)

Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 Iowa L.R. 837 (1980).

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McClellan, The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties? 46 Notre Dame Lawyer 55 (1970)

Novot, Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in its Interpretation, 27 DePaul L.R. 89 (1977)

Schmidt, The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform, 33 Vand. L.R. 441 (1980)

Taylor, Forfeiture under 18 U.S.C. 1963 - RICO's Most Powerful Weapon, 17 Am.Cr.L.R. 379 (1980)

Note, Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO, 65 Vir. L.R. 109 (1979)

Note, Coverage and Application of the Organized Crime Control Act of 1970: The Anti-Racketeering Statute in Operation, 53 Chi. - Kent L.R. 498 (1976)

Note, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity," 124 U. PA. L.R. 192 (1975).

Note, Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970, 83 Yale L.J. 1491 (1973)

Note, Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. 1964 (1970), 53 Tex.L.R. 1055 (1975)

B. 848 - CCE

The Controlled Substances Act, Continuing Criminal Enterprise Offense, 21 U.S.C. 848, was passed on October 27, 1970, eight days after RICO was enacted. The overall purpose of the law was to strengthen law enforcement authority in the field of drug abuse. The purpose of section 848, in particular, was to severely punish the professional drug trafficker. Jeffers v. U.S., 97 S.Ct. 2207, 2219 n.26 (1977). To accomplish this, "848" contains a mandatory criminal forfeiture provision. In summary form, the elements of 848 are:

A LEADER who

IN CONCERT WITH 5 OR

MORE FOLLOWERS commits

A FEDERAL DRUG FELONY
as part of a

CONTINUING SERIES (3 or more) OF
FEDERAL DRUG CRIMES from
which he obtains

SUBSTANTIAL INCOME OR RESOURCES

Shall Forfeit Upon Conviction

HIS PROFITS,

ANY INTEREST IN, and

EVERYTHING AFFORDING A SOURCE
OF INFLUENCE OVER THE ENTERPRISE

The remainder of this section discusses each of these basic elements. A chart comparing the elements of 848 with RICO appears on page 327 of this Guide.

1. A LEADER

Unlike RICO, which can apply to any person in a criminal enterprise, section 848 is strictly limited to "organizers, supervisors or managers." 21 U.S.C. 848(b)(2)(A).

An organizer is a person who puts together people engaged in separate activities and arranges them in one operation or enterprise. A supervisor is a person who manages, directs, or oversees the activities of others:

U.S. v. Barnes, 604 F.2d 121 (2 Cir. 1979)

U.S. v. Valenzuela, 596 F.2d 1361 (9 Cir. 1979

U.S. v. Johnson, 575 F.2d 1347 (5 Cir. 1978)

U.S. v. Cravero, 545 F.2d 406 (5 Cir. 1976)

U.S. v. Collier, 358 F.Supp. 1351 (EDMICH. 1973)

A defendant need not occupy all three positions; he need only occupy one: either organizer, or supervisor, or manager:

U.S. v. Jeffers, 532 F.2d 1101 (7 Cir. 1976), rev'd on other grounds, 97 S.Ct. 2207 (1977)

And, a criminal organization can have more than one organizer, supervisor or manager. A single continuing criminal enterprise can result in more than one prosecutable leader:

U.S. v. Cravero, 545 F.2d 406 (5 Cir. 1976)

2. IN CONCERT WITH FIVE OR MORE FOLLOWERS

To be guilty of an 848 violation, a leader of a continuing criminal enterprise must commit certain crimes "in concert" with five or more of his followers.

The term "in concert" has been interpreted by the Supreme Court to require an agreement among the leader and five or more followers to commit drug crimes. In effect, a defendant must be the leader of a "wheel" or "chain" conspiracy involving five or more underlings to be guilty of 848:

Jeffers v. U.S., 97 S.Ct. 2207, 2215 (1977)

U.S. v. Barnes, 604 F.2d 121 (2 Cir. 1979)

U.S. v. Stricklin, 591 F.2d 1112 (5 Cir. 1979)

U.S. v. Michel, 588 F.2d 986 (5 Cir. 1979)

U.S. v. Johnson, 575 F.2d 1347 (5 Cir. 1978)

The leader need not have personal contact with the five or more followers. If the followers agree to act in concert with the leader, and the leader effectively "calls the shots," the existence of a middleman or the lack of personal contact is no defense:

U.S. v. Bolts, 558 F.2d 316 (5 Cir. 1977)

The leader and followers need never be present in the same location. The crimes they commit in concert need not occur at the same place:

U.S. v. Bolts, 558 F.2d 216 (5 Cir. 1977)

U.S. v. Sperling, 506 F.2d 1323 (2 Cir. 1974)

U.S.v. Fry, 413 F.Supp. 1269 (EDMICH. 1976)

Similarly, the leader and his followers need not be acting together at the precise same moment in time. It is sufficient if they work in concert during the life of the enterprise:

U.S. v. Barnes, 604 F.2d 121 (2 Cir. 1979)

U.S. v. Bolts, 558 F.2d 316 (5 Cir. 1977)

U.S. v. Sperling, 506 F.2d 1323 (2 Cir. 1974)

3. A FEDERAL DRUG FELONY

Unlike RICO, which relies on a wide variety of state and federal crimes to establish a pattern of racketeering activity, section 848 depends entirely upon the repeated commission of federal drug felonies to establish a continuing criminal enterprise.

4. CONTINUING SERIES (3 or more) OF FEDERAL DRUG CRIMES

The federal drug felony committed by the enterprise must be part of a continuing series of

federal drug law violations. The term "series" means "three or more" drug violations:

U.S. v. Valenzuela, 596 F.2d 1361 (9 Cir. 1979)

U.S. v. Michel, 588 F.2d 986 (5 Cir. 1979)

U.S. v. Fry, 413 F.Supp. 1269 (EDMICH. 1976)

U.S. v. Bergdoll, 412 F.Supp. 1308 (DDEL. 1976)

U.S. v. Collier, 358 F.Supp. 1351 (EDMICH. 1973)

The term "continuing" means enduring, spanning a definite period of time, with a single or substantially similar purpose:

U.S. v. Bergdoll, 412 F.Supp. 1308 (DDEL. 1976)

U.S. v. Collier, 358 F.Supp. 1351 (EDMICH. 1973)

5. SUBSTANTIAL INCOME OR RESOURCES

The fifth and final criminal element of 848 requires proof the defendant obtained substantial income or resources from the continuing criminal enterprise. The word "substantial" means of real worth and importance, of considerable value; valuable:

U.S. v. Collier, 358 F.Supp. 1351 (EDMICH. 1973)

The word "income" can include money or other property:

U.S. v. Jeffers, 532 F.2d 1101 (7 Cir. 1976)

Gross income is sufficient proof the defendant obtained substantial income. Proof of net income is not required. In other words, it is not necessary to identify any accumulated gain, or net profit, made by the defendant:

U.S. v. Jeffers, 532 F.2d 1101 (7 Cir. 1976), rev'd on other grounds, 97 S.Ct. 2221 (1977)

345-769 0 - 81 - 22

U.S. v. Sisca, 503 F.2d 1337 (2 Cir. 1974)

U.S. v. Manfredi, 488 F.2d 588 (2 Cir. 1973)

Therefore, tracing drug money to specific assets of the defendant is not required to convict under section 848. Proving a "Swollen Estate" by IRS's Net Worth method is not required to convict under 848. The jury is permitted to conclude the defendant obtained substantial income from the drug enterprise simply by considering:

a. his position in the organization,

b. the volume (and value) of drugs transferred, and

c. the sums of money changing hands.

* U.S. v. Sisca, 503 F.2d 1337 (2 Cir. 1974)

U.S. v. Gantt, 617 F.2d 831 (DCCir. 1980)

U.S. v. Barnes, 604 F.2d 121 (2 Cir. 1979)

U.S. v. Valenzuela, 596 F.2d 1361 (9 Cir. 1979)

U.S. v. Kirk, 534 F.2d 1262 (8 Cir. 1976)

U.S. v. Jeffers, 532 F.2d 1101 (7 Cir. 1976)

U.S. v. Sperling, 506 F.2d 1323 (2 Cir. 1974)

6. Shall Forfeit Upon Conviction

Like RICO, mandatory criminal forfeiture is one of the penalties imposed by 848. And, like RICO, the criminal forfeiture provisions of 848 do not apply to all of the defendant's property:

> "Any person who is convicted...of engaging in a continuing criminal enterprise shall forfeit to the United States -
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise."

The original drafts of 848 placed the burden on the defendant to prove that any substantial income or resources in his name, or under his control, were not derived from drug trafficking. See S.3246 (Bill introduced by Senator Dodd, December 16, 1969)(Act passed by Senate on January 28, 1970). But Congress ultimately rejected this approach. See H.R. 13743 (Bill introduced by Representative Staggers, September 11, 1969); and see the Dingell Amendment, 1970 U.S. Code Cong. & Admin. News, pg. 4650 - 4651.

The burden is now on the Government to prove what property, interests or contractual rights of the defendant are forfeitable under the statute.

a. HIS PROFITS

Unlike RICO, section 848 expressly requires the criminal forfeiture of all profits obtained by the defendant from the continuing criminal enterprise.

> "(Section 848)...is directed at the professional criminal and is designed to make the cost of doing business too high for him to continue in operation."
>
> * * *
>
> "(T)he defendant will forfeit to the United States all illegal profits no matter how disguised or where invested." 116 Cong. Rec. 1663 - 1664 (Remarks of Senator Hruska).

Section 848 does not define "profits." Generally, the term refers to financial "GAIN" realized from some transaction. See Black's Law Dictionary, (5th ed. 1979). The likely interpretation is: all financial gain of any kind realized by the defendant from the illegal drug enterprise.

While proof of financial gain (net profits) is not required to convict under 848, identifying financial gain seems indispensable to the forfeiture of profits under the statute.

The identification process need not, in all probability, involve "strict tracing" of money from drug exchanges to specific assets of the defendant. The courts have already determined that strict tracing is not needed to convict under 848. And, strict tracing may be required in civil forfeiture actions against specific pieces of property (in rem), but it was not historically required in criminal forfeitures against persons (in personam). Finally, if Congress had wanted to require strict tracing of profits in 848, it could have inserted the requirement in the statute or, at least, it could have used terms in 848 normally associated with tracing, such as the word "proceeds." It did neither. And, the legislative history of 848 is silent on the matter.

The method of proof most likely to be acceptable in forfeiture proceedings under 848 is the "Net Worth" method of circumstantial proof used by IRS. It measures the growth, "swell," or gain in a defendant's estate for a given period of time. Unless this gain is attributable to legitimate sources of income, it is virtually certain it represents profits from illegal drug trafficking.

b. ANY INTEREST IN

Like RICO, the forfeiture provisions of 848 reach any of the defendant's interest in, or claim against, the enterprise. This section assumes that the enterprise has seizable assets. If the enterprise consists solely of individuals associated to distribute drugs, there may be no assets belonging to the enterprise to forfeit.

c. EVERYTHING AFFORDING A SOURCE OF INFLUENCE OVER THE ENTERPRISE

Again, like RICO, section 848 reaches property or contractual rights of any kind affording the defendant a source of influence over the enterprise.

Rico	848
Any Person who commits	**A Leader** who
	In Concert with 5 or More Followers commits
Certain Crimes As part of a	**A Federal Drug Felony** As part of a
Pattern (2 or more) **of Racketeering** from which he	**Continuing Series** (3 or more) **of Federal Drug Crimes** from which he
Acquires with Dirty Money or **Acquires by Illegal Acts,** or **Illegally Uses**	Obtains
An Interest In An Enterprise affecting commerce	**Substantial Income or Resources**
Shall forfeit upon conviction	Shall forfeit upon conviction
That Interest, and	**His Profits,** **Any Interest in, and**
Everything Affording A Source of Influence Over the Enterprise.	**Everything Affording A Source of Influence Over the Enterprise.**

NOTES

C. RULE 7 NOTICE REQUIRED

The constitutional right to notice of impending forfeiture is not limited to civil cases; it applies to criminal forfeitures as well. See Federal Rules of Criminal Procedure, Rule 7(c)(2), 92 S.Ct. 2881, 2894(1972); and see Notes of Advisory Committee on Rule 7(c)(2), 54 F.R.D. 143, 156-157(1972). Therefore, Rule 7(c)(2) states:

> "Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture."

Interests and property subject to criminal forfeiture should be described with specificity in the indictment or information. cf. U.S. v. Grammatikos, No. 80-1065 (2 Cir. Sept. 5, 1980); U.S. v. Bergdoll, 412 F.Supp. 1308 (DDEL. 1976).

The connection between the identified property and the criminal activity that subjects it to forfeiture should be disclosed in general terms. U.S. v. Thevis, 474 F.Supp. 117 (NDGA. 1979).

Property not described in the indictment or information cannot be declared criminally forfeited. See U.S. v. Hall, 521 F.2d 406 (9 Cir. 1975). Failure to describe property potentially subject to forfeiture simply bars the criminal forfeiture of that property; it does not affect the validity of the indictment or information. See Notes of the Advisory Committee on Rule 7(c)(2), 25 Cr.L.Rpt. 3049 (May 2, 1979), also reported in U.S. v. Brigance, 472 F.Supp. 1177, 1181 - 1182 (SDTEX. 1979); U.S. v. Meyers, 432 F.Supp. 456 (WDPA. 1977).

Note that Rule 7(c)(2) applies only to criminal forfeitures. See Rule 54(b)(5), F.R.Cr.P. Property subject to civil, in rem, forfeiture need not be specified in a related criminal indictment or information. U.S. v. Brigance, cited above.

D. ASSET SEIZURES

Faced with notice that the Government intends to criminally forfeit property, the instinct of a defendant is to transfer the property by sale

or gift, or to otherwise remove the property to avoid forfeiture. This creates special problems in RICO and 848 cases.

1. Time of Forfeiture

We saw in Chapter V of this Guide that the Supreme Court has established a presumption that the statutory forfeiture of both real and personal property takes place at the very moment of illegal use, at the very moment of the criminal act, unless the forfeiture statute in question specifically provides otherwise. U.S. v. Grundy, 3 Cranch (7 U.S.) 337, 2 L.Ed. 459 (1806); U.S. v. 1960 Bags of Coffee, 8 Cranch (12 U.S.) 398, 3 L.Ed. 602 (1814); U.S. v. One Hundred Barrels Distilled Spirits, 81 U.S. (14 Wall) 44, 20 L.Ed. 815 (1872); U.S. v. Stowell, 133 U.S. 110 S.Ct. 244, 33 L.Ed. 555 (1890).

Because criminal forfeiture had been virtually banned in the United States until 1970, the dozens of reported cases echoing the Supreme Court's rule applied the presumption to civil forfeiture statutes. But, the wording of the presumption is broad enough to apply to all statutory forfeitures, whether civil or criminal. U.S. v. Stowell, 10 S.Ct. 244 at 247 (1890).

Neither RICO, nor 848, nor their legislative histories discusses the time that mandatory criminal forfeiture is to take place: At the time of the crime? At the time of arrest? At the time of conviction? At the time of judgment of forfeiture? At the time of seizure or attachment? At the time all criminal appeals have been exhausted?

Since the forfeiture is mandatory and no time is specified, the Supreme Court's presumption is that forfeiture takes place at the moment the assets are illegally used under these statutes. At that instant all rights and legal title pass to the Government. Later proceedings simply confirm the forfeiture which has already taken place. No third party can acquire a legally enforceable interest in the property after the illegal use or activity.

2. Time of Seizure

Upon conviction, RICO instructs the courts to authorize the Attorney General to seize all property or interests declared forfeited under the statute. 18 U.S.C. 1963(c).

Section 848 (21 U.S.C.), on the other hand, is silent on when seizure should occur, but judges and scholars apparently believe the procedure under 848 should mirror RICO. In 1972 the Supreme Court amended Rule 32(b)(2) of the Federal Rules of Criminal Procedure to provide:

> "Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper."

The Notes of the Advisory Committee make clear the Supreme Court intended Rule 32(b)(2) to apply to both RICO and 848.

The negative implication of these provisions seems to be that the Attorney General cannot seize assets forfeitable under RICO or 848 until after there has been a conviction, declaration of forfeiture, and court order of seizure.

3. Freezing Assets

Between indictment, conviction and seizure, both the Government and innocent third parties can be hurt if the defendant is able to remove or transfer forfeitable property. The Government will be unable to enforce its rights in property it cannot locate. Third parties will be hurt if forfeitable assets are traced to their hands. Remember, forfeiture takes place at the moment of illegal use. No third parties, even bona fide purchasers, can take enforceable title to the property after illegal use. The Government has the right to forfeitable assets regardless of the transfer.

NOTES

a. Injunctions

To prevent this, both RICO and 848 authorize the federal courts:

> "...to enter such restraining orders or prohibitions, or to take such other actions, including...the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture..., as they shall deem proper." 18 U.S.C. 1963(b); 21 U.S.C. 848(d).

This power to maintain the status quo should be used routinely. It protects the defendant; he can possess, use and maintain the property pending a possible acquittal. It protects the Government; the value of the property is maintained in the hands of the defendant, but the property cannot be removed beyond Government reach. And it protects innocent third parties from unwittingly buying forfeitable assets to which they cannot possibly take enforceable title.

Also, freezing assets does not deny the defendant the presumption of innocence associated with his trial. Nor does it deprive him of his right to effective counsel, even though it blocks his use of forfeitable assets to pay attorney fees:

U.S. v. Bello, 470 F.Supp. 723 (SDCAL. 1979)

U.S. v. Thevis, Cr. 78-180A (NDGA 1979) (order issued August 3, 1978)

U.S. v. Scalzitti, 408 F.Supp. 1014 (WDPA. 1975)

Only one court has refused to routinely issue such orders. U.S. v. Mandel, 408 F. Supp. 679 (DMD. 1976) vacated 591 F.2d 1347 (4 Cir. 1979). Unfortunately, the court was apparently unaware of the danger to third parties. Analyzing the problem solely from the points of view of the defendant and the Government, the Mandel court refused to enjoin any transfer of the property.

NOTES

b. Lis Pendens

Most states have statutes which permit contestants in a law suit affecting real estate to record notice of the suit on county land records, even before the outcome of the contest is decided. These statutes are usually referred to as "Lis Pendens" statutes. Basically, they protect innocent third parties from buying property subject to litigation.

In 1958, Congress passed a law designed to make these Lis Pendens statutes applicable in federal cases. Under 28 U.S.C. 1964, where parties in federal court claim an interest in real estate located in a state with a Lis Pendens statute, there must be compliance with that statute in order to give constructive notice of the federal court action. A serious question exists as to the applicability and effect of 28 U.S.C. 1964 in federal forfeiture cases. The wording and the history of section 1964 are totally silent concerning forfeiture. See 1958 U.S. Code Cong. & Admin. News, pp. 3654 - 3658.
In all likelihood, Congress never considered the problem.

Until the question is resolved, Lis Pendens notices concerning real estate subject to forfeiture should be filed as soon as possible. Even if the courts ultimately determine it is not required, it is in the public interest to warn potential buyers that the property is subject to forfeiture.

c. Obstruction of Justice

If a person has been put on notice of the Government's intent to seize property, and he purposely removes, destroys or transfers it in an attempt to prevent seizure, is he guilty of a crime?

Apparently, yes. The destruction or "removal" of property to prevent seizure is

a federal offense; it is a form of obstruction of justice. Title 18, United States Code, Section 2232 provides in pertinent part:

> "Whoever, before, during, or after seizure of any property...in order to prevent the seizure...destroys or removes the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both."

Government agents need not be present when the removal occurs. No force or threat of force need be involved. U.S. v. Spicer, 547 F.2d 1228 (5 Cir. 1977); U.S. v. Woodring, 536 F. 2d 598 (5 Cir. 1976). And see U.S. v. Owens, 511 F.2d 1205 (4 Cir. 1975) and U.S. v. Scolnick, 392 F.2d 320 (3 Cir. 1968). The gist of the crime is the awareness of the impending seizure, combined with an attempt to prevent it.

To a drug trafficker trying to protect millions of dollars worth of assets the $2,000 fine and one year prison term provided by section 2232 will probably be meaningless. But, to an attorney or other non-defendant, prone to assisting the trafficker, the prison term in section 2232 should be an effective deterrent. Defendants and their attorneys should be routinely notified that any attempt to "remove" forfeitable assets pending the outcome of criminal proceedings will be considered a violation of 18 U.S.C. 2232.

d. Civil Seizure

A fourth way to prevent the removal of property subject to criminal forfeiture is to seize it for civil forfeiture under 21 U.S.C. 881(a)(6). Assets forfeitable under section 881 are subject to prompt seizure. No pre-seizure notice or hearing are required.

Assets subject to both civil and criminal forfeiture can easily be "frozen" by quickly starting civil proceedings against them. Once the civil action is filed and the assets are seized, the civil litigation can be stayed pending the outcome of criminal proceedings against the owner. See page 232 of this Guide.

E. REMISSION UNDER RICO & 848

Protecting the property of innocent parties from criminal forfeiture involves two separate, distinct processes.

First, all assets belonging to the defendant at any time during the course of the criminal enterprise and which are technically subject to forfeiture because he used or acquired them illegally, must be identified with accuracy. Distinguishing the non-forfeitable interests of innocent parties from the forfeitable interests of the defendant is a necessary part of this process.

Second, the claims of innocent parties who in good faith took interests in forfeitable property after it became subject to forfeiture, must be considered for possible pardon, or remission. Because there is some confusion over the distinction between these two processes, they are covered in this section on Remission.

1. Identifying Forfeitable Interests

Accurately identifying the defendant's forfeitable property is essential to criminal forfeiture. Remember, unlike the criminal forfeiture of a felon's entire estate permited under early English law, criminal forfeiture under RICO and 848 is limited to property connected in certain ways to its owner's crimes. Also, criminal forfeiture has always been a matter of personal liability. Only property belonging to the defendant at the time of illegal acquisition or use can be subject to criminal forfeiture. See U.S. v. Grande, 620 F.2d 1026 (4 Cir. 1980).

The formal process of identifying the forfeitable interests of the defendant begins before trial. As we have seen, Rule 7(c)(2) of the Federal Rules of Criminal Procedure requires the Government to identify property subject to criminal forfeiture in

NOTES

the indictment. While a general description satisfies the "Notice" requirement of Due Process, see U.S. v. Gramatikos, No. 80-1065 (2 Cir. September 5, 1980); U.S. v. Thevis, 474 F.Supp. 134,143 (NDGA. 1979); U.S. v. Bergdoll, 412 F.Supp 1308 (DDEL. 1976), the better practice is to identify the property with specificity.

The introduction of evidence at trial concerning the nature and extent of the defendant's property and its connection to the illegal enterprise furthers the identification process. Based upon this evidence, the jury is required to deliberate the matter and return a special verdict on precisely what property interests of the defendant are subject to criminal forfeiture. Rule 31(e), F.R.Cr.P., provides:

> "(e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subsubject to forfeiture, if any."

The court should be requested under Rule 30, F.R.Cr.P., to instruct the jury to be exact in determining the extent of the defendant's forfeitable interests. See U.S. v. Grande, 620 F.2d 1026 (4 Cir. 1980). This step contributes to a much more accurate identification of forfeitable property. Finally, Rule 32(b)(2) of the Federal Rules of Criminal Procedure provides:

> "(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper."

NOTES

Presumably, the forfeitable property identified in the judgment must mirror the property identified as forfeitable by the jury. U.S. v. L'Hoste, 609 F.2d 796 (5 Cir. 1980); cf U.S. v. Huber, 603 F.2d 387 (2 Cir. 1979). But the court should have some discretion to correct clearly erroneous determinations of property rights.

Ostensibly, the process of identifying forfeitable property ends with the judgment of criminal forfeiture under Rule 32(b)(2). Neither RICO or 848, nor the Federal Rules of Criminal Procedure, provides for any further judicial proceedings. Logic dictates, however, that some additional proceedings are required.

Remember, civil forfeiture actions are characterized as in rem proceedings. In rem proceedings can determine the property rights of "the whole world", including parties not before the court. VanOster v. Kansas, 47 S.Ct. 133 (1926); Gelston v. Hoyt, 2 Wheat. 247 (1818). Criminal forfeitures, on the other hand, are characterized as in personam proceedings. And, in personam actions can determine only the rights of parties before the court.

Therefore, judgments of criminal forfeiture cannot possibly determine the rights of parties who are not before the court and who have not been able to appear to defend their interests. To interpret a judgment of criminal forfeiture as binding third parties creates serious constitutional problems under the Due Process Clause. See page 212 of this Guide for a detailed discussion of this question.

The likely solution is for the court to require the Attorney General, as a condition of seizure under Rule 32(b)(2) and 18 U.S.C. 1963(c), to serve a copy of the judgment on all potentially interested third parties, such as business partners of the defendant, his spouse, etc. A written notice of forfeiture should accompany the judgment and inform parties that

345-769 0 - 81 - 23

they may present their claims, if any, to the court and that they are entitled to a hearing on the issue. A similar notice should be published in a periodical of general distribution to alert potentially unknown claimants. These notices, combined with the seizure of the property by the Attorney General, should effectively give the court in rem jurisdiction over the property.

The jurisdiction of the court to adjudicate third-party claims of ownership in post-trial proceedings should be inferred as part of its continuing post-conviction, or supervisory powers. See U.S. v. Wright, 610 F.2d 930 (DC Cir. 1979); U.S. v. Chapman, 559 F.2d 402 (5 Cir. 1977).

Alternatively, post-conviction jurisdiction should be found in 28 U.S.C. 1355:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress."

Or, the power of the court to determine third party claims in post-trial proceedings should be found in the doctrine of ancillary jurisdiction. See Aldinger v. Howard, 96 S.Ct. 2413 (1976); U.S. v. 17,400 Dollars In Currency, 524 F.2d 1105 (10th Cir. 1975); U.S. v. $22,993.00 In Currency, 332 F.Supp. 1277 (EDLA. 1971). In Aldinger, the Supreme Court explained:

> "The doctrine of ancillary jurisdiction . . . is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." 96 S.Ct. at 2419.

Finally, in cases involving 848, Continuing Criminal Enterprise, jurisdiction to conduct post-trial proceedings is expressly conferred on the courts by 21 U.S.C. 881(d) and 19 U.S.C. 1608. Section 881(d) provides in part:

> "All provisions of law relating to the seizure, summary and judicial forfeiture and condemnation of property for violation of the customs laws . . . shall apply to seizures and forfeitures incurred . . . under the provisions of THIS TITLE, insofar as applicable and not inconsistent with the provision hereof . . . ." (emphasis is not in the original).

Note the emphasized language; 881(d) makes the customs procedures applicable to all forfeitures under the Controlled Substances Act, including Sections 881(a), 848 and 824(f). Therefore, a post-conviction, in rem proceeding is available to third parties in 848 cases under 19 U.S.C. 1608.

The function of the court in post-conviction proceedings is to determine the exact nature and extent of all property interests asserted by third parties. However, the court's power to protect third party interests from forfeiture is limited to property rights acquired before the illegal acquisition or illegal use of the property by the defendant. Remember, forfeitable property is like stolen property; no one can take enforceable title to it after the illegal activity that makes it forfeitable. U.S. v. Stowell, 10 S.Ct. 244, 247 (1980).

For example, suppose H and W live in a community property state and they have worked for years to establish a successful business. If H succumbs to financial temptation and uses the business as a front to distribute drugs, and if he is convicted of violating RICO or 848, only his share of the business is forfeitable.

W can appear as a claimant in post-conviction proceedings to identify the precise extent of her interests in the business and ask the court that they be partitioned, or protected in some way from forfeiture. She has an absolute right to such judicial protection because her interests in the property arose before the activity of her husband which subjected his interests to forfeiture. The court has the power to protect her rights under 18 U.S.C. 1963(c) and 21 U.S.C 848(d) because her husband's crimes cannot subject her previously established property rights to criminal forfeiture.

On the other hand, suppose H and W live in a community property state and during the course of their marriage, H acquires $1,000,000 from the sale of marihuana. If H is convicted of violating 848 and the money is declared to forfeitable profits, W can appear in post-conviction proceedings and assert a community property interest in half the funds, but the court cannot protect her from forfeiture. Her asserted interest arose after the activity (the sales) which gave rise to the forfeiture. She could not acquire an enforceable property right just as she could not acquire an enforceable interest in property stolen by her husband during their marriage. W's only recourse is to petition the Attorney General for a pardon of half the funds. U.S. v. L'Hoste, 609 F.2d 796 (5th Cir. 1980). See pages 207-211 of this Guide for a detailed discussion of other after-acquired rights.

2. Remission of Criminal Forfeitures

Remission is distinct from the determination that property is technically forfeitable. Remission is a form of pardon. The power to remit or mitigate forfeitures under RICO and 848 belongs to the Attorney General, not the courts. 18 U.S.C. 1963(c); 21 U.S.C 881(d); 19 U.S.C. 1618; Ex. Ord. No. 6166, June 10, 1933 (following 5 U.S.C. 901); 28 CFR 9.1.

In theory, the need for remission in criminal forfeiture cases is very limited. First, the previously acquired property rights of non-convicted third parties cannot be subject to criminal forfeiture. As we just discussed, they are subject to judicial protection in post-conviction forfeiture proceedings. Therefore, a pardon (remission) by the Attorney General will not be required.

Second, remission has never been granted to persons who knowingly violated the law. 19 U.S.C. 1618. Therefore, remission certainly will not be granted to a defendant convicted of RICO or 848.

Remission is likely to be appropriate in criminal forfeiture cases only when an innocent third party has taken an interest in the defendant's assets after the time they became forfeitable. While such after-acquired interests are technically unenforceable in court, remission seems desirable. Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (5 Cir. 1960). This is especially true when the third party could have been prevented from acquiring his interest if the Government had made an early seizure or the court had issued a timely restraining order against the defendant.

IX. ENFORCEMENT IMPLEMENTATION

NOTES

A. INTRODUCTION

The legal background presented on the various forfeiture avenues available to you as drug agents is only of academic importance until it is applied to daily enforcement activities. The bulk of the case law on forfeitures under these statutes stem from such daily activities. The use of forfeiture may have previously been approached as an addendum to other enforcement actions; however, this is no longer the case. The use of forfeiture statutes will further our efforts to immobilize drug trafficking groups.

B. THREE DIMENSIONAL APPROACH

The Drug Enforcement Administration is pursuing an integrated enforcement program which is three dimensional in nature. The effectiveness of this effort will focus on:

1. Trafficker Arrests
2. Drug Removal
3. Asset Removal

These activities are taken in concert; to pursue one and ignore another is less than effective. For example, to arrest and subsequently incarcerate a trafficker but ignore legal removal of his assets permits the trafficker the latitude of re-investing his illicit wealth through confederates still at large. Most important, asset removal strikes at the reason for illicit drug trafficking--large, quick monetary gain. Violators often view arrest and incarceration as a viable alternative if their profits will remain intact. In this context you can see the benefit of proceeding on all three fronts to the extent that your evidentiary situation permits. No one disputes that it is a difficult undertaking but current results indicate it is a worthwhile one.

The concept may be considered new but we can draw upon past experiences to show the previous impact of financial information on the traditional single dimension of trafficker arrests and prosecution. Such experience is cited by Assistant U.S. Attorney Robert J. Perry who observes that:

"Financial information has tremendous impact! Don't overlook the value of financial information in narcotics cases. Everyone understands the value of money. The average juror doesn't know anything about narcotics trafficking, but he knows the value of money and he has probably never seen $20,000 cash at one time. Evidence that your defendant was purchasing luxury cars, homes, boats, etc., when he had no apparent legitimate source of income will have far greater meaning for the average juror than the fact the defendant had a quantity of narcotics with him when he was arrested.

--Financial information is easy to find, and is extremely reliable. It doesn't cause the headaches that informants sometimes cause. (Documents can't be cross-examined.)

--Financial information can be helpful in identifying the leaders of an organization.

--Financial information makes an impact on prosecutors, jurors, and judges -- it frequently causes better prosecutions, quicker convictions, and longer sentences. (It is also helpful in bail arguments.)"

As you can see, these dimensions are interwoven and are fluid, not static.

C. INTEGRATED ENFORCEMENT PROGRAM

The following chart depicts DEA's Integrated Enforcement Program showing the relationship of each dimension.

NOTES

DEA Integrated Enforcement Program

Trafficker Arrests	Drug Removal	Asset Removal
G-DEP Grower Manufacturer Financier Manager Courier Peddler	Heroin Cocaine Dangerous Drugs Marihuana	Currency Securities Other Things of Value Conveyances Real and Personal Property Equipment
	Enforcement Approaches	
Intelligence Substantive & Conspiracy Cases CENTACs & Mobile Task Forces Special Action Office	Eradication Interdiction Undercover Buys Seizures Illicit Laboratories	18 USC 1961-1964 21 USC 848 21 USC 881 Interagency, Foreign and State/Local Cooperation

Illustration #1

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Which DEA Cases Involve Asset Removal/ Financial Investigation?

The policy of DEA requires that all Class I and II cases employ efforts investigating the financial aspects of drug trafficking. This is in line with our emphasis on that violator level. It is not a stop sign. To be successful in this dimension of enforcement, we must be constant. Our experience is that cash seizures alone in all violator classifications makes it beneficial to the government to employ this action against all levels of violators. Large sums of "drug" cash in the hands of a lackey often means he has a high level connection - directly or indirectly. As a drug agent, don't ignore it.

D. IMPLEMENTATION

1. Definition

In order to pursue this three dimensional approach, a working definition for the "financial investigation" in drug cases has emerged. A DEA "financial investigation is the process of identifying through drug investigation, financial information/evidence which will result in the prosecution of drug violators, as well as the identification and seizure of illicit profits and/or assets. This process enhances DEA's investigatory efforts from the most basic to complex conspiracy investigations."

2. The Basic Investigation

Past experience reflects that we have looked at financial aspects of drug trafficking on an after-the-fact basis. In many instances this may have been the only exposure to a violator's wealth. Often it is in the form of large sums of cash seized: tens, hundreds of thousands or even millions of dollars. In dealing with these instances we are beginning to understand the value of the application of the forfeiture avenues available to us, particularly the civil sanctions of 21 USC 881 (a)(6). We cannot wait until

after a drug trafficking investigation has been completed and then re-investigate the facts. To fully implement the three dimensional concept, the total drug investigation case must include the answers to the usual basics - Who? What? When? Why? and How? and further include HOW MUCH? What did the violator do with his drug profits? Your review of the outline of the legal requirements for forfeiture of violators' wealth boils down to the answers to these basic questions.

Just as you have routinely questioned cooperating individuals and sought assistance from other knowledgeable sources on drug defendants and the drugs themselves, now you must include information pertaining to drug related money and assets. You must include this information in the reports of investigation of your case as it develops. At the conclusion of your investigation you will be prepared to secure arrest warrants, search warrants or seizure warrants.

3. Time Line Relevance

When evaluating the relationships of a drug violator's wealth to his drug trafficking, the appearance of wealth is an important factor to be related to the substantive and overt acts of the trafficking. We are speaking in terms of a time line. It may be of a short duration such as one week or one month or a period of years, but the relationship of the facts in time are as important to the seizure of assets, as to the seizure of of drugs. The following example is an indication of the type of procedure you can employ.

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Time Line Evaluation

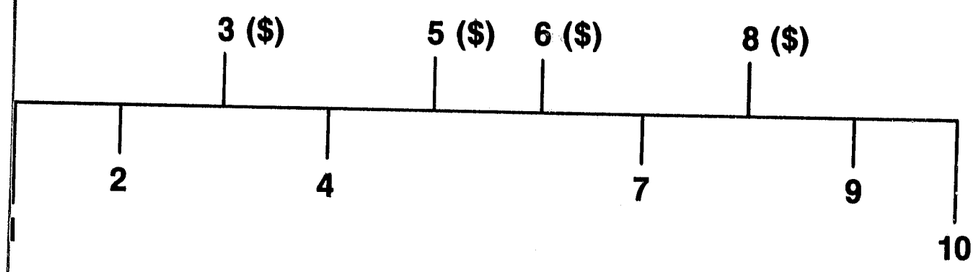

Illustration #2

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1-You receive the initial information indicating an individual is trafficking in drugs.

2-You develop an informant/witness who has details of the trafficker's operations.

3($)-While securing information from the CI on the drug trafficking, question the CI about the money aspects of the operation, i.e., the price of a unit of drugs; $/oz; $/kilo, etc.; or any trappings of wealth the defendant may have.

4-You may employ an undercover penetration.

5($)-The conversations you may obtain from a defendant could be a giant step in later forfeiture of any of his assets.

6($)-Surface investigation of the violator can give you possible indications of further avenues to pursue:

-Does his telephone toll activity reflect calls to banks or financial services or realtors? Later interview of these parties could be revealing.

-Checks of records for real estate transactions or vehicle purchases are points you could use to establish probable cause for forfeiture or seizure. Should you identify such transactions, determine the methods of payment, i.e., cash, check, etc.

7-You establish, through undercover purchase, drug seizure or witness testimony (or hearsay), the date or dates of drug deals and the amount of money involved.

8($)-Surveillance or other method leads you to a bank the violator deals with. Through the use of subpeona you determine he has a safety deposit box and records indicate he entered the box the day after the Item #7 deal. Remember you are always developing probable cause to take action.

9-The case is near termination and you execute arrest and search warrants. These situations present one of the most propitious moments in your investigation to secure valuable documentary evidence. Remember to establish in your warrant application your authority to search and seize such evidence. For example, if you locate documents that indicate a defendant has income of little note, but lives extravagantly, you have another piece of evidence, which may support a conviction, forfeiture or both.

10-Case complete-Defendant arrested and convicted.
-Contraband drugs are seized or trafficking evidence introduced.
-Assets of the violator are seized and forfeited.

The preceding ten points may seem simplistic, but they represent occurrences directly selected from recent DEA enforcement action. We could not possibly cover every circumstance you may encounter, but if you apply such logic to your investigations, you will observe that the "financial investigation" of drug money is not new. It is a valuable inclusion in your case which may have been previously ignored.

4. Which Statute to Use

In drug law enforcement, or law enforcement of any type, the crucial consideration is evidence availability. The mere knowledge that a violator has wealth is simply not enough. As the review of the forfeiture statutes clearly indicates, you must, to varying degrees, directly associate the wealth, money, etc., to drug trafficking. The actual selection process requires the agent to have a personal understanding of his capabilities under the law and to effectively communicate with the prosecutor.

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It is to your advantage to meet with your prosecutorial counterparts and discuss the issue of pursuing violator asset forfeiture. Understanding and communication of this enforcement process will lead to smoother cooperation in the pursuit of the common goals: conviction of the guilty, seizure of illicit drugs and illicit assets, and the enhancement of your profession.

This interaction becomes a matter of resources: investigative, prosecutorial and judicial. The availability and capability of these resources will affect the results you achieve.

The limited resources available to drug law enforcement indicates we must be flexible. The decision to utilize a particular statute, such as 21 USC 881 (a)(6), a civil action, or 21 USC 848, a criminal action, affects the extent of the investigation itself. You, as an investigator, will have to present a higher degree of proof in a criminal action than a civil action. This may require more time or money.

The prosecutor's office also has resource concerns. The division of labor between the civil division and criminal division affects the investigator. Attorneys representing these areas have somewhat different strategies and concerns. Each must smoothly interact at the appropriate time to be effective. The degree of their real expertise is a resource matter.

The resources of the courts also comes into play, such as the number of judges, and the number of cases on the docket. The pressures on the court calendar will affect the prosecutor's situation and subsequently you as an investigator. For example, historically complex criminal cases such as "Continuing Criminal Enterprise" charges (21 USC 848), require a great deal of time and expense to the court. This is due to the more extensive proofs required.

The melding of these three resource areas of concern call for flexibility in approach. You must be aware of your options. Your decisions will be influenced by the evidence you have and your evaluation of the resources available to you. You will have to decide whether to proceed with a distribution charge (21 USC 841(a)(1)) or conspiracy (21 USC 846) and civil forfeiture under 21 USC 881 or the application of Continuing Criminal Enterprise (21 USC 848). The individual capabilities of you, your prosecutorial counterpart, along with the court calendar will temper this decision.

PREFERENCE:

The DEA views Title 21 USC 881(a)(6) as our primary tool in removal of the traffickers' assets. This is not to exclude other avenues. The basis for this view is the civil litigation nature of the proceedings vis-a-vis criminal prosecution. The drug agent is faced with the development of evidence on a probable cause level as opposed to proof beyond a shadow of doubt in criminal proceedings. This is not to say that we will proceed in a whimsical manner, but it does give us a degree of latitude well founded in case law. It gives us a fighting chance. The remainder of this section will address asset removal as encountered in the broader perspective of federal drug case development.

5. Federal Drug Case Development and Asset Removal

It was mentioned that DEA is striving for an "integrated enforcement program." This requires standard operating procedures.

Illustration #3 is designed to show you the relationship of case development based upon statutory authority. Your comprehension of this illustration should provide you with a rational and logical path during your investigations.

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Federal Drug Case Development And Evolution

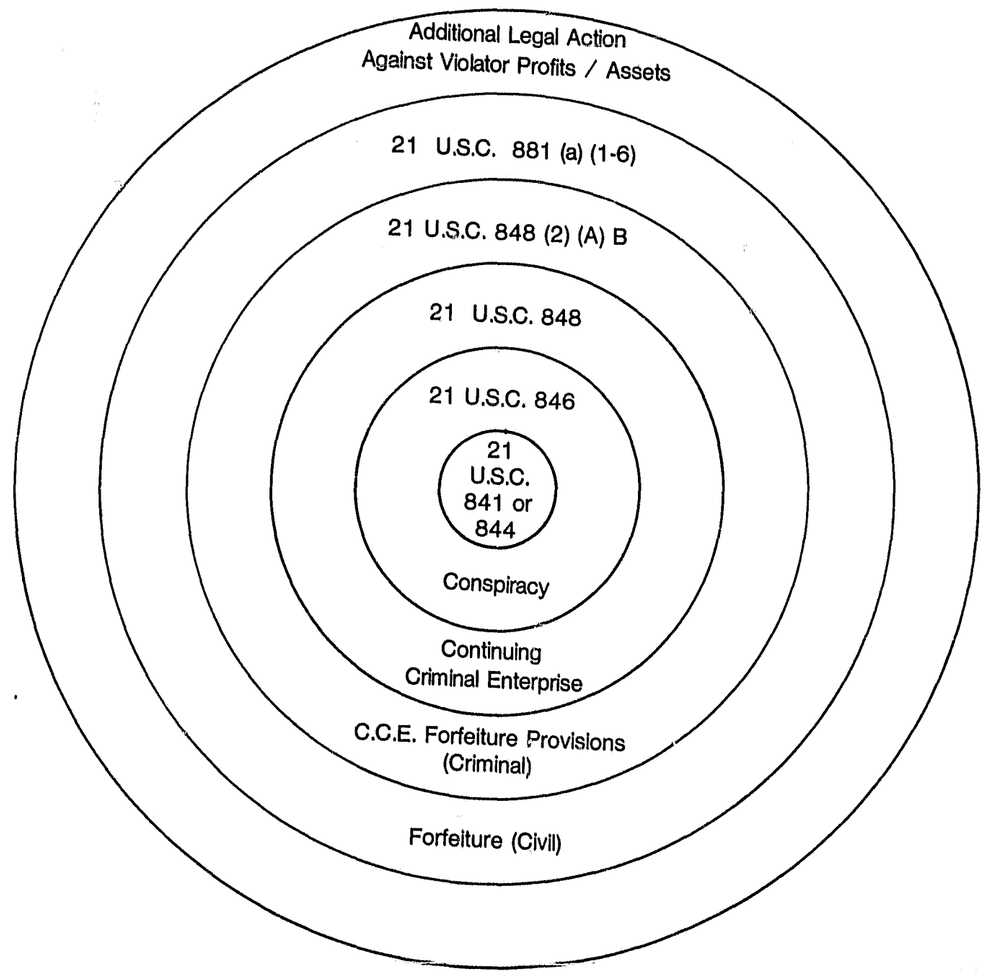

Illustration #3

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The center ring is the most familiar element either at the federal or state/local level. The federal cites 21 USC 841 and 844 represent possession and distribution violations. This core is often taken for granted but is essential. Your investigation will require that your proofs address these basic violations.

The second ring represents a transition or expansion of your case. You have moved from the basics to the expanded area of conspiracy. Your investigation of the financial aspects of your case may serve an evidentiary function in proving a violation of 21 USC 846.

You then progress to the next two circles, evolving to the more complex realm of 21 USC 848 Continuing Criminal Enterprise. Your financially related evidence is useable to prove a required element, substantial income, or to effect the forfeiture of violators' assets.

The latter ring of 21 USC 881(a)(6) is your most pervasive one. Its application possibilities are more fluid as a tactical enforcement tool. It may be applied:

a. Standing Alone - In Rem;
b. Combined with 21 USC 841/844;
c. Combined with 21 USC 846;
d. In Tandem with 21 USC 848

The outer circle moves you into other federal or state/local authority which may be invoked against violator assets outside the authority of the "Controlled Substances Act of 1970." This outer circle will require you to work cooperatively with those authorities.

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6. Joint Investigations

This area of law enforcement is not exclusively drug law oriented. The large sums of cash involved make the finances of drug traffickers of interest to the agencies of the U.S. Department of Treasury, the FBI, as well as various state agencies. They all have a mutual interest in the illicit drug profits. These interests will involve the taxing of the illicit wealth or pursuit of other violations.

Federally, the felony statutes of most violations of the Controlled Substances Act usually takes precedence. It is in the best interests of the public and law enforcement to utilize every available approach. The use of the forfeiture statutes discussed are augmented by these additional avenues.

The Drug Enforcement Administration recognizes these various interests in the financial aspects of drug trafficking. The DEA has agreements, known as Memoradum of Understandings, with the U.S. Internal Revenue Service and U.S. Customs Service. Informal arrangements exist with other federal agencies. DEA also recognizes the need to cooperate with state and local enforcement agencies toward achievement of our mission. This is done through our formalized state/local task forces or ad hoc working arrangements. DEA's federal Interaction includes:

a. The U.S. Internal Revenue Service - Activities are directed at referring to the IRS cases which may merit action on their part against violator assets. It also may include joint investigative activity. There are certain limitations bearing on such interaction. These stem from certain provisions of the Tax Reform Act of 1976. This law sets measures dealing with the types and manner of enforcement activities agents of the IRS may pursue, especially when other law enforcement agencies are involved. Anyone working with IRS should familiarize himself with these provisions. The application of IRS information and cooperation with IRS investigators is a proper adjunct to other drug enforcement efforts.

b. The U.S. Customs Service - In addition to other areas of mutual interest, this agency has the authority to enforce provisions of the Bank Secrecy Act. Particular emphasis is on the regulated deposits of currency or monetary instruments and international transfer of currency or monetary instruments. Drug traffickers routinely handle large sums of money. Their failure to comply with U.S. law on currency movements makes them subject to legal action. The most severe penalties are when Bank Secrecy Act violations are tied with other federal felonies, in our case, violations of the Controlled Substances Act of 1970. The importance of this element, to you as drug investigator, is that it is another possible tool in appropriate circumstances.

c. The Federal Bureau of Investigation - There has been limited specialized activity between the DEA and the FBI. This is an area which will be expanding. It is recognized that certain drug violator groups are involved in other violations coming under the purview of the FBI.

d. "Specialized Financial Task Forces" - In some cities there have been initiatives by U.S. Attorney's Offices bringing all agencies involved into ad hoc task forces. These groups center their activities on the "financial" activity of suspected violators. DEA's

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involvement stems from a presumption that such specailized investigation will lead to proofs at the core of the "bullseye," basic drug violations under 21 USC 841, 844, 846, etc. The unit itself pursues a plethora of federal violations, i.e., RICO, tax violations and banking violations.

This approach has been applied in specific investigations on a successful basis. However, this broad approach and application of resources is a new one. It is considered promising by some, but results in the way of arrests and prosecutions will need to be evaluated.

There are basic administrative and logistical issues involved in these types of "task forces." Some are:

1) Management-The designation as to the supervisor of the task force and the relationship of the agencies involved is a primary issue. Current procedure has a particular Assistant U.S. Attorney serving as "supervisory coordinator" over the various agencies. Investigators are generally melded into one investigative unit.

2) Information and Reporting - The primary concern is the manner, amount and timeliness of the exchange and provision of information by the various members. (NOTE: IRS has specific disclosure concerns.)

3) Operational Collisions - Each involved agency has its own mission. "Task Force" concerns may conflict with an agency's direct mission. Conflicts could also arise with an agency's field office in the way of related investigations crossing "task force" investigations.

4) Time duration and the committment of resources - A decision process is requisite in this area. U.S. Attorney's and agency(s) management will be evaluating the committment of resources and results of their involvement.

Each geographical area will have to consider its situation and the basis for involvement in such groups. Drug wise, the impact on violator groups and DEA's mission is our primary enforcement concern.

e. U.S. Marshal's Service: This agency has the authority for executing court ordered action against property subject to U.S. legal action. They are of immeasureable value to you as an investigator. They will execute and handle all U.S. District Court ordered processes. Establish liaison with them and both of your jobs will be easier when the time comes.

f. U.S. General Services Administration - This is the government's property manager and handles complex seizures and forfeitures of real property, furnishings, etc. The disposition of this property will require their action subsequent to your successful enforcement efforts.

This last segment is meant to show you the broad spectrum of entities who have an interest in drug money. It is not all inclusive but it gives you a feeling for the scope of interest which will surround your investigative efforts.

The model's depicted in this section have been federally oriented. State or local investigators can apply the approach to their particular situation in their jurisdiction. The removal of illicitly-gained drug profits has applicability at all jurisdictional levels. Your individual statutory authority will dictate the degree of latitude available to you.

CONCLUSION:

The enforcement mentality associated with pursuit of the forfeiture of drug violator's assets and financial investigations can be summed up in four elements:

Element One: Pursuit of this aspect of drug investigations will provide the investigator with evidence and/or testimony which will corroborate other evidence of drug trafficking.

Element Two: This type of evidence has application in expanding the scope of conspiracies. The delineation of the relationship of co-conspirators being the main concern.

Element Three: You will identify those illicit assets which are liable to civil or criminal forfeiture.

Element Four: You have the opportunity to apply a wider variety of legal sanctions against the violator through joint action with law enforcement units who have interests mutual to your investigation.

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MODEL FORFEITURE OF DRUG PROFITS ACT

Drafted by the

Drug Enforcement Administration

of the

United States Department of Justice

January, 1981

With

Prefatory Note and Comment

MODEL FORFEITURE OF DRUG PROFITS ACT

PREFATORY NOTE

Widespread drug abuse, particularly among children, teenagers and young adults, poses a serious threat to the well-being of our society. Drug trafficking organizations which cater to this abuse are composed of three elements: (1) contraband drugs, (2) people, and (3) money and other assets. As long as the assets remain untouched, seized drugs and arrested people can always be quickly replaced. Capital is at the heart of all businesses, both legal and illegal. Depriving drug traffickers of their assets, including their operating tools and their illegally accumulated profits, is an essential step in crippling these organizations.

The power to strike at the pocketbooks of organized crime exists in the ancient law of forfeiture. Forfeiture law allows the government to take property that has been illegally used or acquired, without compensating its owner. Forfeiture law has survived for thousands of years: it can be traced to the Book of Exodus in the Old Testament, and it is now an established part of American law. Yet, until recently, forfeiture has played an insignificant role in our struggle with crime.

In the past, state legislatures and the United States Congress have subjected the operating tools of criminals to seizure and forfeiture, but have left illegally accumulated profits intact. The civil forfeiture provisions of the Uniform Controlled Substances Act, for example, authorize the seizure and forfeiture of: (1) contraband drugs; (2) equipment and materials used to make, deliver or import contraband drugs; (3) containers for contraband drugs; (4) cars, boats and planes that transport contraband drugs; and (5) books and records connected with drug trafficking. U.C.S.A. 505(a). Neither the Uniform Act, nor the original federal law on which it was based, subject drug money or illegally accumulated drug profits to forfeiture.

This must be changed. On November 10, 1978, Congress amended the forfeiture provisions of federal law to permit the civil seizure of all moneys used in, and all assets acquired from, the illegal drug trade. 21 U.S.C. 881(a)(6). Federal drug agents now have a very powerful new weapon to strike at organized crime.

Forfeitures also produce vast amounts of revenue. Although the federal law is in its infancy, in 1979-1980 the Drug Enforcement Administration seized assets totaling nearly one-half its annual budget. Drug law enforcement has the potential, through forfeiture, of producing more income than it spends. With tax dollars becoming scarce, forfeiture holds the promise of improving drug law enforcement while profiting the public treasuries. The long range implications are enormous. No state can afford to ignore the modern potential of this ancient doctrine.

The intent of the Model Forfeiture of Drug Profits Act is to amend existing state laws to permit all states to seize, civilly forfeit and deposit in their treasuries: (1) all moneys and other assets used to buy contraband drugs; (2) all moneys used to facilitate any drug law violation; and (3) all assets acquired from drug trafficking, regardless of their form. The Model Act consists of amendments to the civil forfeiture section of the Uniform Controlled Substances Act, which has been enacted by forty-seven (47) states.

345-769 O - 81 - 25

MODEL FORFEITURE OF DRUG PROFITS ACT

SECTION (insert designation of the civil forfeiture section) of the Controlled Substances Act of this State is amended by adding the following paragraph after paragraph (insert designation of the last category of forfeitable property):

"( ) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State), all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this Act; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent. Rebuttable Presumption: All moneys, coin and currency found in close proximity to forfeitable controlled substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof is upon claimants of the property to rebut this presumption.

COMMENT

The Model Act is based on Section 881(a)(6) of Title 21 of the United States Code. That federal drug enforcement provision subjects to civil forfeiture:

> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the owner to have been committed or omitted without the knowledge or consent of that owner.

The Model Act mirrors this law in intent and coverage. A rebuttable presumption has been added to assist state attorneys in prosecuting seized moneys. The language of the Model Act also eliminates certain redundancies and grammatically undesirable wording in the federal provision.

States should seriously consider allocating the moneys forfeited under this Act to drug enforcement, prevention and treatment agencies within their jurisdiction. Variations in the finance laws of the states preclude drafting a model provision dedicating forfeited property. Nevertheless, each state could amend its laws to devote a substantial portion of forfeited drug profits to the goal of drug law enforcement.

The Drug Enforcement Administration has just completed a text that explains all aspects of the law of forfeiture. The text, entitled Drug Agents' Guide to Forfeiture of Assets thoroughly discusses the federal statute on which the Model Act is based. It is approximately 350 pages long and contains over 600 legal citations to state and federal forfeiture cases. The Guide, which is now being printed, should be available in March, 1981 through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. States adopting the Model Forfeiture of Drug Profits Act will find the Guide invaluable in training officials in the enforcement of the law.

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4 OF 5

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Zaicek, U.S. v., 180
Zucker, U.S. v., 24

U.S. GOVERNMENT PRINTING OFFICE : 1981 O - 345-769

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